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Slow Transformations: The WTO as a Distributive Organization

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**INTRODUCTION**

At its Ministerial Conference last November, the World Trade Organization ("WTO") made modest advances of enormous significance. The WTO began transforming itself from an organization whose central value is efficiency to one that also considers global distributive issues. This transformation is an integral part of the next phase of globalization.

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I advance this thesis with some caution; this thesis is built on an admittedly slim reed, and on an acknowledged idiosyncratic read of the Doha Ministerial Declaration and the accompanying agreements. The thesis probably does not reflect the understanding of all who were present at Doha, and history could easily prove it erroneous. It is hard to read the tea leaves of Doha with any certainty. All we have are the words of Doha and the reactions to the words, and we will not know whether the words mean what they seem to mean until we see how the words are put into action. The words may be misleading. WTO Members carefully selected the words so that they would agree to launch a new round of negotiations, and so that all Members could return home and claim victory, accentuating their gains and minimizing their losses. Ultimately, the words were driven by the imperative to get an agreement and move forward. Moreover, interpreting the Doha Declaration provides something of a Rorschach test; what we see may depend on what we want to see. You may learn more from my


analysis about my views on globalization than what the parties thought they were doing at Doha.

Despite these caveats, this article makes and defends the claim that, when we look back on the Doha Ministerial Conference several years from now, we may well see Doha’s significance is that it began the transformation of the WTO from an institution preoccupied with creating wealth to one that also considers the distribution of wealth. We may see the beginnings of an organization concerned with economic outcomes as well as with rules for markets, and we may see an organization in which wealthy countries implicitly acknowledge that global economic integration requires mechanisms to redistribute wealth. The shift in emphasis I highlight is subtle and incremental, and on the surface what happened at Doha does not appear to be a radical departure from WTO practice. But if the seeds of the distributive policies that were spread at Doha germinate, we will someday mark Doha as the symbolic turning point in a significant evolution of the WTO from a wealth creating organization to one that also facilitates wealth distribution.

Although my thesis is ambitious, my analysis is grounded in a traditional understanding of the General Agreement on Tariffs and Trade/World Trade Organization ("GATT/WTO") regime. In Part I of this article, I set forth the general distinction between efficient and non-efficient policies, and relate that distinction to the negotiation agenda crafted at Doha—what is now called the Doha Development Agenda. In this part, I seek to separate two aspects of the Development Agenda—one covers policies to improve the efficiency of the economies of developing countries; the other covers policies that look toward the redistribution of resources from wealthy to poor countries. This discussion sets the broad conceptual framework for understanding the shift I see at Doha.

The analysis of this article revolves around several ways in which the GATT/WTO system must strike a balance between various institutional characteristics of the GATT/WTO regime if the system is to remain stable and flourish. I take these characteristics up in Part II of the article, where I outline three ambiguities about the GATT/WTO system—the question of whether the WTO is about rules or results, the ambiguity concerning the nature of the reciprocity that feeds the WTO system, and the need for the WTO
system to simultaneously champion certainty and flexibility. These ambiguities form a kind of creative tension that underlies the WTO regime—one that reflects the contractual nature of the WTO system—and one that is constantly being balanced and rebalanced to keep the regime intact and on course.

Part III of the article analyzes the Doha Declaration in the context of these ambiguities and shows how Doha recalibrated the balance reached during the Uruguay Round of negotiations. It makes the claim that Doha emphasizes the results of the open trade regime rather than just the rules, it introduces a more specific and more equal notion of reciprocity, and it enhances the flexibility of the system to accommodate specific situations. Part IV of the paper then explains why this change in emphasis can be interpreted to provide the nascent development of distributonal values, and how it can be understood as transforming the WTO from an organization that emphasizes efficiency to one that also cares about distributive values. The conclusion states why this is important and how the WTO might incorporate a redistributive agenda more fully into its work.

I. EFFICIENCY AND DISTRIBUTIVE VALUES IN PUBLIC POLICY

Public policy can be based on one of two broad values, or on a mixture of both. It can be based on efficiency values—the creation of wealth—or on non-efficiency values—values that have to do with how the wealth is distributed and the impact of distribution on people’s lives. Or, public policy can be based on some mix of the two. Because WTO Members are making global public policy when they make international law, it is relevant to think how WTO law implicates various efficiency and non-efficiency values.

Obviously—as the street demonstrators who accompany the WTO and other international economic institutions remind us—the WTO system has concerned itself primarily with values of efficiency—values of wealth creation rather than wealth distribution. The WTO negotiators have been ingenious in finding ways to guide the world’s wealth producing machinery, but paid less attention to distributive values those policies might implicate. The anti-WTO forces are quick to exploit this fact. Putting aside the protectionist forces among those who protest globalization, and abstracting from the protestor’s
specific arguments, their general message is that distributional and other non-efficiency values matter.

The globalization debate is thus framed as a specific challenge to the WTO—to what extent can an institution that dedicates itself to efficiency values flourish without also incorporating non-efficiency values into its policy mix? This is not an idle question, as a quick reflection about national economic policy making shows. When nations form their domestic economic policy they easily incorporate both efficiency and non-efficiency values in their policy mix. They often do this by making economic policy on the basis of efficiency values only, but then using "tax and spend" policies to achieve distributional goals. Both efficiency values and non-efficiency values guide public policy, even if they may be confined to separate spheres. Indeed, it is the presence of a mechanism for redistributing wealth within a country that makes it possible for economic policy to focus on efficiency considerations only. National economic policy in antitrust or trade matters may focus on efficiency values and address non-efficiency values through direct transfer and subsidy policies.

As this depiction of national policy making shows, the challenge that I have identified for the WTO—that is, whether its single-minded focus on efficiency values is sustainable and will support the long-run stability of the free trade regime—forms a more general question about globalization. We have no comprehensive international mechanism for redistributing wealth.¹ No good

³ See generally Report of the International Financial Institutions Advisory Commission, Allan H. Meltzer, Chairman, (2000), available at http://www.house.gov/jec/imf/meltzer.htm. Some view the International Monetary Fund and the World Bank as institutions that redistribute resources. Member countries, of course, subsidize the work of those institutions, which gives them some claim to be redistributing wealth. However, the two institutions carry out most of their work through loans, rather than grants. As a result, the monetary subsidy to the recipient countries is exceedingly small. Only the work of the International Finance Corporation of the World Bank Group, which gives grants, not loans, is redistributive in the true sense of the term. Loans amount to redistribution across time within a country, not redistribution between countries. See id. Of course, loans that impoverished countries cannot repay involve a negative redistribution, a distribution from today’s poor to tomorrow’s even poorer. In this light, President Bush’s decision to urge the World Bank to shift its focus from a system of loans to a system of grants would be a real redistribution of resources from wealthy to poor countries. See, e.g., Adam Lerrick & Allan H. Meltzer, The World Bank Is Wrong to Oppose Grants, WALL ST. J., July 26, 2001,
institutional setting exists for successfully engaging in transnational grants or subsidies that would balance efficiency values with non-efficiency values. We cannot balance efficient policies with policies of transnational redistribution in an effective way. Thus the question facing the WTO and the question facing globalization are similar—in the absence of a mechanism for redistributing wealth, is globalization sustainable?

WTO Members are conscious, of course, that the WTO is an institution whose guiding value is efficiency, but many would argue the WTO is not oblivious to non-efficiency values. By and large, however, the free-trade dogma has skirted the issue of the role of distributional values, and the possibility of giving distributional values any independent force in WTO lawmaking, by asserting that efficiency and distributional values go hand-in-hand. The implicit free trade assumption, one embraced in WTO lawmaking, is that only efficiency values matter in the setting of economic policy because policies that enhance global efficiency will also lead to a better distribution of wealth. The rising tide lifts all boats, and economic liberalization benefits everyone, so policies that improve the efficiency of the global economy naturally benefit all Members. This is an essential part of the WTO story, for it portrays the possibility that efficiency and distributional values are not at odds.

But what if that is not true? What if efficient policies make it harder for governments to reach distributional goals, and what if they make some countries poorer rather than wealthier? Or what if efficiency requires investment that poor countries are ill equipped to make? How might the global trading community try to achieve its efficiency goals without sacrificing distributional goals, which are important to many people and to future support for free trade?

at A14. I comment on the role of international aid programs as a form of distribution at the end of Section IV of this article.


Although I do not purport to answer these important questions in this paper, they are real questions the global trading system must address. The developing countries came to Doha with the claim—real or imagined—the deals made in the Uruguay Round left them worse off, not better off—the burdens they undertook were greater than anticipated, and the benefits of the deals they struck were less than anticipated.\textsuperscript{6} The system had to respond to these essentially distributional claims. Although it was never explicit, the Doha Conference proceeded with the silent assumption that not all countries benefited from the Uruguay Round.

The response was the Doha Development Agenda. But we should not assume from its name that the Doha Development Agenda has distributional features. Instead, we must understand the difference between policies seeking to advance development goals only by improving the efficiency of the trading system and those seeking to achieve non-efficiency values. Paragraph 2 of the Doha Ministerial Declaration states that “enhanced market access, balanced rules, and well targeted, sustainable financed technical assistance and capacity building programs have important roles to play.”\textsuperscript{7} The first part of the agenda—captured in the words “enhanced market access” and “balanced rules”—is not particularly striking. It is the efficiency, wealth creating part of the agenda. The WTO has been conscious of the interests of developing country Members at least since the 1960s and through preferential market access and generous transition periods has taken many actions to make the WTO a comfortable home for developing countries.\textsuperscript{8} Doha does not represent a

\textsuperscript{6} See, e.g., Dr. Supachai Panitchpakdi, \textit{Keynote Address, The Evolving Multilateral Trade System in the New Millennium}, 33 GEO. WASH. INT’L L. REV. 419, 422 (“[F]rom the side of the less developed countries, there have been even more numerous complaints that the more advanced countries have not given them the kind of access that they were supposed to be getting in exchange for the kind of regime that they had to put up to get protection for intellectual property rights, for example.”).

\textsuperscript{7} Doha Ministerial Declaration, \textit{supra} note 1, para. 2.

\textsuperscript{8} \textit{See generally} CONSTANTINE MICHALOPOULOS, DEVELOPING COUNTRIES IN THE WTO (2001) (discussing advice to developing countries in the context of the WTO); BERNARD HOEKMAN & PATRICK MESSERLIN, COUNCIL ON FOREIGN RELATIONS, REPORT ON HARNESSSING TRADE FOR DEVELOPMENT AND GROWTH IN THE MIDDLE EAST (2002) (recommending policy changes to Middle East and North African Countries), \textit{available at} http://www.cfr.org/public/MENA/pdf;
fundamental shift simply by highlighting the WTO’s concern for the poorer countries. The insistence of the Ministerial Declaration that “international trade can play a major role in the promotion of economic development and the alleviation of poverty” is warmed over broth indeed.

On the other hand, the call for “well-targeted sustainably financed technical assistance” and “capacity-building programmes” is explicitly distributional in emphasis. In this phrase, the Doha negotiations accepted the notion that some countries face systematic barriers to development, which make it difficult for them to take advantage of the wealth producing aspects of the global trade regime, and seemed to accept the notion that wealthy countries ought to pay to help overcome those barriers. Although only a small step, this premise creates the beginnings of an organization involved in redistributing wealth, as well as increasing it.

In this article, I pull together this and other evidence from Doha to show the sense in which the WTO seems to be moving from the assumption that trade negotiations are necessarily a win-win situation to one in which the Members understand they must sacrifice their own short-term interests to make sure each Member comes out a winner. I show the ways in which the WTO may be shifting emphasis from efficient policies to policies to redistribute wealth—policies where one country has to sacrifice its wealth in order to ensure the wealth of another country. I show the evolving official recognition given to claims of developing countries that their special


9. Doha Ministerial Declaration, supra note 1, para 2.
10. See id.
status as poor countries justifies that redistribution. And I show that "fairness" in the distribution of wealth may now lead to an effort to make sure that the benefits of any round of negotiations are more widely spread.

I do not want to overstate my thesis—the WTO is still primarily about generating new wealth, and the distributive policies I identify can always be justified on the ground that without growth in all markets, the growth of each market will suffer. But I believe Doha can be interpreted to have sowed the seeds for a new kind of institutional expectation at the WTO, one that takes distributional values more seriously. I think we can see this if we understand the ambiguities driving the WTO system, which appear to have been recalibrated at Doha.

II. THE AMBIGUITIES OF THE GATT/WTO SYSTEM

A series of unresolved ambiguities underlies the GATT/WTO system and together provide the creative tension the system must balance. These ambiguities are interrelated. The GATT/WTO system is a system of rules, yet the outcome of the competitive struggle between producers in different countries affects how the Members view, and will react to and shape, the system in the future. The system espouses reciprocity, without specifying the nature of the reciprocity or what reciprocal results are expected from the system. Furthermore, the GATT/WTO system embodies a mix of certainty and flexibility, which reflects the ambiguity of a system that values both rules and results while maintaining unspecified expectations about the system's reciprocity. This section examines each of these ambiguities.

Understanding these ambiguities and the difficulty of balancing them is important to our understanding of the tensions underlying the Doha Development Round. The ambiguities cannot be resolved because they are inherent in the system, and Doha did not attempt to resolve them. However, as I show in the next section of this article, Doha can be interpreted as changing the balance in the values represented by the ambiguities. As I argue there, after Doha, the GATT/WTO system is more flexible, focuses more upon results than in the past, and freshly views the nature of the reciprocity that
the system is trying to achieve. Understanding Doha in the context of the ambiguities of the GATT/WTO system therefore provides important perspectives that the terms of the Declaration do not themselves reveal.

I refer to these ambiguities as inherent in the GATT/WTO system because the system is essentially a large multilateral contract with an interactive process of negotiation and renegotiation. It is a complex relational contract;11 the parties are unable to specify at the outset all the terms of the contract, the parties do not know what changes will affect their relationships over the course of time or what the true motivations of the bargainers are (bounded rationality), and the lack of specificity and constrained knowledge make it possible for one party to act opportunistically after the Members have put the contract in place, grasping the benefits of the bargain but not the bargain's costs.12 As in any relational contract system, how parties fare in the relationship—the outcomes of the contracts—matters to the future of the relationship; when outcomes diverge from expectations the system is under strain.13

In order to deal with opportunism, bounded rationality, and changing circumstances, complex contractual systems normally build in governance systems to deal with unanticipated results. They also build in flexibility to allow one or both of the parties to adjust to new situations and unforeseen circumstances. Such flexibility is important because without it, the parties may never enter into the contract in the first place. Yet too much flexibility in the contract system will also reduce the number and value of bargains, and opportunistic use


13. See Alan Schwartz, Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies, 21 J. LEGAL STUD. 271, 272-73 (1992) (showing incentives to breach contracts when the terms are incomplete).
of the flexibility of the contractual system will impair the benefits of the bargain. When, as in the case of the GATT/WTO system, the bargaining is over time and in repeat rounds, the relationships among those doing the bargaining continually change, making it harder to have a rule based system that is also flexible enough to accommodate the changing circumstances and interests of the parties. Informal norms of behavior developed over time hold such a system together. These informal norms accommodate the needs of the system to rely on rules at the same time the parties are renegotiating in the face of changing circumstances.

The possibility that one or more of the negotiating parties will use the flexibility of the system to engage in opportunistic behavior complicates the creation of these norms. The difficulty of distinguishing legitimate interests from strategic interests, bluffs from honest interests, makes any contractual system like the GATT/WTO system difficult to manage. What provides the incentive to create the norms that give the rule-based system flexibility without opportunism is the belief and expectation that the system on the whole will make the bargaining parties better off. This, in turn explains why expectations about the results of the system, and not just the rules, matter in contractual relations.

We can see these general attributes of cooperative systems if we examine the ambiguities of the GATT/WTO system in detail.

A. RULE-BASED VERSUS OUTCOME-BASED

The first ambiguity of the GATT/WTO system is whether it is a rule-based or outcome-based system. One image of the WTO—the rule-based image—is that the WTO is simply designed to let Member countries set up rules for the global market, without any particular interest in the effect of the rules on determining winners and losers. This is the predominant image that the WTO itself projects; the web site description of the organization proclaims, right at the beginning, that: "[t]he WTO is a rules-based, Member-driven organization—all decisions are made by the Member governments, and the rules are the outcome of negotiations among Members."14

The rule-based image is the common image of the WTO in external descriptions as well.

The appeal of the rule-based image of the WTO is that it appears to be procedural only—the WTO sets up the rules of the road but does not pick winners and losers. The market chooses the winners and losers—invisible hand guided by comparative advantage. This has the advantage of being, or appearing to be, value-neutral. It has the advantage of appearing to eschew inter-governmental decisions about which producers (or which producing countries) will flourish and which will not. The rule-based image of the WTO is supported by the notion that free trade is a positive sum game—it makes winners out of everyone. Because everyone gains when the "correct" rules are set up to govern trade, all that is required for global prosperity is that countries get the rules correct.

The rule-based image clearly guided the Uruguay Round of negotiations. At the start of those negotiations, the chairman made a proposal "to include, among other objectives of the negotiations, that of redressing growing, [sic] disequilibria in world trade and of achieving, in the spirit of the Preamble to the General Agreement, a greater mutuality of interests." This was rejected as "incompatible with the basic objectives and principles of GATT, the guarantor of the open and non-discriminatory trading system." Although no one denied the growing inequality, that problem "would need to be tackled by the countries concerned by various policy means, including macro-economic policy, exchange rates, structural reform and trade policy." Significantly, consistent with that philosophy, the Ministerial Declaration itself adopted the principle of "mutual advantage and increased benefits to all participants" as an overriding negotiating principle, but did not require that the benefits of the negotiations be shared evenly.

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16. Id.
17. Id.
18. See infra text accompanying notes 37-39 (explaining that the Doha negotiations started from a vastly different perspective than the Uruguay
In other words, the negotiations were to concern themselves with rules, not outcomes. They were not to address the problems of poor countries except insofar as the appropriate rules for an “open and non-discriminatory” trading system would help those countries. The negotiations were not to address results; the market was to do that.

As important as the rule-based image is for the legitimacy of the WTO, the dilemma of the rule-based image is that the Members of the WTO are not interested in rules; they are interested in results. They buy into the rules only because the rules promise pay-offs for the Members. The rules determine how particular producers prosper under the system, and the impact of the rules therefore matter. It is difficult to focus only on rules and not on results. Perhaps the most dramatic example of this was in the Bananas dispute. On the surface, the dispute was about one of the most important rules of the system—the rule prohibiting discrimination on the basis of national origin (the most favored nation rule). But there was no doubt in anyone’s mind that the dispute was really about which banana producers would flourish and which would not. The dispute settlement process was certainly applying a rule, but it was also deciding the fate of thousands of people with a stake in the decision—and of several countries whose prosperity depends on banana trade. It is very difficult to separate a rule-based regime from the outcome of the application of the rules.

Although the ambivalence between rules and outcomes often embroils the WTO in public relations difficulties, the problem is not just one of public perceptions. Outcomes determine the allegiance


20. See American Frozen Foods Institute, International Trade Update, July 2001 (relaying the compromise reached between the European Community and the United States), at http://www.affi.com/update-intrade-july.pdf. Indeed, the severe impact of the decision on countries whose economies depended on the banana trade made it difficult for the European Communities to comply with the ruling. Eventually, the parties could not settle on the basis of rules but settled on the basis of a political compromise that accommodated—better than did the rules—the interests of the countries most directly affected. That compromise required, and resulted in, a waiver of the obligations that the rules had imposed on Europe in order to allow the parties to implement a result-oriented solution.
Members have to the WTO system. Countries join the system not for the rules but because the rules promise results. Their continued good faith participation in the system depends on the results they get or feel they get from the system. Therefore, the GATT/WTO system faces the challenge of managing the expectations of its Members without managing trade. Managing expectations is important because the WTO Members enter into agreements based on their expectations that the agreements will have certain outcomes. They would not enter into the agreements without having expectations, for they expect to maximize the gains from the agreements and minimize the costs of the agreements. And they appraise the effect of the agreements based, in large part, on how reality compares with their expectations. It is important that results bear some relationship to expectations, because the willingness to enter into new negotiations depends on whether a country can trust its expectations—and its trust level is often informed by the country's past experience with its own expectations. It is a separate question of how those expectations form and what influences them, but it is clear the WTO Members manage each other's expectations.

The interest of the Members in the outcomes of the competitive struggle is not simply a theoretical matter. The Members of the WTO, and sometimes the WTO itself, do in fact manage trade, not rules. Although the WTO system tried to limit outcome-based negotiations, side deals between countries sometimes supplant rules. The relationship between the United States and Japan in the semiconductor industry in the 1980s was not rule-based, but outcome-based. The same was true in the steel industry in the 1970s. And the United States is reportedly trying to organize a cartel of the


world's steel producing countries to deal with the current global overcapacity in the steel industry. These and other examples are not offered critically, but simply to recognize that, when the stakes are high, the Members of the WTO move outside the rule based system to manage trade. They act as if what matters is results, not rules.

Moreover, the WTO—while espousing a rule-based system—has itself managed trade. In the textile sector, producers have divided up markets to fit political needs, not to reflect rule-based allocations. In the agricultural sector, the toleration of exceptions to free trade principles resulted in de facto managed trade. Again, the point is not to argue the pros and cons of the "rules" in the textile and agricultural sectors, and we must recognize the efforts to restore the regimes of agriculture and textile trade to rule-based regimes. But it is worth noting, even within the rule-based system that the WTO has set up, outcomes sometimes drive the rules, not vice-versa.

In short, the ambiguity between a rule-based system and an outcome-based system is significant. The GATT/WTO system is a system of rules to govern economic relations between countries, but

24. See The U.S. Won't Take "No" for an Answer at Paris Steel Summit, WALL ST. J., Dec. 14, 2001, at A1 (discussing the current state of the steel industry, and past and future efforts to control steel production). The meetings are being held under the auspices of the Organization for Economic Cooperation and Development ("OECD") and periodic reports on the progress of the consultations can be found on the OECD web site. See, e.g., Organization for Economic Cooperation and Development, High Level Meeting on Steel, 18-19 April 2002 (documenting a high level meeting on steel on April 18-19, 2002), at http://www.oecd.org/EN/document/0,EN-document-0-nodirectorate-no-12-28636-0,00.html (last visited May 9, 2002). Any agreements to limit production capacity could easily be construed as violations of Article 11 of the Agreement on Safeguards, which obligates WTO members not to "take or maintain any voluntary export restraints, orderly marketing arrangements, or any other similar measures...." Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, art.11 [hereinafter Agreement on Safeguards], available at http://www.wto.org/english/docs_e/legal_e/25-safeg.pdf.


its stability depends on the ability of countries to meet their goals through a system of rules. To sustain the system, the rules must deliver results.

B. RECIPROCITY—EQUAL OPPORTUNITIES OR EQUAL BENEFITS

It is well acknowledged that the WTO negotiations demand reciprocal benefits; negotiations must provide a win-win situation. But the principle of reciprocity is ambiguous. Does reciprocity mean, for example, that every country must benefit, or that every country must benefit equally? And if reciprocity demands that benefits be equal, how should equality be measured? And does reciprocity mean every country must benefit in terms of the expected outcomes of the negotiations, or, instead, in terms of the actual outcome of the negotiations? None of these attributes of reciprocity is well-specified in the WTO negotiating context.

By contrast, the concept of reciprocity is clear when a country wants to avoid its obligations. When a country violates an obligation and is unwilling to change its conduct, the country in violation of its WTO obligation must provide the prevailing party with reciprocal, compensatory benefits or the Dispute Settlement Understanding will allow the prevailing party to take reciprocal retaliatory action. Similarly, when a country imposes safeguards, it must give reciprocal compensation to the countries whose exports are reduced. And when a country wants to increase a bound tariff, it

27. See Patrick Low, Trading Free: The GATT and U.S. Trade Policy 29 (1993) (discussing notions of fair trade and reciprocity, why they are sought through GATT tariff negotiations, and the difficulties these goals present); see also Young, supra note 21, at 762 (interpreting certain facets of the right to seek reciprocal trade concessions).

28. See, e.g., Naboth van den Broek, Legal Persuasion, Political Realism, and Legitimacy: The European Court's Recent Treatment of the Effect of WTO Agreements in the EC Order, 4 J. Int'l Econ. L. 411 (2001) (arguing that reciprocity should not be seen as central to the WTO system).


must take reciprocal action to lower tariffs. In all these cases, the term reciprocal means "equal" or "equivalent" benefits, and the dispute settlement process exists to determine what the equal compensation is.

But the concept of reciprocity in trade negotiations is not so clear. The reason, of course, is that no external monitor of the negotiating process exists to determine whether the reciprocity requirement has been met. No judge or tribunal sits outside the halls in Geneva to rule on the validity of the agreements under the reciprocity standard. The WTO Members have no reason to specify the nature of the reciprocity requirement because it is not enforceable, except in the context of the rules set up to govern the negotiations and the conduct of the negotiations themselves. Reciprocity in negotiations is not an external measure but an internal one, determined not in the abstract but by the conduct of the Member countries as they undertake the negotiations. The standard becomes self-defining, and self-realized, through the negotiating process.

The nature of negotiating reciprocity that is actually employed by the WTO system is not, however, an idle question. As I will show in Part III, the issue of the type of reciprocity built into the GATT/WTO relates closely to the nature of the fairness that underlies the system. And the fairness question is never an easy one to address.

Even if we were to specify that WTO Members should share the benefits of an open trading system "equitably," we would have difficulty specifying what that means. It surely would not mean that

A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, art. IX [hereinafter GATT]; see also Agreement on Safeguards, supra note 24, art. 8. (guiding Members to maintain equivalent levels of concessions and obligations when applying a safeguard).

31. See GATT art. XXVIII (providing for "negotiations on a reciprocal and advantageous basis" when concessions are modified).

32. See generally Raj Bhala & Kevin Kennedy, World Trade Law 80 (1998) (explaining that these formulas are highly dependent on assumptions about the responsiveness of trade to tariff changes and other factors, making the nature of the reciprocity underlying tariff negotiations depend on the precise formula chosen and the validity of the assumptions for which the formula calls); Sam Laird & Alexander Yeats, Tariff-Cutting Formulas – And Complications, in The Uruguay Round: A Handbook on the Multilateral Trade Negotiations 89 (J.M. Finger & Andrezej Olechowski eds., 1997) (discussing tariff negotiations generally).
the wealth of each country should increase by the same amount following a negotiating round, for countries start off at much different levels of wealth. It might mean that countries should increase their wealth by equal percentages, but even that figure would be difficult to ascertain.

The ambiguity of the concept of negotiating reciprocity is further heightened by another factor—whether what is to be reciprocal is the expected benefit of the bargain—the *ex ante* bargain—or the actual benefit of the bargain—the *ex post* benefit of the bargain. This ambiguity presents the problem of comparing *ex ante* expectations with *ex post* results alluded to above, and is a formidable problem in the trade realm indeed. Competitive outcomes depend on many variables. Things change and unanticipated changes that no one controls will influence the difference between expectations and results. Although it often appears to be assumed that reciprocity involves *ex ante* benefits, that assumption creates a source of tension for the GATT/WTO system. As was pointed out above, it is results that matter, so when countries measure their allegiance to the system it must be *ex post* reciprocity that matters as well. So even a system that sought to achieve *ex ante* equality of bargaining outcomes must consider how to readjust the system in the light of experience if they wanted *ex post* equality as well.

Moreover, even if the system were to settle on *ex ante* equality as a goal, determining *ex ante* equality is a gargantuan task, especially when bargains are made across sectors. Even when countries are exchanging promises to reduce tariffs—a relatively straightforward determination—any negotiation depends on each country being willing to make some broad assumptions about the effect of lower tariffs on their exports. These assumptions include whether other barriers will impede their exports, whether circumstances might change the competitive balance between firms in various countries, whether consumer tastes are indifferent between goods from various countries, and whether consumer tastes might change. Negotiators can overcome the problems associated with trying to bargain in light of these assumptions only if they are willing to adopt some simplified and stylized models of what influences trade flows.

Now that trade negotiations have expanded beyond tariffs to internal processes for producing goods, the difficulty of measuring
gains and losses from various obligations and trading across sectors is magnified. How should a negotiator compare, for example, the benefits of having greater access to the United States market in textile and agricultural goods against the short term costs and slow developing benefits of an intellectual property system to protect U.S. patent owners? What does the concept of reciprocity mean when WTO Members are trading these kinds of program packages?

C. CERTAINTY AND FLEXIBILITY

The third GATT/WTO ambiguity flows from the first two. Because the system is ambiguous about whether it is interested in rules or outcomes, and because it is ambiguous about whether the benefits of the bargain must be evenly spread around, then it must combine a reverence for certainty with an allegiance to flexibility. And so it does. The GATT/WTO system is a living system, breathing out and breathing in, combining rule-based certainty with rule-based flexibility.

Virtually every WTO obligation is matched with at least one exception, and oftentimes many. Tariffs are bound, but they may be unbound for a price, and safeguards are available if imports increase by too much. The TRIPs agreement establishes minimum standards for national intellectual property regimes, but it allows countries to maintain exceptions, not only to properly balance the interests of producers and consumers, but also to meet national

33. See GATT art. II (binding tariffs through specific Schedules).

34. See id. art. XXVIII (allowing parties to modify the appropriate Schedule in accordance with this article).

35. See id. art. XIX (permitting parties to take emergency action on imports of particular products and describing the methods to do so); see generally Agreement on Safeguards, supra note 24 (explaining the implementation procedures for safeguards).


37. See id. art. 30 (permitting limited exceptions to patent rights that “do not unreasonably conflict with a normal exploitation of the patent and do not
social priorities.\textsuperscript{38} GATT 1994 is filled with examples of "studied ambiguity" that allow the system to have meaning that depends on the context and changing circumstances.

One could expect no less from a system that is unsettled as to what kind of reciprocity drives the system, one in which there is a tension between rules and results. The flexibility is precisely because of the need to adjust \textit{ex post} results with \textit{ex ante} expectations, and to make sure that the rules give results that are reasonably acceptable to Members given changing circumstances. As the U.S. delegate to the GATT 1947 negotiations said with respect to the flexibility given by the safeguards provisions, "[i]t would give more flexibility to the commitments undertaken \ldots [s]ome provision of this kind seems necessary in order that countries will not find themselves in such a rigid position that they could not deal with situations of an emergency character."\textsuperscript{39} This flexibility is not obeisance to political expediency. Rather, it is an essential ingredient in getting the agreement in the first place.\textsuperscript{40} In the words of one noted trade scholar, "flexibility in the process of reducing trade barriers\ldots

\textsuperscript{38} See id. \textsuperscript{art. 8} (allowing Members to adopt "measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development" if consistent with the TRIPs Agreement). Exceptions like these present curious interpretive tasks because of their circularity—an exception to the requirements must be consistent with the Agreement, which authorizes the exception. This must mean something other than that the measure must be consistent with the obligation, for then there would be no need for an exception. But, it must mean something less than carte blanche to avoid obligations. For one attempt to reconcile these obligations and exceptions, see Markus Nolff, \textit{Compulsory Patent Licensing in View of the WTO Ministerial Conference Declaration on the TRIPS Agreement and Public Health}, 84 J. PAT. & TRADEMARK OFF. SOC'Y 133, 136 (2002).

\textsuperscript{39} See U.N. Doc. EPCT/C.II/PV.7, at 3 (1946).

enhances the likelihood of agreement by accommodating the self-interest of each Member."

In sum, the GATT/WTO system must exhibit flexibility within a rule-based system because the outcomes of the competitive process matter to WTO Members and because the outcomes must be reciprocal in some sense for the WTO Members to have continued faith in the overall benefits of the system. The GATT/WTO system must therefore continually balance rules against results, certainty against flexibility, and various kinds of reciprocity in order to give Members an incentive to comply in good faith with the applicable rules.

III. DOHA RECALIBRATES THE BALANCE

Doha did not resolve these ambiguities, which are essentially irresolvable. It did, however, tip the balance in an apparently new direction. Outcomes matter: Members must make sure that the outcomes generated by the trading rules, and not the expected outcomes of the negotiations, become a win-win situation. Flexibility matters: the WTO system must be flexible enough to accommodate unanticipated circumstances. And wealth matters: the poorer countries have an implicit claim on the wealth created by the global trading system to help them take advantage of the wealth-creating opportunities of the rule-based system. This new balance is reflected in several key characteristics of the Doha Ministerial Declaration.

A. NEGOTIATING AROUND BALANCED GAINS

If one were looking for a single phrase to symbolize the hope of Doha it would be in the phrase "balanced outcomes." Paragraph 49 of the Declaration states that the negotiations "... shall be conducted with a view to ensuring benefits to all participants and to achieving an overall balance in the outcome of the negotiations." This phrase alone distinguishes the Doha Development Round from the Uruguay

41. RAJ BHALA, INTERNATIONAL TRADE LAW 889 (1996).
42. See Doha Ministerial Declaration, supra note 1, para. 49 (emphasis added).
Round. As we have seen, the concept of balanced outcomes was explicitly rejected as a rule of negotiation prior to the Uruguay Round, which opted instead for a principle of "mutual advantages and increased benefits to all." How might we interpret this shift from "mutual advantages" to "balanced outcomes?"

Under one interpretation, the goal of "balanced outcomes" could be only verbiage. It could therefore be an unrealistic guide for understanding the Doha Development Agenda. And we must acknowledge the numerous ways in which that goal can easily be subverted. But let us put those notions aside for the moment, returning to them later, in order to see how powerful the "balanced outcomes" principle would be if it were implemented. Basically, the principle imposes a standard of fairness on the outcome of the negotiations that serves as a non-efficiency constraint on the negotiators.

We can use a simple bilateral negotiating diagram to show the power of that thought. As illustration 1 (infra page 1068) shows, in any two party negotiations, both parties (countries or individuals) start off with a certain level of welfare and seek to negotiate deals that will increase their welfare. Country A's welfare is measured on the horizontal axis and Country B's welfare on the vertical axis. For the purpose of this illustration we need not define welfare. In the context of trade negotiations, it can be considered as national wealth, or as some mix of wealth producing and social policies that make the

43. See supra text accompanying notes 9-12.
44. See Doha Ministerial Declaration, supra note 1, para. 49 (requiring that negotiations be conducted to ensure benefits AND a balanced outcome to all). The declaration launching the Uruguay Round, like the Doha Declaration, endorses benefits to all the participants; the declaration launching the Uruguay Round does not, however, endorse a balanced outcome.
45. See BARNARD HOEKMAN & MICHEL KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO 62 (1995) (using a simple bilateral negotiating diagram in the context of trade negotiations); see also HOWARD RAIFFA, LECTURES ON NEGOTIATION ANALYSIS 23-25 (1996) (demonstrating that basic two-party negotiating diagrams are essential to understanding the bargaining process).
country better off. Indeed, we do not need to know what index of welfare each party adopts since each party defines its welfare to fit its situation and seeks to increase that welfare in the negotiations. The position of the each of the parties before the negotiations start is the status quo point, point \( x \) on illustration 1 (where A's welfare is \( aI \) and B's welfare is \( bI \)). As can be seen, both parties seek to increase their welfare and therefore look for "deals" that are above and to the right of the status quo point—which is the field of results that make both parties better off.

Where the negotiations in fact end up is indeterminate, and, in one sense, as long as each party gains from the negotiation, where any party ends up is irrelevant. That is, if both parties are made better off, the negotiations have succeeded. Even point \( y \) improves the welfare of each country and makes the negotiations worthwhile (provided, of course, that the increase in the welfare of the two countries exceeds the cost of negotiations). The concept of efficiency imposes some determinacy on the outcome of the negotiations, because we want the parties to overcome the barriers to negotiation in a way that maximizes the Pareto efficiency of the bargaining—that is, we want them to bargain such that neither party could have a welfare gain without the other party suffering a welfare loss. If we can make one party better off without making the other party worse off, we should do that, for the sum of their welfare then increases. In other words, if the parties are at point \( y \) and could, given the resources available to them, get to point \( z \) we should find a way to help them bargain to point \( z \).

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46. The policy-makers and negotiators, of course, define the welfare for each party, so public choice theory always impels us to add that the welfare may in fact make the policy-makers or negotiators better off as well. But that public choice perspective is also not relevant to the analysis of what bargaining looks like when it is constrained by a notion of "balanced outcomes."

But even the concept of Pareto-efficient bargaining does not yield much of a criterion of determinacy, for the range of outcomes that are Pareto efficient (in the sense that neither party can be made better off without making the other party worse off) is large. Indeed, we can define a range of outcomes, denoted on illustration 1 as $p_1$, $p_2$, and $p_3$, that are each Pareto efficient. This defines the Pareto frontier—at each of these points resource restrictions keep us from getting more welfare for one of the parties without reducing the welfare of the other. The Pareto efficiency criterion gives us no basis for preferring one of these outcomes to any other; no one of those Pareto efficient points is superior to any other Pareto efficient point on any ground of efficiency. If we end up at any Pareto point we have as efficient an outcome as we can get, but we have no efficiency reason for picking that efficient point over any other efficient point. And the reason we end up at point $p_1$ or $p_3$ does not affect the efficiency of the outcome in Pareto terms.
Notice that any of the Pareto efficient points corresponds to the notion of mutual gains from the negotiations, fulfilling the simple requirement that each party benefit from the negotiations (the simple reciprocity requirement). But notice that the distribution of the benefits differs greatly between the most efficient points. At \( p_1 \), country B has gained a great deal from the negotiations and country A has gained little (relative to B). At point \( p_3 \), A has gained much and B little (relative to A). And notice that at point \( p_2 \) both parties have gained proportionately equally.

The concept of "balanced outcomes" is easy to see from this illustration. That concept would impose a fairness criterion on the negotiations that would rule out any Pareto efficient outcome that did not make the two parties better off in roughly the same proportion. In other words, it would impose a criterion that would rule points \( p_1 \) and \( p_3 \) as unacceptable in the negotiations and would confine the negotiations to a range of outcomes denoted by the shaded area—that range where any gain by one of the parties is roughly balanced by a gain by the other party.

Several properties of this fairness (or "balance") criterion are worth mentioning. First, the criterion could require the negotiations to sacrifice efficiency for fairness. The parties might have to forego a point that is Pareto efficient in order to meet the requirement of "balance." For example, assuming that the party's bargain to point \( p_2 \) (which is both Pareto optimal and "balanced") but that they have the possibility of changing the outcomes and getting to point \( p_4 \) (a new Pareto optimum point). They would have to forgo that outcome because it violates the fairness criterion (it is unbalanced in favor of A) and would make the outcomes unbalanced. For much the same reason, the "balanced" criterion makes the conclusion of the negotiations harder to reach because it limits the range of choices that the parties have. When the range of outcomes includes all Pareto points, it is easier to get a deal and claim success. When we can only find deals in the shaded area, the "success" of the negotiations (in terms of reaching a deal) is more difficult to achieve.

These considerations suggest that the "balanced" criterion may destabilize the negotiations because there is an imperative in the negotiations to get a deal, and also an imperative for country A to hold out for point \( p_4 \). These factors could drive the negotiators to
drop the notion of "balance" in favor of efficiency and expediency. And this, in turn, illustrates the chief weakness of the "balanced outcomes" objective. Without an external monitor to determine whether the outcome is balanced, the Doha promise of balance may melt away. If the balance criterion is to be maintained, the parties themselves must maintain it.

My claim in the subsequent sections of this Part of the article is that the Doha negotiations may be interpreted as having been set up to enforce the criterion of balance. There, I show the ways in which, at Doha, WTO Members subscribed to a negotiating plan that might make balance self-enforcing. Before undertaking that discussion, however, we should explore more generally the factors that may compel the negotiators to keep the "balanced outcome" goal, even when doing so makes it harder to reach an outcome and may require one party to sacrifice some benefit so that the "balance" can be maintained.

In this respect, two other properties of the "balanced" criterion are worthy of notice. First, the "balanced outcome" criteria corresponds to fundamental notions of fairness—conceptions of fairness that have wide appeal because they are fairness ideals that people use to govern their own behavior and to appraise the behavior of others.48

Second, the fairness criterion highlighted also corresponds to a notion of efficiency that is captured in the concept of Kaldor-Hicks efficiency.49 Pareto efficiency is a weak criterion for appraising the outcome of bargaining (or the desirability of policy changes) because it yields so many equally desirable Pareto-efficient outcomes. To address this indeterminacy, the Kaldor-Hicks efficiency criterion allows deals (or policy changes) that improve one party to such an extent the benefits to that party outweigh the foregone benefits of (or costs) to the other party—that is, the party that gains the most from the deal or policy change could compensate the party that gains less


49. See generally Posner, supra note 47, at 14-15 (explaining the concept of Kaldor-Hicks efficiency in the presence of externalities); Cooter & Ulen, supra note 47, at 43-44 (explaining the concept of Kaldor-Hicks efficiency in public policy changes).
and still be better off than without the deal (or policy change).\textsuperscript{50} In the context of illustration 1, the point \( p5 \) is Kaldor-Hicks efficient as compared to point \( p2 \) because the party that gains from the move to \( p5 \) could take the gains from that move, compensate the other party, and still be better off. That is, although point \( p2 \) is an equitable division of the benefits, point \( p5 \) is Kaldor-Hicks efficient because the gains to \( A \) from moving to \( p5 \) outweigh the losses to \( B \) of moving from \( p2 \). \( A \) could compensate \( B \) for \( B \)'s losses and would still be better off at point \( p5 \) after making the compensation than \( A \) would be at \( p2 \).

Indeed, in a sense point \( p4 \) is Kaldor-Hicks efficient compared to \( p2 \), though it is not a “balanced” or fair outcome. It is Kaldor-Hicks efficient because Country \( A \) could take the gains from moving to \( p4 \) and pay country \( B \) enough to restore the balance of benefits. \( A \) would be better off than not making the deal and \( B \) would be better off—in both an efficiency sense and (if \( A \) actually paid \( B \) enough to restore the balance of the benefits) in a distributive sense. Because of the distributive transfer payments, \( A \) would end up slightly to the left of \( p4 \), and \( B \) would end up in the lower portion of the zone of balanced outcomes (the shaded area).

In other words, the concept of fairness that is inherent in the notion of “balanced outcomes” and the Kaldor-Hicks concept of efficiency coincide in an important respect.\textsuperscript{51} They both suggest that parties should make a bargain if it can yield to one of the parties benefits large enough to allow that party to compensate the other party and still be better off. The two concepts differ, of course, in one important respect. The Kaldor-Hicks criterion does not require actual

\textsuperscript{50} See id. at 14 (noting that Kaldor-Hicks is called Pareto superiority because “[t]he winners could compensate the losers, whether or not they actually do”).

\textsuperscript{51} Kaldor-Hicks efficiency has another property that is worthy of consideration. It can be a wealth maximizing point as well as an efficiency point. If the Pareto frontier—the range of points at which one party can be made better off only by making the other party worse off—is a straight line, then any point on that frontier yields total benefits (that is, total increases in welfare) that are equal to all other points on the frontier. But if the frontier is bowed outward from the origin, then both the fairness and the Kaldor-Hicks criterion yield greater wealth than other points on the Pareto frontier. In that respect the fairness criterion and the Kaldor-Hicks criterion maximize wealth in a way that Pareto efficiency cannot achieve. See id.
payment of compensation.\footnote{See \textit{id.} at 14 (describing that under Kaldor-Hicks compensation does not actually have to take place for a negotiation to be successful).} Under the Kaldor-Hicks criterion, it is enough that the gains to the "winner" exceed the losses to the "non-winner," for that signals an increase in total wealth. By contrast, the fairness notion inherent in the word "balance" is not met unless the "winning" party actually compensates the other party and restores the fairness balance to the outcome of the bargaining. We can say that the notion of balanced outcomes—or the notion of fairness—is similar to Kaldor-Hicks efficiency when the transfer payments are actually made. Under this notion of balanced bargaining, we can achieve both efficiency and fairness if, but only if, the transfer payments are made.

This analytical framework shows us, of course, why the economist's efficiency view of the trade regime differs in important respects from the non-economist or from an economist with a broader welfare perspective. The economist with only an efficiency perspective wants to achieve Kaldor-Hicks efficiency, for that maximizes wealth and therefore makes the world better off by the efficiency criterion. Others want to see efficiency coupled with fairness (in the sense of equal gains) and they insist that the actual welfare of both parties increase—that is, the WTO Members actually make transfer payments. They couple the efficiency criterion with a distributive criterion—the parties should bargain to reach an efficient result but should then transfer wealth (i.e., distribute the gains in wealth) until the gains are balanced.\footnote{There may, of course, be costs in making the transfer payments. In the absence of lump sum payments, the mechanism "taxing" the accumulated wealth in the lump sum payments may have adverse incentive effects. And the payments themselves may have adverse incentive effects on the country receiving the payment. Each of those incentive effects has to be weighed in assessing the overall welfare of the outcome of the negotiation.} The transfer payment becomes a redistribution of wealth. In other words, if the term "balanced outcomes" means what it appears to mean, the WTO system can achieve both efficiency and fairness by becoming an institution that facilitates the kind of redistributive transfer payments that make the twin goals possible.

Implementing this ideal will not be easy. However, as I argue in succeeding sections of Part III, the Doha Development Agenda
seems to be set up to reinforce the ability of the developing countries to make sure that the WTO achieves balanced outcomes. For one thing, several decisions of importance to developing countries were made, even before the negotiations began—a reflection of a process of renegotiating the Uruguay Round agreements (subsection B.1). Moreover, the negotiations are staggered to address some issues of importance to developing countries early in the negotiations, giving the developing countries leverage in the process (subsection B.2). Finally, transfer payments made to support capacity building will ensure that developing countries have a better chance of negotiating toward balanced outcomes (subsection B.3). In other words, the Doha agenda starts off with a built-in balanced agenda.

In the final part of the article, Part IV, I show how, taken together, the Doha agenda can be seen as a slow transformation of the WTO toward an institution that also embraces distributive values.

B. ENSURING BALANCE

A large part of the Doha Development Agenda is crafted to give developing countries an assurance that the outcome of the negotiations will be balanced in fact as well as in spirit. Decisions reached at Doha extended beyond the decision of what to negotiate about, which is the usual kind of decision made when WTO Members decide to launch a new negotiating round. Instead, decisions were made on issues relating to the substantive scope of the obligations under existing WTO agreements, and these decisions resulted in rollbacks of prior commitments and decisions of substantive interpretation favorable to the developing countries. This is an important advance in WTO practice because it signals a new flexibility in thinking about how the effect of prior negotiations will influence future bargaining rounds. Moreover, even when the Members could not decide an issue, and merely framed the issue for further discussion and resolution, the Doha Development Agenda puts some subject matter on a "fast track," and gives developing countries some leverage, by assuring them that the resolution of those issues will be known before the other parts of the negotiations are completed. These techniques seem to be designed to keep a sense of balance in the negotiations.
1. Concessions to Start Negotiations—Rollbacks and Reinterpretations

The most significant procedural development at Doha was that industrial countries made concessions to developing countries to get the negotiations started. As shown in this subsection, the Doha Declaration contains rollbacks of previous obligations and new interpretations that, if not a rollback of prior expectations, are at least clarifications that favor developing countries. In essence, these rollbacks and concessional interpretations restore, in a small way, a kind of balance to the Uruguay Round negotiations some Members thought had been missing. Several obligations developing countries undertook following the Uruguay Round were extinguished. In other decisions made at Doha, the industrial countries gave up the right to seek interpretations that would favor their interests. Taken together, these concessions amount to a small but significant renegotiation of the Uruguay Round Agreements.

One can see this renegotiation going on especially clear with respect to the Uruguay Round agreement on intellectual property, TRIPs. The creation of intellectual property involves a careful balance between incentives and access, between producers and

54. See, e.g., infra note 59 and accompanying text (describing the extension of the transition period under TRIPs with respect to developing countries).

55. The legal status of the various Doha actions is an open question. Arguably, those portions of the documents that speak to the obligations in the various WTO treaties are Interpretations under Article IX of the WTO Agreement. They are not, however, termed "Interpretations;" they are termed "Decision," or "Declaration," or even "Procedure." See supra note 2. Even if they are not technically binding Interpretations, they can be construed to be "subsequent agreements between the parties regarding the interpretation of the treaty or application of its provisions" under the Vienna Convention on the Law of Treaties, signed in Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 ILM 679, that can be used in interpreting the WTO treaty obligations. They can therefore be given legal effect in that way. In any event, they are clearly intended as a statement of common understanding that will guide the conduct of WTO Members and, in that sense, represent a real shift in our understanding of the content of the Uruguay Round agreements.

Subsequent to Doha, the United States has refused suggestions to make more formal the informal moratorium on bringing dispute settlement cases in those areas where rollbacks and concessions have been given, although it has acknowledged the informal moratorium. See WTO, TRIPs Council Regular Meeting, March 5-7, 2002, available at http://www.wto.org/english/news_e/news02_e/trips_reg-020307_e.htm (last visited May 9, 2002).
consumers. Incentives are necessary to overcome the appropriation problem—the problem that investment in intangible assets can be so easily appropriated as to take away the incentive to invest in those assets. On the other hand, access is important to insure that the intangible assets are widely available and returns given to intangible assets are no greater than necessary to provide the appropriate incentive. Accordingly, TRIPs requires WTO Member countries to meet minimum standards of intellectual property protection, but it also recognizes the special position of intellectual property in development and contains several exceptions allowing countries to balance incentives and access. Often, this search for balance between incentives and access, and the related search for balance between development and minimum standards, is reflected in language that is general or indeterminate.56 Like so many of the WTO agreements, TRIPs was an agreement waiting for refinement.

As soon as the Uruguay Round concluded, it became apparent that the balance struck there might be inappropriate in light of developing health crises in many countries involving HIV, malaria, and tuberculosis. As a result, as soon as TRIPs was signed, a wide variety of governmental and non-governmental organizations began a prolonged debate and reconsideration of the role of intellectual property in the context of national health policy.57 Doha became the culminating event in that public debate and a substantial refinement of the balance struck during the Uruguay Round with respect to pharmaceutical products—and in some respects even more broadly in the intellectual property area. It also enabled further reconsideration in the future.

56. See J.H. Reichman, The TRIPs Agreement Comes of Age: Conflict or Cooperation with Developing Countries, 32 CASE W. RES. J. INT'L LAW 441, 463-64 (2000) (pointing out the “wiggle room” inherent in TRIPs and arguing that the interpretive gaps should be closed through negotiation rather than dispute settlement).

In some respects, the TRIPs refinement was a rollback of pre-existing obligations. Under TRIPs, the least-developed countries were to take on the TRIPs obligations after an eleven-year transition period, ending in 2006. A "least-developed country Member" could obtain an extension only "upon a duly motivated request." This provision made extensions available on a case-by-case basis, but gave no guarantee that any extensions would be given and gave no hint concerning the grounds for denying the extension. Under Doha, that transition period is extended with respect to pharmaceutical products for all least-developed countries an additional ten years, until 2016, for the minimum requirements relating to patents and trade secrets. No application is necessary. Obviously, the expectations with respect to a reasonable transition period for least-developed countries, at least with respect to pharmaceutical products, and the process for granting those extensions, has been rolled back.

Moreover, the Doha interpretations clarified some of the ambiguities in TRIPs. Under TRIPs, the moratorium on bringing non-violation violations was to last five years, during which time the Council for TRIPs was to make recommendations concerning non-violation violations. Under TRIPs, as clarified at Doha, the moratorium is to be continued until the Mexico City Ministerial Conference in 2003, with the "agreement that the Members will not initiate such complaints under the TRIPs agreement." In other words, the industrial countries formally gave up their right to claim that the moratorium on non-violation violations was ineffective

58. TRIPs Agreement, supra note 36, art. 66(1).

59. See TRIPS DECLARATION, supra note 2, para. 7 (stating that in addition to the ten-year grace period provided to least-developed countries regarding pharmaceutical products, least-developed countries maintained the right to seek an even longer transition period with respect to pharmaceutical products).

60. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1183, art. XXIII (1194) (stating that a GATT Member is permitted to challenge the measures of another Member that nullify or impair a bargain, even if the measure does not itself violate an obligation).

61. See TRIPs Agreement, supra note 36, art. 64 (setting the rules governing dispute settlement under TRIPs).

62. IMPLEMENTATION DECISIONS, supra note 2, art 11.1.
unless it was explicitly extended, and they gave up the right to seek to have the moratorium extended.

Furthermore, the Doha TRIPs agenda adds potential new exceptions to the TRIPs obligations, which TRIPs did not even contemplate. For example, some Members were concerned that even if TRIPs were interpreted to permit them to secure needed pharmaceutical products by compulsory licensing, they could not effectively take advantage of compulsory licensing provisions as long as those licensees had to be located in their country. Some least developed countries do not have the manufacturing capacity to make generic versions of patented drugs. If those countries were not able to secure their generic drugs from manufacturers who were located in other countries, any right they had to address their health problems through compulsory licensing would be illusory. In light of this problem, the Doha Declaration directed the TRIPs Council to find a way to allow countries with insufficient manufacturing capacity for pharmaceuticals to take advantage of compulsory licensing provisions to get access to drugs. This effectively sets the course for a new exception to the TRIPs minimum standards.

The compromises with respect to pharmaceuticals were often expressed in terms of an interpretation of TRIPs. But realistically, they were major rollbacks of prior expectations. The declaration, "[e]ach Member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted," is, in fact, a substantial gloss on Article 31 of TRIPs and a rollback to the substantial limitations Article 31 placed on compulsory licenses. At the very minimum, it is an expression that the developed countries will give up their right to argue that Article 31 puts limitations on the compulsory licensing process. Similarly,

63. See TRIPs DECLARATION, supra note 2, art. 6 (requiring that TRIPs solve this problem by the end of 2002).
64. TRIPs DECLARATION, supra note 2, art. 5(b).
65. See TRIPs Agreement, supra note 36, art. 31 (establishing the requirements for "other Use Without Authorization of the Right Holder). The requirements include, among other things, the following: that the authorization shall be considered on a case-by-case basis; that a license have been rejected by the patent holder, except in cases of national emergency; decisions to authorize use are subject to judicial review; and that supply be limited "predominantly" to the domestic market. See id.
the declaration, "[e]ach Member has the right to determine what constitutes a national emergency or other circumstance of extreme urgency,"\textsuperscript{66} amounts to a declaration that the ambiguous provisions of Article 8 of TRIPs—allowing Members to protect the public health in a manner that is consistent with the TRIPs requirements—carve out an exception to the TRIPs requirements. It effectively promises that declarations of national emergency will be unchallenged through the WTO dispute resolution system.\textsuperscript{67}

The concessionary interpretations and refinements at Doha were not limited to intellectual property issues and pharmaceutical products. Another contentious issue in recent years is the use of antidumping proceedings, which are something of a protectionist weapon of choice for many countries. Developing countries want to more tightly control Members' use (and abuse) of antidumping proceedings. Not only did the Members agree to "negotiations aimed at clarifying and improving disciplines"\textsuperscript{68} on national antidumping proceedings, but the Implementation Decisions refined our understanding of the WTO rules governing antidumping proceedings. For example, some Members are concerned about instances in which a foreign country closed an antidumping proceeding because it found insufficient evidence of an antidumping violation but then immediately opens a new investigation. For these Members, antidumping investigations have no finality. To address this concern, the Members articulated an agreement that national authorities will not open an antidumping investigation within a year of a negative antidumping determination involving the same product and country unless circumstances changed.\textsuperscript{69} It is difficult to escape

\textsuperscript{66} TRIPs Declaration, supra note 2, art. 5(c).

\textsuperscript{67} See id. art. 5(d) ("The effect of the provisions in the TRIPs Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge ... "). This effectively leaves the application of Article 6 of the TRIPs Agreement—which had originally stated that principle—unreviewable.

\textsuperscript{68} Doha Ministerial Declaration, supra note 1, para. 28.

\textsuperscript{69} See Implementation Decisions, supra note 2, art. 7.1 ("[W]here an investigation of the same product from the same Member resulted in a negative finding within 365 days prior to the filing of the application and that, unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed.").
the conclusion this is an effective amendment of the rules relating to antidumping proceedings since it gives exporters more assurance the trading system will be stable.

In other instances, the Implementation Decisions signal that new certainty will be added to provisions that appeared only hortatory to some. The obligation in the Antidumping Agreement that developed countries consider the special circumstances of developing countries when applying their antidumping proceeding was reaffirmed to be “mandatory,” with the instruction to make this mandate operational within twelve months. Furthermore, the provision requiring antidumping proceedings to be terminated promptly is to be made more predictable and objective within twelve months of the Doha Ministerial.

The treatment of export subsidies given by developing countries provides another example of the rollback of previously negotiated rights. Under the Uruguay Round Agreements, some developing countries could keep their export subsidies for only an eight-year transitional period, subject to an extension if the Committee on Safeguards determined a justification for the extension. The extension was apparently discretionary and without objective criteria that would determine when the privilege of an extension had to be given. At Doha, this changed. Under the new procedures, interested


71. See IMPLEMENTATION DECISIONS, supra note 2, art. 7.2 (acknowledging that Article 15 of the Antidumping Agreement is mandatory, but indicating that clarification of its application is necessary).

72. See Antidumping Agreement, supra note 70, art. 5.8 (noting also that immediate termination of investigations is required where dumping is “de minimis”).

73. See IMPLEMENTATION DECISIONS, supra note 2, art. 7.3 (instructing the Committee on Anti-Dumping Practices “to study this issue and draw up recommendations within 12 months, with a view to ensuring the maximum possible predictability and objectivity in the application of time frames”).

74. See Agreement on Safeguards, supra note 24 (identifying the countries that are exempt from the measures of Article 11, paragraph 2).
countries have an opportunity to seek extensions, and they have them as a matter of right—the Committee "shall grant extension to calendar year 2003"—when certain requirements are met. This effectively makes the extension a matter of right instead of a matter of discretion. Moreover, the conditions upon which the extension is to be granted are made objective, further reducing the discretion to deny the extensions.

Taken by themselves, these rollbacks and interpretive concessions are not of great import or general significance. Given the challenges faced by poor countries, some might even characterize them as niggardly. The significance of the concessions is not in their substance but in what they portend for the WTO system. The concessions occurred at the beginning of the negotiating round—not during the round—and they were given without any return consideration to the industrial countries except the promise by developing countries to continue the negotiating process. They change the image of the WTO from that of a bicycle that must always be moving forward, to that of a unicycle that must sometimes move backwards if it is to go forward. In a sense, they were echoes from Uruguay, a symbolic concession by industrial countries that more balance in the Uruguay Round agreements was


76. See Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, art. 27.4 (stating that the Committee would "...determine whether an extension of this [transition] period is justified, after examining all the relevant economic, financial and development needs" of the country seeking the extension), available at http://www.wto.org/english/docs_e/legal_e/24-scm.wpf; see also Extension Procedures, supra note 75, at 2 (explaining that under the new procedures the extension will be granted unless the trade involved exceeds a numerical threshold or the country Gross National Income exceeds a numerical threshold).

77. See Robert B. Zoellick, The WTO and New Global Trade Negotiations: What's at Stake, Address Before the Council on Foreign Relations (Oct. 30, 2001) (providing an example of the popular metaphor that the WTO is a bicycle that must constantly be moving forward if it is not to fall over), available at http://www.cfr.org/public/resource.cgi?pub!4149. "[T]he bicycle theory of trade is again in force: [i]f the trade liberalization process does not move forward, it will, like a bicycle, be pulled down by the political gravity of special interests." Id.
needed in order to initiate the Doha Round. This tips the balance of
the WTO toward flexibility and recognition that outcome matters.

2. Phased Negotiations—Guaranteeing Early Benefits

Even when decisions were not made on issues of importance to
developing countries, an important characteristic of the Doha
Ministerial Declaration is the way the negotiations will be staggered
within the context of a single undertaking. As during the Uruguay
Round, all Members will be expected to accept all the agreements,
even though "agreements reached at an early stage [of the
negotiations] may be implemented on a provisional or a definitive
basis." But at Doha it is also contemplated that some parts of the
package will definitely be completed before the negotiations as a
whole are concluded. And the timing of the stages is such that a large
part of the agenda of the developing countries will be fully addressed
before the agenda of the developed countries is completely
discussed.

As a result, developing countries will be able to understand what
benefits they are to get from at least some part of the Doha
Development Agenda that they put forth before they are asked to
agree on more difficult matters. They will know whether at least
some of the outcomes that will ensure balance are addressed—or at
least whether their interests are being taken into account. This early
decision mandate is reflected especially in the Implementation
Agenda. Whereas the general negotiations are scheduled to go on
until 2005, virtually all of the implementation issues are to be
resolved this year (2002), or, at the latest, by the Fifth Ministerial

78. Doha Ministerial Declaration, supra note 1, para. 47 (providing an
exception for improvements and clarifications of the Dispute Settlement
Understanding). Balance is achieved in the negotiations by a provision that "[e]arly
agreements shall be taken into account in assessing the overall balance of the
negotiations." Id.

79. See id. paras. 45, 47 (explaining that negotiations on certain issues have a
deadline to conclude by May of 2003 while other negotiations must be completed
by January 1, 2005).

80. See id. (requiring that the Dispute Settlement Understanding negotiations
be complete by May 2003).
Conference in Mexico City in 2003. For example, according to the Implementation Decision, the Committee on Antidumping Practices must determine within twelve months the time period over which imports should be measured when a country is determining whether they are *de minimis* in volume and should therefore be exempt from an antidumping investigation. Similarly, the Committee on Subsidies and Countervailing Measures must complete its review of countervailing duty procedures by July 31, 2002.

Moreover, some of the issues to be resolved quickly are more than just questions to be studied. Some of the issues also assume an answer that will alter and refine the substantive obligations of the Uruguay Round agreements. Take, for instance, the TRIPs provision that “Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least developed country Members.” This was obviously of importance to developing countries, but they had little means of enforcing the requirement, even though the requirement was clearly mandatory. The Implementation decision goes beyond merely confirming this. It also requires industrial countries to submit detailed reports on the functioning in practice of the incentives provided under that mandate. In other words, there is a commitment to make the requirement that industrial countries provide incentives for the transfer of technology more than just a formal commitment. There is now a commitment on the part of industrial countries to prove that the commitment has been fulfilled.

In short, the promise of the industrial countries to complete work on a portion of the Doha Development Agenda in advance of negotiations on other matters represents a way by which industrial

81. See id. para. 12 (explaining that committees must report on implementation-related issues and concerns by the end of 2002).

82. See IMPLEMENTATION DECISIONS, supra note 2, para. 7.4 (stating that the committee on anti-dumping practices must submit proposed guidelines within 12 months).

83. See id. para. 10.3 (stating that the Committee on Subsidies and Countervailing Measures will complete a review of the Agreement on Subsidies and Countervailing Measures).

84. TRIPs Agreement, supra note 36, § 66.2.

85. See IMPLEMENTATION DECISIONS, supra note 2, para. 11.2
countries can signal their commitment to balanced outcomes and by which the developing countries can determine whether the commitment to balanced outcomes will be fulfilled.

C. CAPACITY BUILDING AND BALANCED OUTCOMES

The Doha Declaration emphasizes capacity building and technical cooperation as "... core elements of the development dimension of the multilateral trading system." It backs that emphasis with a New Strategy for WTO Technical Cooperation for Capacity Building, Growth, and Integration. Indeed, capacity building and technical cooperation were such a pervasive theme at Doha that Paragraph 41 of the Declaration lists eleven paragraphs in the Declaration where "firm commitments on technical cooperation and capacity building" are made. Not only is capacity building a central feature of the Declaration, but it is also a specific part of much of the Implementation agenda. And in a new year's press release following Doha, Director General Moore announced both an increase in the budget of the WTO to carry out this capacity building agenda, and the establishment of the Doha trust fund—with a proposed initial endowment of fifteen million Swiss francs—to make the commitment of financial support a reality.

86. Doha Ministerial Declaration, supra note 1, para. 38.
87. See id. para. 41 (citing paragraphs 16, 21, 24, 26, 27, 33, 38-40, 42, and 43 for the specific commitments established for technical cooperation and capacity building).
88. The Implementation Decision endorses capacity building, for example, with respect to both the implementation agenda for the Agreement on Sanitary and Phytosanitary Measures ("SPS measures") and the Technical Barriers to Trade ("TBT measures"). See IMPLEMENTATION DECISIONS, supra note 2, para. 3.5 (explaining capacity building for SPS measures); id. para. 5.3 (explaining the capacity building for the TBT measures). It also urges Members "to the extent possible" to give financial and technical assistance to allow least developed countries to respond to the new SPS measures and to the new TBT measures. See id. paras. 3.6(i), 5.4(i). Finally, the Implementation Decision urges Members to provide financial and technical assistance to least developed countries to help them manage their own systems of SPS and TBT. See id. paras. 3.6(ii), 5.4(ii).
89. Press Release, WTO, Moore Pledges to Build on Doha Success in 2002 (Jan. 2, 2002), at http://www.wto.org/eng/ news_e/pres02_e/pr266_e.htm. In fact, the Doha Development Agenda Global Trust Fund was set up with initial pledges of more than 30 million Swiss francs ($18 million), twice the original goal. See Press Release, WTO, Governments Pledge CHF 30 Million to Doha
The redistributive aspects of these commitments are unmistakable. If the trust fund is successful it will result in a direct transfer from rich to poor countries. Significantly, the industrial countries recognize the need for capacity building. They recognize that implementing the Uruguay Round agreements is expensive and the expense should not rob the poorest countries of the resources needed for other development investments. They recognize that bargaining is not fair—and that outcomes will not be balanced—if a Member does not have the human and institutional capacity to bargain effectively. They recognize that this means that some Members need money to create a larger and more technically trained staff. It is also significant that the industrial countries did not say that the developing countries must fund their capacity building out of the gains from trade. Absent from this program is the notion that if a country just reduces barriers to trade and adopts the institutional accoutrements of an industrial country, their economy will grow. The industrial countries are willing to contribute to the tab.

It is easy to be cynical about the capacity building promise. The capacity building touches only two of the many needs of developing countries—help in implementing obligations and help in building the capacity to negotiate effectively and meaningfully.\footnote{Development Agenda Global Trust Fund (Mar. 11, 2002), at http://www.wto.org/english/news_e/pres02_e/pr279_e.htm (last visited May 9, 2002).} It may be that the money donated for capacity building is in fact used primarily to spread the rhetoric of free trade rather than to fashion trade-related development policies that actually promote growth. Much of the capacity building will be in terms of technical advice, and even the direct payments will primarily be used to facilitate the training. The amount in the trust fund is not great in relation to the need. One might argue that the capacity building initiative was the minimum necessary to get the negotiations launched—a kind of goodwill development.

gesture rather then a meaningful contribution to the Member countries.

All of this is accurate. However, we can look at the capacity building plank of Doha in a different way as well. It was both consistent with the WTO barter model of exchanging interests and a fundamental shift in that model. On the one hand, the role of capacity building at Doha was no different from any other deal made at Doha—an advantage for developing countries, which imposed a cost on industrial countries. The industrial countries offered a carrot to get the developing countries to agree to an agenda that is thought to yield benefits for the industrial countries. Nevertheless, the exchange was fundamentally different from the normal exchange in WTO negotiations. Here the carrot was a financial carrot, not market access. The inducement to agree took a new form. Rather than offering more access in a particular sector, the industrial countries offered in kind and financial rewards. The industrial countries did not just agree to more market access to allow the developing countries to earn the money to invest in capacity building. The industrial countries are making a direct financial commitment. This changes the coin of the realm used for facilitating negotiated exchanges at the WTO from market access to direct financial payments.

At a minimum, Doha represents a subtle shift in emphasis in the ambiguities underling the GATT/WTO system, a shift to greater flexibility in addressing the outcome of prior negotiating rounds, a commitment to balanced outcomes, and a new form of exchange that contains explicit redistribution of wealth to poor countries. Let me now tie these themes together to show how we can understand these shifts as part of incorporating redistributive values at the WTO.

IV. THE WTO AS A DISTRIBUTIVE ORGANIZATION

None of the analysis in the preceding section necessarily demonstrates the transformation of the WTO from an organization grounded in efficiency values to one that also cares about distributive values. Many will see the concessions by industrial countries simply as pragmatic adjustments to the realities of the division between developed and developing countries. In what way do the aspects of
Doha I highlighted reflect more than a simple recalibration of the ambiguities underlying the GATT/WTO system? Assuming that the words of Doha are in fact transformed into action, in what way does the change in emphasis that I have charted suggest that the WTO is taking on distributive values?

The capacity building provisions are the clearest example of the redistributive ideal at work. They represent an admission that openness alone is not enough, and that rules for openness may not, by themselves, be capable of generating economic gains. They represent an admission that poverty can be a stumbling block to taking advantage of the promises of the WTO system. And they represent an acknowledgment that the decision-making autonomy of individual Members is crucial to the legitimacy of the WTO system—even in the context of a system designed for their benefit. Finally, they represent a commitment by the wealthier nations to make the system work by sacrificing some of their riches to enable the poorer nations to share more evenly in the wealth the system generates.

But the claim that we can see the emergence of the WTO as a redistributive organization does not rest solely on the capacity building provisions of Doha. The rollbacks and concessional interpretations introduced at Doha—while themselves relatively modest—can also be interpreted as a redistribution of wealth. This is true in the sense that the rollbacks and reinterpretations were given by industrial countries without any corresponding or reciprocal sacrifices from the developing countries (other than the willingness to sign on to the new round of negotiations). Once you assume that the Uruguay Round gave industrial countries the right to insist on certain obligations—or to press a particular interpretation of the treaties through dispute resolution—then suspending that obligation or foregoing that interpretation is a kind of gift—a kind of redistributive act recognizing that the measure would otherwise have unacceptable consequences in light of the poverty of the beneficiary country.91

91. In addition, the United States may have provided special market access as a kind of side payment to make the launch of a new round of negotiations attractive. See Harbaksh Singh Nanda, U.S. to Give $543 Million in GSP to India, Zoellick Says on Visit to Win WTO Support, 18 Int'l Trade Rep. (BNA) 1293 (Aug. 16,
This is not the first time, of course, that countries gave up their rights to enforce their obligations under the GATT/WTO system. That kind of renegotiation of prior commitments is inherent in a rule-based system that must provide flexibility. Yet formally, at least, those renegotiations of prior commitments are generally accompanied by compensation for the country that gave up its rights. A country may give up its rights to insist on a bound tariff, but that rollback is accompanied (at least in form) by reciprocal compensation from the country raising its tariff.92 Similarly, an escape from obligations under the safeguards clause is also supposed to be accompanied by compensating action.93 In other words, once an obligation is undertaken, avoiding it is costly. By contrast, the rollbacks and concessional interpretations at Doha were not costly to developing countries.

It can always be argued, of course, that a rollback or favorable interpretation given in order to induce another country to enter trade negotiations is not truly unilateral, not truly a gift—it is simply the price of getting to the next level of an integrated global economy. As I indicated above, the rollbacks and reinterpretations can be depicted as given in return for the promise of future gains from the new round of negotiations. Such an interpretation of Doha, while plausible, would be a dangerous interpretation for the WTO Members to embrace, however. If we interpret the Doha rollbacks of prior commitments to establish a new norm of general availability, then new negotiations would always be hostage to whatever country wanted to renegotiate prior agreements, and that would open a huge opportunity for any country to escape prior obligations or reinterpret prior treaties without cost. It would make the certainty of the prior negotiations depend solely on the good faith of countries not to

92. See GATT, supra note 30, at Annex 1A, GATT 1947, art. XXVIII (explaining how Member countries may modify previously negotiated terms).

93. See id. at Annex 1A, art. XIX (explaining the procedures for emergency withdrawal of negotiated concessions); see also Agreement on Safeguards, supra note 26, art. 8.1 (stating that Members may agree on the means of trade compensation).
invoke the consensus rule—the informal norm that the GATT/WTO system must get consensus before moving forward.

For that reason, I do not interpret the concessions given to developing countries that encouraged them to agree to the new negotiating round to be precedent for a general rule that disappointed bargainers can renegotiate prior commitments before launching a new negotiating round. Instead, I see the concessions in distributional terms. Under this view, the concessions given to developing countries acknowledged that because of the particular circumstances of the developing countries—especially poverty—it was appropriate for the developing countries to give up some of the gains won during the Uruguay Round. This is a redistributive value.

Doha seems to move the WTO toward distributional values in still another sense. If the Members carry through on their promise to negotiate toward balanced outcomes, they will be induced to continue to make transfer payments in order to make sure the benefits of the negotiating round are shared equally. As I showed above, if a commitment to balanced outcomes is a commitment to proportionally equal outcomes, the negotiation will be severely constrained unless those who would gain the most in the negotiations make transfer payments to those who benefit the least. Without transfer payments, Members will have difficulty finding bargains that meet the “balanced outcomes” criteria and also increase total wealth, for the negotiators will then have to sacrifice some outcomes that favor one party a great deal but help other parties only a little. With transfer payments, the negotiators can reach outcomes favoring one side a great deal as long as that side is willing to compensate the

94. See supra Part III.B.1. (explaining the various concessions that the industrial Members are giving through the Doha negotiations to the developing countries).

95. See generally IMPLEMENTATION DECISIONS, supra note 2 (explaining the various ways that the industrial countries will work to negotiate issues that are beneficial to developing countries).

96. See supra Part III.A. (discussing the point that equal outcomes will constrain negotiations).

97. See id. (discussing the use of transfer payments to balance the outcomes of negotiations).
other side for accepting a deal with relatively little benefit. A system truly constrained to reach balanced outcomes will naturally gravitate to transfer payments. In that way, negotiations can maximize the welfare the system provides while also maximizing the system's efficiency.

Theory, therefore, tells us that if the balanced outcomes goal is maintained, we can expect to see more transfer payments from wealthy to poor countries in order to keep the system moving forward. Practical reasoning leads us to the same conclusion. Institutional dynamics may well induce WTO Members to continue to experiment with transfer payments as a method of improving the bargains struck during the negotiations. Doing so will insure the long-run viability of the WTO enterprise.

Those who look down the road far enough—past Doha, past Mexico City, and past the successful conclusion of the Doha Development Round—will see that the endgame in market access negotiations will present the WTO with a significant institutional dilemma. Once markets are fully open, and once adequate controls are in place to remove trade remedies as significant distortions of trade, WTO Members will have lost the ability to induce other countries to change their inefficient policies by offering market access. WTO Members will have exhausted the coin of the realm—the market access that induces foreign governments to change their conduct—because markets will be open and threats to close them will be controlled adequately by WTO disciplines. In the absence of the ability to promise to reduce trade barriers—the carrot and main engine driving trade negotiations—the possibility of further negotiations will be exhausted.

98. See id. (explaining that transfer payments can shift benefits from one contracting party to another in order for both to benefit equally).

99. See id. (explaining that transfer payments may be the only way to equalize the benefits of negotiations).

100. See id. (explaining that benefits from a contract may benefit one party greater than the other, and transfer payments from the greater benefiting party to the less benefiting party can equalize the benefits).

101. See supra Part III.A. (discussing the general use of transfer payments and the theory that they can equalize benefits of negotiations).
Yet, clearly, the need for new negotiations will not be exhausted. The range of issues of international economic integration will continue to be large. National economic systems will continue to be diverse, many of them riddled with inefficiencies that create conflicts with the economies of other countries and opportunities for improvements in global welfare if the conflicts can be addressed successfully. A WTO system based only on the barter of market access opportunities will be unable to address those inefficiencies.

A redistributive WTO opens up a new possibility, however. Recall that the commitment of wealthy countries to redistribute wealth to poor countries for capacity building can be viewed in one of two ways. On the one hand, it can be viewed as a straightforward and good faith commitment to improve the balance in the outcome of the negotiations. Alternatively, we can interpret capacity building as a bribe—a monetary payment to get the least developed countries to agree to the negotiations. Under this interpretation, the carrot is not market access but monetary and monetary-like contributions. That is, under this interpretation, the WTO Members have already begun to change the coin of the realm from market access to the direct redistribution of money.

We can see why this bribe was necessary if we briefly revisit the Seattle Ministerial. The central lesson we must learn from the Seattle Ministerial is that the United States is running out of market access promises it can offer to make negotiations attractive to other countries. True, the United States economy, although open, is far from friendly to producers in many countries. Restrictive trade remedy legislation and protection in textile and agricultural sectors

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102. See supra Part III.B.1. (highlighting the fact that the industrial nations may have given concessions to developing countries merely as bait to begin negotiations, rather than a feeling that the developing countries deserve a sort of wealth distribution).

103. See id. (giving examples of relaxed provisions for developing countries in the area of the TRIPs agreement).

104. See id. (stating that the concessions may have the sole purpose of starting a new round of negotiations).

105. See generally The Seattle Ministerial (explaining the agenda and issues raised at the Seattle Ministerial meetings as well as links to those issues), available at http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/03bgd_e.htm.
continue to thwart the aspirations of many foreign producers to reach the United States market. But at Seattle, the United States was blocked from offering anything of value to developing countries. In the agricultural sector, the United States had nothing to offer Europe to induce Europe to move the agricultural negotiations forward, so the United States could not offer developing countries any market access in agriculture.\footnote{See id. (giving agricultural statistics).} Europe would not budge on agriculture because any additional market access that the United States offered Europe was trivial in value; for products of interest to European companies, formal protection is relatively minor.\footnote{See id. (describing the agricultural issues that the Members were to negotiate at the Seattle Ministerial).} Seattle showed that the lure of market access was of little value in getting negotiations started.

Undoubtedly, the failure of Seattle was due in part to the U.S. position on other matters. The United States was then unwilling to consider new constraints on the protectionist flexibility offered by trade remedy legislation, like antidumping and countervailing duty legislation.\footnote{See id. (stating the issues to be negotiated).} In light of the demands that the United States was making for additional commitments with respect to labor rights and other issues, the offers made by the United States looked miniscule in terms of the demands made by the United States. But at bottom, the inability of the United States to make offers of market access that had any real value made it impossible for developing countries to agree to a new round. At least under those political circumstances, the coin of the realm that the United States has traditionally used to get other countries to the bargaining table—market access—was too weak for the United States to exert any leadership.

Many things changed between Seattle and Doha. At Doha the United States was able to get Europe to be more flexible on agriculture and was able to offer more in other areas.\footnote{See Doha Ministerial Declaration, supra note 1, para. 13 (discussing the negotiations to date on the Agreement on Agriculture).} And the United States, following a change in administrations, dropped its demand with respect to labor rights, which required it to offer less to
get the developing countries to agree to the start the round. But it is significant that at Doha the United States, and other industrial countries, also implicitly offered direct payments in order to get the negotiations started, for those direct payments—although quite small—demonstrate the power that monetary transfers can have in inducing countries to consider a change in their policies. Symbolically, they changed the coin of the WTO realm from market access to direct payments.

Although only symbolic in its impact, the potential power of this broadened basis of exchange at the WTO is significant. Direct transfer payments provide a model under which countries that seek to bring about costly changes in the regimes and policies of other countries can pay those countries to make the changes. A country seeking to induce another country to eliminate a distortionary economic policy could choose between market access and direct payment as the carrot to make it attractive for the other country to change its policy. Say that the United States believed a country’s court process for enforcing intellectual property rights was ineffective. The United States could direct its aid to that country toward improving the judicial process in return for a promise to use the aid to improve the process in specified ways. The United States could bring about the reform within the context of WTO negotiations without having to provide greater market access to the other country. Moves such as this would greatly increase the range of policy changes that the WTO Members could bring about.

The model is not without its difficulties, but it is also not without precedent. Foreign aid is already heavily conditional—the aid is conditioned on the recipient countries agreeing to restrictions on how the aid is used, and on controls to make sure that the aid meets its intended goals. And the aid is also conditioned on the recipient countries changing policies that are antithetical to the interests of the

109. See id. (mentioning many issues, but never mentioning any labor standards negotiations on the agenda, while labor practices were a part of the Seattle planned negotiations).

donor countries. Many countries are now increasing their international aid budgets. If WTO Members were to begin to channel their foreign aid through the WTO they would find that the ability to make bargains at the WTO increased. They would also be able to harness the enforcement machinery of the WTO to ensure the conditions on which the aid was given were in fact being met.

CONCLUSION—THE VISION OF A DISTRIBUTIVE WTO

I have interpreted the events at Doha to suggest that the WTO Members may be incorporating distributive values into their work. This does not suggest that the WTO will lose its character as an organization that is primarily interested in efficiency. Nor does it

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suggest that the interpretation I give to Doha is irreversible. The "kindlier gentler" WTO that appears to have emerged at Doha is but a small step—some would say too small—and it will not make the bargaining during the Doha Development Round less self-centered or hard-edged. Moreover, an organization like the WTO, which is built on self-interested exchange, can pursue redistributive goals in only a limited fashion. Because the WTO system was developed as an exchange of market opening opportunities, the gains from the WTO process are limited to gains that can come through the exchange process, and those gains are primarily related to increased wealth. Because there is no internal control on the bargaining mechanism, and no external monitor to evaluate the fairness of the exchange, it is difficult to get redistributive or fairness gains from an exchange system. Exchange generally involves a positive sum game, while redistribution involves a zero sum game.

Nonetheless, my reading of the Doha tea leaves suggests how one might think the WTO system is transforming into one that advances distributive values as well as efficiency values. At the core of that transformation would be the recognition of the public goods aspects of international prosperity and relative equality. Equality has a value for the global economic system that benefits all countries, even those who must sacrifice some wealth to bring about the equality. At a minimum, Doha recognized in principle that equality in bargaining capacity is important to the future of the WTO regime, and the Members took steps to improve the bargaining capacity of poorer countries. More broadly, Doha may be interpreted to recognize that relative equality provides stability and acceptability that will enhance both the legitimacy and stability of global governance. International social stability provides the synergy that keeps the system of rule-based, neutral economic growth intact. This value cannot be achieved simply by asking each country to follow its own self-interest, for, as in the case of other public goods, individual investment yields too little. The kind of relative equality that will give some stability to the international economic system can be reached only if self-interest is tempered by joint interest, and if WTO bargaining is therefore done so that the benefits are not only reciprocal but also balanced. Any mechanism that the WTO can put in place to improve the balance in the bargaining between nations
and the “fairness” of the outcomes will surely catch the spirit of the distributional goals I derived from Doha.

At bottom, my interpretation of Doha is built on the notion that, at Doha, industrial countries recognized—at least implicitly—that they may temper what they could get in the short run in order to get what is surely in their long term self-interest—a global system in which the interests of the system—the interests of the community of nations—transcend the interests of individual nations. As self-interest in the success of the system replaces self-interest in what can be gained from the system, industrial countries will naturally come to embrace distributive values as they seek to guide the growth of the WTO.