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## AID FOR TRADE: A ROADMAP FOR SUCCESS

PHOENIX X.F. CAI\*

### I. INTRODUCTION

Let us imagine a cooperative of mango growers in Mali,<sup>1</sup> one of the poorest countries in Western Africa. These mango farmers grow delicious mangos prized by local consumers for their sweetness, firmness, and long shelf life. Let us further imagine that our mango farmers dream of expanding their business beyond local demands to export their mangos to markets in Europe, where they can garner higher prices for their produce. How would they make their dream come true? Imagine the difficulties our mango growers would have to overcome. Perhaps the roads from Mali to the closest seaport of Dakar, Senegal are poorly maintained and unreliable. Perhaps no fleet of refrigerated trucks is available to transport the mangoes to port. Perhaps the Mali government does not have a system in place for inspecting agricultural products for export to meet the safety and health regulations of the European Union. Aside from these infrastructural concerns, the farmers may not possess the know-how to market their products to compete effectively

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1. Mali is, of course, one of the major producers of cotton in Africa. As a member of the Cotton Four, Mali has been pushing, thus far in vain, for the United States, European Union, and other developed countries to open their markets to imported cotton from Africa. For an excellent description of the intractable position of the Cotton Four, see generally, Kevin C. Kennedy, *The Incoherence of Agricultural, Trade, and Development Policy for Sub-Saharan Africa: Sowing the Seeds of False Hope for Sub-Saharan Africa's Cotton Farmers?*, 14 KAN. J.L. & PUB. POL'Y 307, 315 (2005) (arguing that "[c]otton subsidies, especially those bestowed by the United States upon its cotton farmers, have had at the least a price suppressing effect on world prices for cotton, to the detriment of cotton farmers in sub-Saharan Africa"); see also Oxfam, *"White Gold" Turns to Dust: Which Way Forward for Cotton in West Africa?*, Oxfam Briefing Paper, Mar. 2004, 4-6, available at [http://www.oxfam.org.uk/resources/policy/trade/downloads/bp58\\_cotton\\_wafrica.pdf](http://www.oxfam.org.uk/resources/policy/trade/downloads/bp58_cotton_wafrica.pdf); Charles E. Hanrahan, CRS Report for Congress, *The African Cotton Initiative and WTO Agricultural Negotiations 1-2* (2004), available at <http://www.nationalaglawcenter.org/assets/crs/RS21712.pdf>; Ruth Gordon, Essay: *Sub-Saharan Africa and the Brave New World of the WTO Multilateral Trade Regime*, 8 BERKELEY J. AFR.-AM. L. & POL'Y 79, 121 (2006) (arguing that sub-Saharan African countries may have no choice but to disengage from the international trade regime and explore regional solutions). Largely because Mali's dominant agricultural product, cotton, is so controversial and on which negotiated market access issues overshadow aid for trade possibilities, I choose to focus the hypothetical on a less fraught and complicated agricultural product.

with mangos grown in Mexico, California, or the Philippines. To whom should our hypothetical farmers turn for assistance? The answer, surprisingly, may be the WTO.

Traditionally, when one thinks of development and aid, the World Trade Organization (WTO) does not immediately come to mind. Rather, the usual suspects are the development agencies of the UN,<sup>2</sup> private non-governmental organizations (NGOs), and the much beleaguered World Bank<sup>3</sup> and International Monetary Fund (IMF).<sup>4</sup> Nonetheless, development had been a hot topic at the WTO recently. In particular, aid for trade has emerged as the rising star, invested with the hopes of many as the best means to carry out the laudable goals of the so called "development"<sup>5</sup> or Doha Round<sup>6</sup> of multilateral negotiations. While the

2. The United Nations Development Programme (UNDP) is the UN's global development network, an organization advocating for change and connecting countries to knowledge, experience and resources to help people build a better life. The UNDP is on the ground in 166 countries, working with them on their own solutions to global and national development challenges. Under the sponsorship of UNDP, world leaders have pledged to achieve the Millennium Development Goals, including the overarching goal of cutting poverty in half by 2015. For more information on the Millennium Development Goals, see *infra* text pp. 119-20.

3. Steven R. Weisman, *Wolfowitz Resigns, Ending Long Fight at World Bank*, N.Y. TIMES, May 18, 2007, at A1, available at <http://www.nytimes.com/2007/05/18/washington/18wolfowitz.html>.

4. Steven R. Weisman, *I.M.F. Faces a Question of Identity*, N.Y. TIMES, Sept. 28, 2007, at C1, available at <http://www.nytimes.com/2007/09/28/business/worldbusiness/28imf.html> (quoting a statement by the newly appointed managing director that the IMF faces questions of both "relevance and legitimacy.").

5. The member nations of the WTO launched the Doha Development Agenda ("DDA") on November 14, 2001. The initiative seeks to change the orientation of the global trade architecture to make it more supportive of development. See World Trade Org., *The WTO Hosts Public Symposium: The Doha Development Agenda and Beyond*, [http://www.wto.org/english/tratop\\_e/dda\\_e/symp\\_devagenda\\_02\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/symp_devagenda_02_e.htm) (last visited Feb. 25, 2008) (quoting statements by then WTO Director General Mike Moore, who spoke about the Doha Declaration's emphasis on the major role of international trade in the promotion of economic development and the alleviation of poverty).

6. The Doha Round of trade negotiations were launched in 2001, soon after the attacks of September 11, 2001. The self-styled "development round" was to be an ambitious effort to extend the reach of globalization to help the world's poor gain access to global markets for agricultural products, among other goals. In order for the Doha Round to succeed, more developed economies had to agree to lower tariffs for foreign farm products and slash barriers and subsidies in farming domestically. The Doha Round was suspended officially on July 24, 2006, when it became obvious that gaps were still too wide among the six principal negotiating countries (Australia, Brazil, the European Union (E.U.), India, Japan and the United States (U.S.)). As the talks continued to stall, Mr. Lamy observed, on October 10, 2006, that "it is now obvious that the cost of failure, and the missed opportunity to rebalance the trading system, would hurt developing countries more than others." World Trade Org., *Lamy: Round Failure Would Hurt Developing Countries More Than Others*, Oct. 10, 2006, [http://www.wto.org/english/news\\_e/news06\\_e/tnc\\_chair\\_report\\_10oct06\\_e.htm](http://www.wto.org/english/news_e/news06_e/tnc_chair_report_10oct06_e.htm); see also, *In the Twilight of Doha*, THE ECONOMIST, July 27, 2006, at 63. Little progress was made in 2007, but Pascal Lamy, the Director General of the WTO, believes that the round may be concluded in 2008 following the issuance of new draft framework deals from the chairs of the WTO negotiating committees on agriculture and industrial goods trade. These reports should contain proposals, called modalities, for expanding market access for agricultural and industrial products by developing nations. On December 5, 2007 Pascal Lamy told reporters that "[I]f we agree on modalities early next year, I believe we could be able to conclude the round before 2008." *WTO Negotiators Look to 2008, Though DOHA Deal*

Doha Round has collapsed, seemingly moribund for moment, WTO officials have been casting about for another means of spurring economic growth in the developing countries.<sup>7</sup> The answer of the moment is aid for trade, the appealing simple idea of building trade capacity from the ground up with various forms of trade-targeted aid. Aid for trade is broad, multifaceted, and complex, comprising forms such as technical assistance (helping countries develop trade policies, negotiate more effectively, and implement outcomes), technology transfers, infrastructural projects, capacity-building, and adjustment assistance (helping with the costs associated with tariff reductions and declining terms of trade). Aid for

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*Prospects Look Slim*, BRIDGES WEEKLY TRADE NEWS DIGEST, Dec. 5, 2007, <http://www.ictsd.org/weekly/07-12-05/story1.htm>. The WTO did issue a new framework containing modalities or formulas for reducing agricultural subsidies on February 8, 2008. See World Trade Org., Draft Blueprints Issued for Final Deal on Agricultural and non-Agricultural Trade, (Feb. 8, 2008) [http://www.wto.org/english/tratop\\_e/agric\\_e/chair\\_texts08\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/chair_texts08_e.htm) (last visited May 8, 2008). The initial response to the draft framework has not been very promising, however. See Press Release, Institute for Agriculture and Trade Policy, New WTO Agriculture Text Falls Short-Again (Feb. 8, 2008), <http://www.iatp.org/iatp/press.cfm?refid=101542>. (last visited May 8, 2008). See also David Blandford et al., *Implications of the WTO February 2008 Draft Agricultural Modalities for the United States*, available at [www.ifpri.org/events/seminars/2008/20080501/20080501USLabordeet.pdf](http://www.ifpri.org/events/seminars/2008/20080501/20080501USLabordeet.pdf) (last visited May 8, 2008).

7. See World Trade Organization, *The Sub-Committee on Least-Developed Countries*, [http://www.wto.org/english/tratop\\_e/devel\\_e/dev\\_sub\\_committee\\_ldc\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/dev_sub_committee_ldc_e.htm). (last visited Feb. 18, 2008) (explaining that the WTO recognizes as LDCs those countries which have been designated as such by the United Nations. There are at present 50 LDCs on the UN list, thirty-three (with the accession of Cape Verde as a member in December 18, 2007) of which are Members of the WTO); see also United Nations Statistics Division: *Definition of Developed, Developing countries*, [http://unstats.un.org/unsd/cdb/cdb\\_dict\\_xrxx.asp?def\\_code=491](http://unstats.un.org/unsd/cdb/cdb_dict_xrxx.asp?def_code=491) (last visited Feb. 18, 2008) (stating that “[t]here is no established convention for the designation of “developed” and “developing” countries or areas in the United Nations system. In common practice, Japan in Asia, Canada and the United States in northern America, Australia and New Zealand in Oceania and Europe are considered “developed” regions or areas. In international trade statistics, the Southern African Customs Union is also treated as developed region and Israel as a developed country; countries emerging from the former Yugoslavia are treated as developing countries; and countries of eastern Europe and the former USSR countries in Europe are not included under either developed or developing regions.”). *But see* United Nations Statistics Division: *Definition of Least Developed Countries (LDCs)*, [http://unstats.un.org/unsd/cdb/cdb\\_dict\\_xrxx.asp?def\\_code=481](http://unstats.un.org/unsd/cdb/cdb_dict_xrxx.asp?def_code=481) (last visited January 18, 2008) (explaining that the UN, however, does have a system to designate a list of those countries considered to be Least Developed Nations (LDCs), whereby on the recommendation of the Committee for Development Policy, the General Assembly decides on the countries to be included in the list of the least developed countries. In Africa, they are: Angola, Benin, Burkina Faso, Burundi, Cape Verde, Central African Republic, Chad, Comoros, D. R. of the Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, Sudan, Togo, Uganda, U.R. of Tanzania, Zambia. In Asia and the Pacific, they are: Afghanistan, Bangladesh, Bhutan, Cambodia, Kiribati, Lao P.D.R., Maldives, Myanmar, Nepal, Samoa, Solomon Islands, Tuvalu, Vanuatu, Yemen; In Latin America and the Caribbean: Haiti). While there are numerous significant differences among countries falling into these groups, in this article, I refer generally to “developing nations” to include all the LDCs and all the developing economies, without necessary differentiating between them. This is not to say the differences between them are not important -they certainly are. Instead, it reflects on the fact that they share certain common concerns, particularly with respect to trade, such that they may be treated as one group for the purpose of this article. Thus, the term “developing nations” is used merely as a convenient short-hand.

trade is such a hot topic these days that Pascal Lamy, Director General of the WTO, recently devoted a whole conference (a Global Forum on Aid for Trade) to it, and afterwards went on tour to promote its virtues to WTO member nations and NGOs.<sup>8</sup>

This article seeks to critically examine aid for trade, to assess its shortcomings and strengths, and to offer a roadmap for implementing it with success. Part II begins by taking a very selective and brief look at the development of trade-related aid from the end of World War II into the 21<sup>st</sup> century, with a focus on the historical and political tensions that have lingered and continue to shape aid for trade today. Part III provides both a description and a frank assessment of how aid for trade is currently conducted, and argues that it is still largely ineffectual in promoting sustainable economic development where it is most needed. Part IV examines the inherent conflicts between the aid regime and the trade regime, which conflicts yield implications for how aid for trade should be structured. Another goal of Part IV is to encourage greater dialogue between aid experts and trade experts, who have much to learn from each other. Lastly, Part V coalesces the lessons from the first three parts into a normative roadmap for success, one in which aid for trade is not a substitute for meaningful changes to WTO multilateral trade regime, but rather an effective tool both for promoting economic growth and laying the informational and institutional foundations for effective reform of the WTO system to ensure it works for both developed and developing nations.

## II. THE HISTORICAL LESSONS

Aid for trade is not new. So long as development agencies have been in existence, some portion of the aid they oversee has been ear-marked for trade-related projects. While it is beyond the scope of this article to canvass the complete history of trade-related development aid, it is worthwhile to highlight some of the trends in such aid since the end of World War II. The broad themes that emerge are important guideposts in shaping aid for trade programs today.

### *A. Recipient Countries of Aid had Limited Autonomy*

Development aid and trade-targeted aid in the post-World War II era was

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8. The first Global Review of Aid for Trade was held at a conference in Geneva on November 20-21, 2007. The objectives of "Mobilizing Aid for Trade: A Global Review" are threefold: (1) Take stock of what's happening: The global review weaves together various inputs in the monitoring process, including a discussion on the results and recommendations of the three regional reviews that took place prior to the Global Review, in Lima, Peru for Latin America and the Caribbean; in Manila, Philippines for Asia and the Pacific; and in Dar es Salaam, Tanzania for Africa. (2) Identify what should happen next: The meeting was expected to help develop roadmaps for mainstreaming trade in national development strategies. For the next steps, partner countries, donors and agencies were encouraged to identify key objectives and to discuss how these objectives can most effectively be met. (3) Better monitoring and evaluation: The global review discussed ways of better monitoring and evaluating progress by partner and donor countries, including efforts to launch a work program aimed at developing qualitative targets for improving trade capacity. In addition to the Global Review, the WTO has launched a blog about aid for trade as well as an online chat with Director General Pascal Lamy about aid for trade. See World Trade Org., *Aid for Trade Can Turn Possibility into Reality, Lamy Tells Global Review*, Nov. 20, 2007, available at [http://www.wto.org/english/news\\_e/sppl\\_e/sppl81\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl81_e.htm).

largely donor-run, politically driven, and characterized by a lack of country ownership. For example, beginning with the Marshall Plan, the United States used aid in a politically-driven way to advance its Cold War policies – in order to prevent the spread of communism.<sup>9</sup> Other developed nations subsequently used aid to ensure “a relatively peaceful transfer of power to independent governments at the end of colonialism.”<sup>10</sup> Recipient nations also exercised little autonomy over the uses of aid funds. Aid grants often came with political or commercial strings.<sup>11</sup> It is important for aid for trade not to repeat the mistakes of the past by avoiding similar problems. Part IV will develop detailed suggestions to ensure aid for trade is country-driven, politically and commercially untied, and characterized by a high degree of country ownership.

*B. Exclusion of Developing Nations from Meaningful Participation in Multilateral Trade Negotiations*

Until very recently, developing nations played little, or no, role in the shaping of the global trading system.<sup>12</sup> Immediately in the aftermath of World War II, the reconstruction of Europe was the number one priority of the victorious allies. When twenty-three nations, consisting of primarily wealthy but war-ravaged nations, formed the General Agreement on Tariffs and Trade (GATT) institutions in 1947, their focus was on the rebuilding of trade linkages among themselves. For the most part, the developing nations of Asia, Central and South America, and Africa, many of whom were still under colonial control, were not part of the calculus.<sup>13</sup> Economic growth and integration were principally goals for Europe,

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9. See Pierre de Senarclens, *How the United Nations Promotes Development Through Technical Assistance*, in THE POST-DEVELOPMENT READER 190 (Majid Rahnama & Victoria Bawtree eds., 4th ed. 2003) (1997) (noting that just as the Marshall Plan was to contain the communist threat in Europe, economic aid became part of the American political strategy during the Cold War with respect to other parts of the world as well).

10. Nicolas Van De Walle, AFRICAN ECONOMIES AND THE POLITICS OF PERMANENT CRISIS, 1979-1999 189 (2001) (describing the crisis of foreign aid in post-independence Africa).

11. See, e.g., Nsongurua J. Udombana, *Back to Basics: The ACP-EU Cotonou Trade Agreement and Challenges for the African Union*, 40 TEX. INT'L L. J. 59, 100 (2004) (arguing that the “increasing tendencies to impose conditionalities of a political nature for development assistance to Africa has had unintended but negative consequences.”).

12. See Joseph E. Stiglitz, *Two Principles for the Next Round or, How to Bring Developing Countries in from the Cold*, in DEVELOPING COUNTRIES AND THE WTO: A PRO-ACTIVE AGENDA 7-9 (Bernard Hoekman & Will Martin eds., 2001) (noting that rich countries sometimes play-down the political imbalances within developing countries); see also Wesley A. Cann, Jr., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 YALE J. INT'L L. 413, 419-20 (2001) (recognizing the special needs of developing countries in the WTO agreements and arguing that the absence of standards perpetuated by a minority of powerful countries pose a threat to the security of the entire international trade system).

13. In the aftermath of World War II, fifty countries convened at the Bretton Woods Conference to create, among other things, the International Trade Organization (ITO), a specialized agency of the United Nations. Those at the conference hoped that the creation and development of an ancillary institution dealing solely with trade would decrease obstacles to international trade and give effect to multilateral nondiscriminatory trade principles. Along with the ITO, the countries created the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development

North America, and Japan, achieved through a series of multilateral trade liberalization agreements negotiated under the auspices of the GATT. In fact, developing nations continued to not have a seat at the table for many decades. One explanation is that the majority of developing nations continued to export only primary commodities, an area in which the trade regime was already fully developed and solidified. In fact, with respect to agricultural commodities, the GATT system was so mature and inflexible that major changes to it critical to the trade interests of developing nations are being negotiated only now under the Doha Rounds. The upshot is that developing nations were, and remained for a long time, marginalized voices in the global trade system. As one scholar has noted:

Instead of aggressively seeking market access in the industrialized world, these countries defensively sought special and differential treatment on commitments to open their markets, and they obtained marginal trade preferences or concessions on a nonreciprocal basis. Not surprisingly, even while they were "free-riding" by virtue of the GATT's most favored nation (MFN) principle, they received new concessions of specific interest to them.<sup>14</sup>

The history of exclusion of developing countries means that much rides on the ability of the Doha Development Agenda to both fix and make some amends for past lack of participation.

### C. *How Aid for Technical Assistance can be Used Successfully*

History does offer one model of success, albeit not from the trade arena. Commentators are virtually unanimous in hailing the Ozone Convention and accompanying protocols<sup>15</sup> as a success in the reduction of ozone depleting

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(the World Bank). The countries designed the three organizations with three purposes in mind: the IMF would repair the disintegration of the world economy; the World Bank would stimulate and support foreign investment; and the ITO would reverse the protectionist and discriminatory trade practices believed by many to have in part caused the two World Wars. In the fall of 1946, twenty-three of the countries present at the Bretton Woods Conference formed a provisional agreement, the General Agreement on Tariffs and Trade (GATT). These countries ratified the GATT in 1947 as a permanent treaty. The original GATT agreement is often referred to as the 1947 GATT. It remains largely in place today even though many revisions and additions have been made to it. When it came time in 1948 for the formal ratification of the ITO, the U.S. refused to sign the charter and the ITO was aborted. The GATT was initially signed by twenty-three countries: Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, the Czechoslovak Republic, France, India, Lebanon, Luxembourg, the Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, the United Kingdom, and the U.S. JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS* 200, 199-201, 211 (4th ed. 2002).

14. Jayashree Watal, *Developing Countries' Interests in a Development Round*, in *THE WTO AFTER SEATTLE* 71 (Jeffrey J. Schott ed., 2000) (explaining that for many decades, developing nations were not significant players in the rounds of multilateral trade negotiations under GATT).

15. Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513 U.N.T.S. 293 [hereinafter the Ozone Convention]. See also John W. Kindt & Samuel P. Menefee, *The Vexing Problem of Ozone Depletion in International Environmental Law and Policy*, 24 *TEX. INT'L L. J.* 261, 277-82 (1989) (arguing that the Ozone Convention was a success because it provided an umbrella treaty on the ozone problem along with mechanisms for adopting subsequent protocols for future CFC control

chlorofluoridecarbons (CFCs), halons, and certain other greenhouse gases.<sup>16</sup> The relative success of the Ozone Convention can be attributed to a number of factors, including, among others, the presence of strong public support, widespread political will, the efforts of the UNEP in consensus building among interested constituencies including industrial CFC producers,<sup>17</sup> education, and implementation, the imposition of measurable milestones and other binding obligations in the Ozone Convention's progeny. For the purposes of this article, one characteristic of the ozone regime is especially salient for the aid for trade discussion, i.e., its technology transfer and technical assistance mechanisms to enable developing nations to comply with the Ozone Convention.

Certain similarities between the ozone regime and the trade regime are striking. First, no regime to reduce the emission of ozone-depleting substances would work without the buy-in of developing nations, in particular of rapidly industrializing or developing economies like China, India, Brazil, and the former Soviet republics. Likewise, the world trade regime functions optimally only with full participation. Second, developing nations felt that developed nations bore the lion's share of the blame for the ozone problem. After all, industrialized nations had the benefit of using dirty technologies to fuel their economies for decades. It seemed both hypocritical and morally wrong to ask developing nations to wean themselves off such technology, resulting in a slowing of their own development. The same feeling of moral outrage explains why for many years developing nations sought special concessions to trading rules. They felt severely disadvantaged by having a system in whose creation they played no part imposed upon them. Third, for developing nations to comply with the emission standards and milestones of the Ozone Convention, they would need financial, technical, and technological assistance. Developing nations need similar assistance today to make the world trade system work for them.

The Multilateral Fund was one of the keystones of the Ozone Convention's success. It was a brilliant idea, and like many brilliant ideas, it was simple at its core and complex in its implementation. The Fund was created under the London

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measures); Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541; Carol A. Petsonk, *The Role of the United Nations Environment Programme (UNEP) in the Development of International Environmental Law*, 5 AM. U. J. INT'L L. & POL'Y 351, 367-72 (1990) (describing the framework of the Montreal Protocol and arguing that it was unique among environmental agreements because it contains economic incentives to encourage participation and compliance).

16. See e.g., Elias Mossos, *The Montreal Protocol and the Difficulty with International Change*, 10 ALB. L. ENVTL. OUTLOOK J. 1, 1-5 (2005); Laura Thoms, *A Comparative Analysis of International Regimes on Ozone and Climate Change with Implications for Regime Design*, 41 COLUM. J. TRANSNAT'L L. 795, 802-03 (2003); Michael Weisslitz, *Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential Versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context*, 13 COLO. J. INT'L ENVTL. L & POL'Y 473 (2002); O. Yoshida, *Soft Enforcement of Treaties: The Montreal Protocol's Noncompliance Procedure and the Functions of Internal International Institutions*, 10 COLO. J. INT'L ENVTL. L & POL'Y 95, 96-100 (1999).

17. See Petsonk, *supra* note 15, at 367 (pointing out that the UNEP took care to involve not only environmental NGOs, but also industry groups).



Amendment to the Montreal Protocol in 1992.<sup>18</sup> Developed nations pledged to contribute money to the Multilateral Fund, which would be disbursed, under the auspices of an implementation team consisting of both governmental and NGO representatives at the UN, to developing nations for either retrofitting or cleaning up ozone depleting industries. The Fund also provided for assistance in kind, in the form of free technology transfers for new non-polluting industrial chemicals or methods and know-how and clean-up technologies, which developing countries might not otherwise be able to afford. The fund was also well designed to mitigate the North/South conflict, the impasse between developed and developing nations, which inspired its creation. The rotating membership on the Executive Committee that oversees fund decision-making, comprised equal numbers of developed and developing nations' representatives. Decisions are taken by consensus where possible; if votes must be taken they require a two-thirds majority vote overall, which also had to consist of a majority among both developed and developing countries.<sup>19</sup> The fund had the intended effect. China joined immediately in 1990, followed by India and Brazil in 1992 and eventually by almost all the developing nations.<sup>20</sup> "By early 1999 developed nations had contributed more than \$847 million to the fund, and the Executive Committee had approved nearly 3,000 projects...."<sup>21</sup>

Therefore, the Multilateral Fund addressed all three of the problems highlighted above. It gave tacit acknowledgement to the historical responsibility developed nations bear for ozone depletion. At the same time, it balanced the need for uniformity in the application of standards to a transnational problem like the protection of the environment with the recognition that poorer nations may lack the resources to remedy such problems. Most critically, the Fund provided the necessary means to enable developing nations to meet their commitments.

Similarly, a successful aid for trade system must also provide a compelling framework for developing nations. It too should give implicit or explicit acknowledgement to the historical exclusion of developing nations in decision-making that shaped the global trade regime. It would reflect the responsibility that developed nations must now play in bringing in their developing nation counterparts into the trade regime. It must also provide the resources to allow developing nations to take full advantage of the global trade regime, including meaningful participation in its decision-making.

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18. London Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer art. 10, June 29, 1990, 1598 U.N.T.S. 469, 30 I.L.M. 537; see also Elizabeth R. DeSombre, *The Experience of the Montreal Protocol: Particularly Remarkable, and Remarkably Particular*, 19 UCLA J. ENVTL. L. & POL'Y 49, 49-55, 57, 69-76 (2000-01) (describing the Montreal Protocol framework and the Multilateral Fund as the innovative mechanism that brought in developing nations into the ozone regulation scheme).

19. Elizabeth R. DeSombre & Joanne Kauffman, *The Montreal Protocol Multilateral Fund: Partial Success Story*, in INSTITUTIONS FOR ENVIRONMENTAL AID: PITFALLS AND PROMISE 89, 99 (1996).

20. DeSombre, *supra* note 18, at 71.

21. *Id.* at 71-72.

In conclusion, the history of trade-related aid, characterized by marginalization and limited success, has several important implications for aid for trade policy today. First, developing nations are beginning with a severe disadvantage, not just in terms of economic and political clout, but in terms of familiarity with the trade regime and the ability to negotiate its vagaries to their advantage. There is a great deal of scholarship about the lack of meaningful participation by developing nations in both trade negotiations and dispute settlement.<sup>22</sup> It is not my goal to re-play such insights and arguments. Rather, I wish to merely point out that aid for trade can play a pivotal role in correcting such historical imbalances. Aid in the form of technical assistance and training focused on the formulation and implementation of trade policies and on negotiation or litigation strategies for achieving meaningful changes at the WTO has the potential to making developing nations real players in the system. Such gains by developing nations, if widespread and deep, coupled with cooperation among blocs of developing nations as a negotiation strategy, could lend voice to a historically disenfranchised group. Such is the promise of aid for trade.

### III. AID FOR TRADE TODAY

Today, the total volume of aid for trade is estimated by the OECD to be about \$25 to \$30 billion annually.<sup>23</sup> Most aid for trade is disbursed directly by donors or disbursed multilaterally through regional finance and development organizations like the World Bank and the regional development banks.

The WTO participates in a very small distribution of aid for trade funds. It is not a development or aid agency, and it does not wish to become one. Rather, its role can best be described as that of a facilitator. The WTO clearly has a role and

22. See generally, William J. Davey, *Dispute Settlement in GATT*, 11 *FORDHAM INT'L L.J.* 51, 90 (1987) (questioning whether less developed countries will "have the diplomatic or economic muscle to ensure that the decision is implemented" even if they win their case, based on the United States' past refusal to implement successful GATT findings against the United States by smaller countries); William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 *J. INT'L ECON. L.* 17, 24 (2005); Kara Leitner & Simon Lester, *WTO Dispute Settlement 1995-2002: A Statistical Analysis*, 6 *J. INT'L ECON. L.* 251, 255-56 (2003) (presenting empirical data showing that the WTO dispute settlement process is often quite slow).

23. The OECD has compiled its estimate based on 2002-2005 data, the most recent years for which data was available. The four categories of spending in 2005 were divided as follows: "(a) Trade policy and regulation [which] amounted to roughly \$0.9 billion in 2005. This helps build local capacities of national trade policies, participate in trade negotiations and implement trade agreements. (b) Building productive capacity amounting to roughly \$9.5 billion. This includes trade development spending targeted at helping enterprises to trade and at creating favorable business climate. (c) Economic infrastructure spending was \$12.1 billion in 2005. This assistance helps countries build the physical means – transport and storage, communications and energy – to produce and move goods and export them . . . . Since there is no way of breaking out the amount that is strictly trade-related (how much of a road is used for export trade as opposed to general domestic transport, for example), the total is treated as a proxy for aid for trade. (d) Another component of the broadest measure of aid for trade is assistance for trade-related structural adjustment (about \$3-6 billion a year). [This is assistance to offset the costs associated with tariff reductions, loss of industries, or declining terms of trade.]" World Trade Organization, *Aid for Trade Fact Sheet*, [http://www.wto.org/english/tratop\\_e/devel\\_e/a4t\\_e/a4t\\_factsheet\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/a4t_e/a4t_factsheet_e.htm) (last visited Feb. 26, 2008) [hereinafter, *Aid for Trade Fact Sheet*].

responsibility for ensuring that countries can effectively participate in, and benefit from, trade. As such, it has an interest in ensuring that the existing development mechanisms work together efficiently and synergistically to promote trade. The WTO was given a specific mandate by its General Council as part of the Uruguay Round, the so-called Coherence Mandate, to ensure and promote coherence in global economic policy making.<sup>24</sup> The WTO's interest in aid for trade is an extension, and a test, of the Coherence Mandate.

#### *A. Opportunities for the WTO*

As a facilitator, the WTO can play a pivotal role. First, it can work with the World Bank, the IMF, governmental and NGO donors, regional development banks, and the U.N. development agencies to deliver a more coordinated international policy. It can do so by ensuring that aid is directed where it can do the most good for each recipient country. For instance, while the World Bank may have particular expertise about the need for certain infrastructure projects (ports or roads, for example), the WTO might be able to optimize the value of such infrastructural improvements by coupling it with aid designed to draft and implement export control regulation. The WTO can assist in coordinating projects between countries, by ensuring, for example, that our mango farmers in Mali have good roads not only in Mali, but also through Senegal to the western port of Dakar or through the Côte d'Ivoire to the southern port of Abidjan.

However, these types of advising roles, while important, are not the areas in which the WTO can have the greatest impact. The WTO can, and currently does, play an important role in providing more and better aid for trade. It does so in two major ways – advocacy and assessment. The 2005 Ministerial Meeting in Hong Kong set in motion both steps by establishing a two-track process. First, Director General Lamy engaged in a series of consultations with partner development organizations on securing additional financial resources in aid for trade. The result was a Ministerial Meeting affirmation by donors of their commitment to step up their aid for trade contributions.<sup>25</sup> The United States, the European Union, and Japan made specific pledges to increase their aid for trade contributions. The consultations also made clear that a number of new and non-traditional donors, including some developing nations, were willing to be part of the process. This advocacy role continues to be a critical one for the WTO to play because of its linkages with donor governments and development agencies. It is ideally placed to lobby for broadening and deepening the donor pool for aid for trade.

Step two of the two-track process consisted of the creation of a Task Force to advise on how best to deliver any additional funding for aid for trade. The Task Force issued a report in October of 2006 that was endorsed by the WTO's General

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24. Marrakesh Agreement Establishing the World Trade Organisation art. III, Apr. 15, 1994, 1867 U.N.T.S. 154, available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf). See World Trade Organization, *Task Force*, [http://www.wto.org/english/tratop\\_e/devel\\_e/a4t\\_e/implementing\\_par57\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/a4t_e/implementing_par57_e.htm) (last visited Feb. 26, 2008).

25. See World Trade Org., WTO to Press for Additional Aid for Trade Resources, September 18, 2006, available at [http://www.wto.org/English/news\\_e/sppl\\_e/sppl36\\_e.htm](http://www.wto.org/English/news_e/sppl_e/sppl36_e.htm) (last visited May 8, 2008).

Council.<sup>26</sup> The report set out a series of recommendations for optimizing aid for trade. In particular, it called for strengthening the demand side, improving the donor response, and closing the gap between demand and response at the country, regional, and global level. It also suggested that the WTO should take a lead in monitoring and evaluating aid for trade. The WTO heeded the suggestion and initiated a three-part monitoring system. First, the OECD undertook a global report on aid for trade. Next, donor and recipient-country monitoring took shape in the form of self-evaluations. All three assessments would be examined in an annual conference and debate in the WTO General Council, the first of which took place in November 2007.

Both the advocacy and monitoring roles are obviously quite important. For instance, since the Hong Kong Ministerial Declaration in 2005, annual contributions for building productive capacity have increased by 75 percent.<sup>27</sup> Monitoring on a global level enables better decision-making in the investment of aid for trade funds. More information and transparency generally leads to more informed policies at both the donor and recipient country levels. Coordination in monitoring is also a crucial first step towards greater coordination in the implementation of regional or global aid for trade policies.

However, aid for trade also creates a great opportunity for the WTO to enhance its own transparency and increase its democratic participation. The WTO has been criticized by many for being secretive, non-transparent, and unsusceptible to democratic oversight. Critics point to many shortcomings, such as the lack of NGO and citizen participation in the trade negotiation process, and the total absence of methods for interested parties like consumers, trade unions, and advocacy groups to be heard in cases in the dispute settlement process.<sup>28</sup> While

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26. See World Trade Org., Development: Aid for Trade: Task Force, available at [http://www.wto.org/english/tratop\\_e/devel\\_e/a4t\\_e/implementing\\_par57\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/a4t_e/implementing_par57_e.htm) (last visited May 8, 2008)

27. See Aid for Trade Fact Sheet, *supra* note 23. However, it is not possible to determine if this increase represents a net increase in donor giving for all development purposes, including aid for trade, or is merely a reallocation of existing donor commitments for aid.

28. The Appellate Body did briefly accept amicus briefs in WTO dispute proceedings, but has drawn back from the position after a loud outcry by member nations. According to the Appellate Body, the panels' comprehensive authority to seek information from any relevant source (Article 13 of the DSU) and to add to or depart from the Working Procedures in Appendix 3 to the DSU (Article 12.1 of the DSU) permits panels to accept and consider or to reject information and advice, even if submitted in an unsolicited fashion. The Appellate Body has confirmed this ruling several times, but the issue remains extremely contentious among WTO Members. See Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 105-108, WT/DS58/AB/R (Nov. 6, 1998) [hereinafter US – Shrimp]. Many Members are of the strong view that the DSU does not allow panels to accept and consider non-requested amicus curiae submissions. They consider WTO disputes as procedures purely between Members and see no role whatsoever for non-parties, particularly NGOs. The statements of these Members can be found in the minutes of the Dispute Settlement Body (“DSB”) in which the DSB adopted the US– Shrimp panel (and Appellate Body) report. To date, only a few panels have in fact made use of their discretionary right to accept and consider unsolicited briefs. On the basis of the Appellate Body’s interpretation, panels have no obligation whatsoever to accept and consider these briefs. Accordingly, interested entities, which are neither parties nor third parties to the dispute, have no legal right to be heard by a panel. *Id.*

deliberations during multilateral rounds of negotiations are conducted in public, many critics allege that many critical provisions are hammered out in “late night secret” negotiation sessions among key players.<sup>29</sup> These, and other perceived failings by the WTO, can be summed up in the phrase “democratic deficit,” which has become a touchstone of dissatisfaction about the WTO.<sup>30</sup> These criticisms are valid and should be taken seriously because they may ultimately erode the WTO’s legitimacy.

In the international economic literature, discussion of the WTO’s democratic deficit is contextualized within the broader so-called constitutionalization debate. The term constitutionalization came into use with regard to the WTO in 1995, at end of Uruguay Round, invoking both fears (loss of sovereignty) and hopes (the ability to “exert control over decisions the State makes, the democratic community itself”).<sup>31</sup> There is wide-spread disagreement within the literature about the precise meaning of constitutionalization or constitutionalism,<sup>32</sup> similar to the

29. For example, critical negotiations surrounding the language of the standard of review provision (Article 17.6) in the Anti-dumping Agreement was resolved in a late-night session. See Phoenix X.F. Cai, *Between Intensive Care and the Crematorium: Using the Standard of Review to Restore Balance to the WTO*, 15 TUL. J. INT'L & COMP. L. 465, 488 (2007).

30. For a thoughtful discussion of the global democratic deficit in general, not specific to the WTO, see generally Andrew Strauss, *Considering Global Democracy, An Introduction to the Symposium: Envisioning a More Democratic Global System*, 13 WIDENER L. REV.(2006-2007); Gregory H. Fox, *Internationalizing National Politics: Lessons for International Organizations*, 13 WIDENER L. REV. 265 (2007). The literature on the democratic deficit in the WTO is quite extensive. See generally Jeffery Atik, *Democratizing the WTO*, 33 GEO. WASH. INT'L L. REV. 451 (2001); Steve Charnovitz, *The WTO and Cosmopolitics*, 7 J. INT'L ECON. L. 675 (2004); Robert Howse, *How to Begin to Think About the 'Democratic Deficit' at the WTO*, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS 79, 91 (Stefan Grillier ed., 2003) (critiquing WTO procedure); Joel P. Trachtman, *The Constitutions of the WTO*, 17 EUR. J. INT'L L. 623 (2006). In contrast, Ernst-Ulrich Petersmann advocates constitutionalization from a human rights point of view, even arguing that the WTO’s mandatory dispute settlement system should be a model for the United Nations. See, e.g., Ernst-Ulrich Petersmann, *How to Reform the UN System? Constitutionalism, International Law, and International Organizations*, 10 LEIDEN J. INT'L L. 421 (1997); Ernst-Ulrich Petersmann, *How to Reform the United Nations: Lessons from the International Economic Law Revolution*, 2 UCLA J. INT'L L. & FOREIGN AFF. 185 (1997-98); Ernst-Ulrich Petersmann, *How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?*, 20 MICH. J. INT'L L. 1 (1998); Ernst-Ulrich Petersmann, *How to Reform the United Nations? Lessons from the "International Economic Law Revolution,"* 53 AUSSENWIRTSCHAFT: SCHWEIZERISCHE ZEITSCHRIFT FÜR INTERNATIONALE WIRTSCHAFTSBEZIEHUNGEN [SWISS REV. INT'L ECON. REL.] 193 (1998); Ernst-Ulrich Petersmann, *Dispute Settlement in International Economic Law — Lessons for Strengthening International Dispute Settlement in Non-Economic Areas*, 2 J. INT'L ECON. L. 189 (1999); Ernst-Ulrich Petersmann, *Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?* 31 N.Y.U. J. INT'L L. & POL. 753 (1999).

31. Deborah Z. Cass, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY, AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM* 16 (2005).

32. Some international trade lawyers take constitutionalization of the WTO to refer to increasing strength of the institutional structure. See, e.g., JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 6, 14 (1998). Others believe constitutionalization in the WTO context refers to the deepening of rights penetration into national legal systems. See, e.g., ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* (1997). Yet others distinguish between a “structural” form focusing on matters such as division of powers, or establishment of

confusion over the meaning of the same terms within the European Union.<sup>33</sup> These divergent views can best be reconciled with the observation that “constitutionalism and constitutionalisation are... not... black- and-white, all-or-nothing terms [but are questions] of nuance and gradation.”<sup>34</sup> Moreover, no commentators seem to seriously doubt that the WTO has already embarked on a course of constitutionalization, they just disagree as to scope and degree. Among those who accept the constitutionalization discourse, there seems to be some agreement that participation by a broad spectrum of civil society actors is both a definitional characteristic of constitutionalization and a core part of its success. For instance, according to one respected scholar, three (out of seven) of the indices of constitutionalization – institutional structure, specification of conditions and incidents of membership, and terms of representation of membership – all speak to the question of democratic participation, in one way or another.<sup>35</sup>

The WTO performs relatively weakly on each of these three indices of democratic participation. On institutional structure, the WTO is completely state-actor focused, with state actors acting in both legislative and executive capacities, through respectively the Ministerial Conference (consisting of all members acting in a legislative capacity) and the General Council (again consisting of all members acting in an executive capacity). There are no formal mechanisms for representative decision-making or formal civil society involvement. With respect to specification of conditions and incidents of membership, aside from certain broad concepts like Most Favored Nation treatment,<sup>36</sup> none are specified or understood before-hand, but are instead subject to individualized negotiation culminating in the terms and conditions of accession. Again, with respect to the terms of representation of membership, there are no formal mechanisms, and civil society actors are not given a formal role or means of giving input.

institutions for representation, and between a “material” form in which obstacles to free trade are eliminated. See, e.g., J. H. H. Weiler, *Epilogue: Towards a Common Law of International Trade, in THE EU, THE WTO, AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE?* 201, 206 (J. H. H. Weiler ed., 2000).

33. For a discussion of some of the multiple meanings of the term in the European Union context, see, e.g., Günter Frankenberg, *The Return of the Contract: Problems and Pitfalls of European Constitutionalism*, 6 EUR. L. J. 257 (2000) (arguing that the meaning varies depending on whether a constitution is perceived as a contract, political manifesto, plan/program, or statute).

34. Neil Walker, *The EU and the WTO: Constitutionalism in a New Key*, in *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* 31, 35 (Gráinne de Búrca & Joanne Scott, eds., 2001). Walker argues there are seven indices of constitutionalization: explicit constitutional discourse, a claim to foundational legal authority, jurisdictional scope, interpretative autonomy, institutional structure, specification of conditions and incidents of membership, and terms of representation of membership. *Id.* at 35.

35. *Id.* at 35.

36. At its most basic level, most-favored-nation treatment means non-discrimination between countries. See generally, Martin Domke & John N. Hazard, *State Trading and the Most-Favored-Nation Clause*, 52 AM. J. INT’L L. 55 (1958). See also World Trade Org., *WTO: Seattle – Misinformation*, [http://www.wto.org/english/thewto\\_e/minist\\_e/min99\\_e/english/misinf\\_e/07ineq\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min99_e/english/misinf_e/07ineq_e.htm) (last visited Feb. 17, 2008) (providing a more colloquial description of the principle).

Professor Cass has argued convincingly that traditionally constitutionalization consists of six elements:

1. [A] set of social practices to constrain economic and political behavior...
2. [A] belief that a new foundational device or *Grundnorm* has emerged such that what was once merely a set of rules is transformed into a coherent and unified body of rules with the appearance of a new system of law...
3. [A] political community to authorize its making and that the community's interests are represented...
4. [A] process of deliberative law-making...
5. Some realignment of the relationship between the sub-entities and the central, putatively constitutionalized entity...
6. [A] level of social acceptance, or legitimacy of the process itself.<sup>37</sup>

Under Professor Cass' formulation, the WTO falls short in the same ways, in the areas of representation and deliberative law-making, with the most prominent failure being the lack of participation by some developing nation members.

The constitutionalization debate is a rich and complex one. It shall no doubt provide fertile ground for international law scholars for many, many decades. In this short article, I wish to make only one modest contribution to the debate. Whatever the form or direction constitutionalization may take in the WTO in the coming years, it must first confront head-on the problem of developing nations. They must not be left out of the process. Today, the WTO has 151 member nations.<sup>38</sup> Two-thirds of them are developing nations.<sup>39</sup> They hold a large stake in the WTO and the WTO's future success will depend on them to a great extent. Any opening for greater participation by developing countries in the rule-making, institutional-building, implementation and adjudicative functions of the WTO must be fully exploited.

How can aid for trade play a part in facilitating the participation of developing nations? Aid for trade enables the WTO to reach out to a broader community, including many who have historically been excluded from participation in the world trade regime. The most obvious constituency comprises developing nations, the recipients of aid for trade. Each project successfully completed brings a developing country closer into the fold of the world trade regime. While each project may not bring great leaps in economic integration by itself, it does represent one more baby step in the right direction. At a minimum, each aid for trade project opens channels of communication about the particular needs of the

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37. See Cass, *supra* note 31, at 19 (listing the traits of the received account of constitutionalization) (bullet numbers added).

38. World Trade Org., *Understanding the WTO – Members and Observers*, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Feb. 17, 2008).

39. World Trade Org., *Understanding the WTO – Overview*, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/dev1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm) (last visited Feb. 17, 2008).

developing country and available resources to meet those needs. Beyond that, each project allows key actors to learn about each other. For example, in a productive capacity project, in-country government officials may become familiar with the inner workings of a regional development bank disbursing the funding. They may also learn a great deal about the necessary domestic regulatory changes to comply with the WTO's regulatory regime. Involved industry leaders learn how to make their products safe for export and navigate the complex customs and tariffs system, which information may be passed on to other sectors and leaders. These types of informational flows are critical to the acquisition of intellectual capital that can be no less valuable than the financial capital invested.

Another important constituency consists of other multilateral agencies, like the World Bank, the IMF, and most importantly, the United Nations. The WTO has traditionally worked relatively closely with both the World Bank and the IMF in terms of coordinating monetary, trade, and economic policy. However, aid for trade requires even tighter cooperation, often at the local and regional level. Engaging in such cooperation lies clearly within the WTO's Coherence Mandate. With respect to the U.N., however, the WTO does not have such a clear relationship. However, that doesn't mean the relationship would not a desirable one.

The WTO should leverage its involvement with aid for trade to actively seek closer ties with the U.N. In order to carry out the coordination and monitoring tasks given to it by the General Council, the WTO must interface with the U.N. Development Agencies. However, it should go beyond that, to seek support for and input on aid for trade from the General Assembly. It can do so by asking one of its member nations, one that is also a member of the General Assembly, to put forth a resolution, similar to the one adopted by the Hong Kong Ministerial Conference in 2005, affirming the commitment to aid for trade. Such a resolution should pass quite easily. Its value lies in the legitimization function of a U.N. resolution. A motion of support coming from the largest, oldest, and most respected multilateral organization would not only draw attention to the WTO's laudable efforts in promoting aid for trade, but also send an important signal to the General Assembly. That signal would be that the WTO does value the input and support of a body that is now largely made up of developing nations.<sup>40</sup> Moreover, resolutions in the U.N. are often valued for their moral and persuasive force, which would only re-enforce the value of aid for trade.

The WTO can also advance its monitoring function by soliciting in-country self-assessment reports at the General Assembly. Only seven self-assessments were submitted as part of the 2007 Global Review,<sup>41</sup> a very small fraction of the number of countries that received some form of aid for trade. A bit of spurring

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40. The General Assembly has 192 members, of whom approximately two-thirds are developing nations. United Nations Gen. Assembly, *U.N. General Assembly: Functions and Powers of the General Assembly*, <http://www.un.org/ga/about/background.shtml> (last visited Feb. 17, 2008).

41. World Trade Org. & The Org. for Economic Co-Operation and Development, *Aid For Trade at A Glance 2007 – First Global Review* at 49 (2007), available at [http://www.wto.org/english/tratop\\_e/devel\\_e/a4t\\_e/a4t\\_at\\_a\\_glance07\\_e.pdf](http://www.wto.org/english/tratop_e/devel_e/a4t_e/a4t_at_a_glance07_e.pdf).



from the General Assembly may lead to more voluntary self-reporting. This is likely because there is some evidence that in the General Assembly, peer pressure, especially among regional blocs of nations, can translate into real action.<sup>42</sup>

Most critically, aid for trade brings the WTO into contact with a constituency with whom it has not engaged in dialogue previously – NGOs, advocacy groups, and local citizens' groups. As previously mentioned, critics have decried the lack of direct access to the WTO's proceedings and deliberations by interested non-governmental entities. Unfortunately, aid for trade can not completely redress the asymmetries in the WTO decision-making process – the WTO is unlikely to abandon its state-oriented approach any time soon.

Nonetheless, aid for trade does provide some avenues for the traditionally disenfranchised to be heard. Because the WTO is not a development agency, it needs the input of experts in both development and aid. NGOs, advocacy groups, industry associations, citizens' advocacy groups, and other similar civil society organizations could play a potentially pivotal role. By participating in aid for trade projects, either as beneficiaries, advisors, facilitators, or monitors, grassroots organizations would gain an important toe-hold at the WTO. Granted, the toe-hold may be small, but it must be exploited nonetheless. No similar foothold has become available in the last fifty years of the WTO's existence. Thus, it represents a unique and valuable opportunity.

How might NGOs and others interface with the WTO in connection with aid for trade? Let's go back to the Malian mango farmers hypothetical at the beginning of the article for some illustrative examples. Recall that one of the obstacles we posited was lack of expertise about the health and safety inspections required to export to Europe. A two-pronged approach is required to address this problem. First, Mali needs to be able to formulate a set of domestic policies to implement the Sanitary and Phytosanitary Agreement, the WTO agreement that deals with health and safety issues related to agricultural and food products.<sup>43</sup> Second, health inspection personnel need to be trained in operationalizing and enforcing the new policies.

What would the WTO gain from greater cooperation with NGOs? The answer is a great deal. First, the WTO would gain legitimacy in the eyes of NGOs with whom it collaborates in aid for trade projects. Many NGOs are skeptical of the WTO's ability to reach out to civil society organizations. Aid for trade projects provide a means to de-fuse some of the skepticism. Second, opening channels of communications with NGOs initially, with respect to specific aid for trade projects, will hopefully lead to the establishment of some permanent avenues of dialog, a result that the current Director General would welcome. Lastly, aid for aid provides a chance to receive informal input from NGOs which might shape policy at the multilateral level. NGOs possess a valuable base of knowledge about the

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42. For example, the G77, a coalition of 77 founding developing nation members which now has 132 members, has coordinated opposition against weighted voting in the General Assembly. See Editorial, *Resolving the U.N. Power Struggle*, 184 N.J. L. J. 410 (2006).

43. See *infra* note 91.

needs of developing nations that might guide in creative solutions or compromises to move the Doha Round forward. If closer cooperation with NGOs through aid for trade initiatives yields ideas for putting the Doha Round back on track, then it would be well worth the effort.

### *B. Limits of Aid for Trade*

No matter how effective aid for trade is, or becomes, it can be no substitute for a successful Doha Round. No matter the scope, aid for trade is fundamentally a form of triage. Elements of it should and will remain in effect for a long time, even after the conclusion of the Doha Round and the next round of multilateral negotiations, because some developing nations will continue to need transitional and development assistance. However, aid for trade fails to accomplish the types of structural changes necessary to *meaningfully* advance the interests of developing nations.

In order to understand this, some background regarding the history of the Doha Round, and the nature of multilateralism at the WTO, is necessary. As previously stated, industrialized nations dominated the agenda and policies of the GATT regime for many decades. It was not until the creation of the WTO in 1994, at the end of the Uruguay Round, that a significant change took place in the nature of participation by developing countries.<sup>44</sup> Even though developing nations were not happy with many of the results of the Uruguay Round,<sup>45</sup> the shift in their attitude towards multilateralism represented a watershed. Instead of seeking special concessions as they had in the past, developing nation participants choose to strike bargains on the basis of reciprocity, and thereby become fully a part of the trading system.<sup>46</sup> The willingness to play by the rules of a game in which they were little more than spectators in the past is significant in another sense. It suggests that developing nations saw themselves as having a stake in the success of the multilateral trading system and desired a role in shaping its evolution.<sup>47</sup> The benefits of a transparent and rule-based trading system, rather than a power-based one, coupled with an effective dispute settlement system, are arguably stronger for developing nations than for powerful industrialized ones.<sup>48</sup> Developing nations

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44. See The World Bank, *Global Economic Prospects and the Developing Countries*, at xi (2002), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2002/02/16/000094946\\_0202020411334/additional/310436360\\_20050012014722.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2002/02/16/000094946_0202020411334/additional/310436360_20050012014722.pdf) (discussing the background information of past negotiations, focusing on the type and number of participating countries).

45. See Watal, *supra* note 14, at 72 (explaining that low market access payoffs and the heavy burden of implementing certain WTO agreements made developing nations believe they were not gaining much from the Uruguay Round).

46. As one trade scholar elaborated, “[b]y and large, they committed themselves to lowered industrial and agricultural tariffs, accepted stringent disciplines in new areas such as intellectual property, and opened up some of their services sectors in return for improved and more secure market access for their exports, particularly for agricultural products and clothing.” *Id.* at 71.

47. See A.V. Ganesan, *Seattle and Beyond: Developing-Country Perspectives*, in *THE WTO AFTER SEATTLE* 85, 85 (Jeffrey J. Schott ed., 2000) (describing the developing countries’ view of the importance of their active participation in multilateral trade negotiations).

48. *Id.* (describing the type of trading system developing nations would prefer and benefit from

also pragmatically understand the rationale for open trade and the necessity of expanding the multilateral trade agenda.<sup>49</sup> However, they also have some serious, and justified, reservations about the current course of such agenda.<sup>50</sup>

When developing nations arrived in Doha, they had some serious qualms about the multilateral system. They felt that it had become less fair and less responsive to their development concerns; that the trade agenda was expanding to address only issues relevant to developed nations; that the multilateral rules were increasingly becoming no more than codifications of existing rules and laws prevalent in developed countries, but which are inappropriate or unenforceable in developing countries.<sup>51</sup> These fears were so prevalent, that a group of like-minded developing countries actually opposed the launching of a new round of multilateral negotiations at Doha. Despite recognizing the potential benefits of a new round, these nations feared that (i) they would be the main targets for extracting concessions in any new round; (ii) the round would take up subjects of interest to developing countries which would be irrelevant to their concerns; and (iii) the subjects which had been of interest to them for a long time would get ignored, as the focus of the WTO would shift to the new issues initiated in the round.<sup>52</sup> Other developing nations supported the launching of a new round because they felt that these and, and other pressing problems, could be addressed only through comprehensive negotiations and bargaining.<sup>53</sup>

As we can see from the above discussion about the launching of the Doha Round, the priorities and interests of developing nations are not monolithic. Rather, they are marked by variety and even divergence.<sup>54</sup> The pivotal substantive issues of concern to developing nations fall into several categories. The first, of critical importance, is to secure greater market access for their goods and services.<sup>55</sup> Within this broad context, developing nations sought both the faithful

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the most).

49. *Id.* (arguing that developing nations understand the need for trade agenda expansion).

50. *Id.* (detailing the concerns of developing nations about the evolution of the trade system and noting that developing countries are apprehensive that developed nations are influencing new rounds of negotiation too much).

51. See International Centre for Trade and Sustainable Development, *Like Minded Group Sets Out Positions Before Doha*, 5 BRIDGES WKLY. TRADE NEWS DIG. 26 (2001), available at <http://www.ictsd.org/html/weekly/10-07-01/story2.htm> (listing the members of the Like-Minded Group as Cuba, the Dominican Republic, Egypt, Honduras, Indonesia, India, Jamaica, Kenya, Malaysia, Sri Lanka, Tanzania, Uganda, and Zimbabwe).

52. See *id.* (clarifying the Like-Minded Group's position that even if progress is made on implementation issues of concern to them, it does not guarantee that the group would participate in the negotiations).

53. See Jeffrey J. Schott, *The WTO After Seattle*, in *THE WTO AFTER SEATTLE* 3, 15-16 (Jeffrey J. Schott ed., 2000) (listing the numerous issues of developing nations that could only be addressed through the Ministerial Conference negotiations at a new round).

54. See BHAGIRATH LAL DAS, *THE WTO AGREEMENTS: DEFICIENCIES, IMBALANCES AND REQUIRED CHANGES*, at xi (1998) (stating that some researchers believe that the developing nations are so diverse that they should not be joined together as a group for analysis for negotiating purposes).

55. See Ganesan, *supra* note 47, at 85 (stating that the central element of developing nations' strategy is to gain market access in order to compete in the global marketplace).

execution of commitments made in the Uruguay Round by developed nations (particularly with respect to subsidies and export supports) as well as increased flexibility in the implementation of WTO rules on their own part.<sup>56</sup> The second category consists of numerous technical implementation issues relating to the separate agreements on textiles and clothing, anti-dumping, the Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS"), as well as the built-in agenda items relating to agriculture, services, and intellectual property. Developing nations pushed (and continue to push heavily) for further reductions of domestic farm subsidies, elimination of export supports, and substantial reductions in agricultural tariffs, particularly for corn, sugar, and cotton. With respect to services, developing nations sought greater movement of labor. With respect to TRIPS, they advocated for both the correction of perceived imbalances in the agreement as well as substantial reviews of the existing accord. Lastly, they were very concerned, even apprehensive, about the incorporation of non-trade issues, like environmental and labor standards, within the WTO.

All of the listed issues can only be addressed at the level of ministerial negotiations. No amount of aid for trade can address these issues. To give a simplified example, no amount of aid for trade targeted at productive capacity building and infrastructural projects will help our hypothetical Malian mango farmers who wish to export to Europe if the European Union subsidizes its domestic mango producers (if any) directly. The mangos from Mali simply would not be price competitive with subsidized European mangoes. The removal of such a subsidy must be done through comprehensive negotiations, in which not only the European Union, but also the U.S., Canada, Japan, and other core markets all agree to remove their agricultural subsidies. In order to achieve the type of structural changes developing nations hope for in the WTO, developing nations must play an active role in current and future rounds of negotiations. Aid for trade, can never be a substitute for active, meaningful, and sustained participation in the multilateral process.

#### IV. CONFLICTS BETWEEN AID AND TRADE

While the potential synergies between aid and trade are substantial, the two are locked in an uneasy marriage, characterized by a marked lack of communication and even apparent conflict. Experts in both fields have failed to communicate with each other. The academic scholarship in both aid and trade has grown up in isolation, with little to no dialogue between the two disciplines. Yet, the two fields overlap in many ways and have much to learn from one another. One of the goals of this section is to start the conversation by pointing out ways in which aid for trade can be structured so as to benefit from research done in both disciplines. I hope that as aid for trade continues to be important, more opportunities for cross-disciplinary work will arise.

Both historically and currently, the focus of aid organizations has been poverty reduction and alleviation. The poverty reduction aims of the Millennium

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56. *See id.* at 87 (arguing that increased flexibility in the application and definition of rules would help developing nations create plans that meet their particular needs).

Development Goals,<sup>57</sup> the official U.N. targets for aid announced by Secretary General Kofi Annan in 1999, centers around social spending. Donors and aid organization have shifted their attention firmly to social spending, rather than infrastructural spending.<sup>58</sup> Since the 1990's, development aid seems to be driven more by notions of human capital investment and human freedom rather than economic development.<sup>59</sup> In contrast, trade policy seeks to spur economic development, and thereby reduce poverty, primarily through trade liberalization and exports, not social assistance. From the aid side, aid applications and reports rarely mention trade.<sup>60</sup> On the trade side, trade experts and theorists do not consider aid because its volume is so small compared to the volume of trade. Moreover, the economic theory underlying trade, favoring free market mechanisms over governmental intervention and planning, is somewhat at odds with aid. To compound the divide, aid officials and trade ministers tend to work separately, occasionally at cross purposes.<sup>61</sup> Similarly, the literatures on trade and aid respectively rarely cross-fertilize.<sup>62</sup> This section gives a flavor of the major strands of potential conflict between aid and trade in order to highlight what the two fields have to learn from each other. Each of these conflicts is chosen both for their import in terms of policy setting as well as for their value in interdisciplinary cross-fertilization of ideas.

Trade scholars need to understand the underlying architecture of the new aid thinking to ensure that their contributions to the future of aid for trade will be thoughtful, well-informed, and grounded. Every new house needs to be built on a solid foundation. Trade scholarship must be informed by the existing rich body of aid scholarship and vice versa. It is time for the two disciplines to talk to each other. Aid for trade provides the ideal forum for those conversations to take place.

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57. The Millennium Development Goals (MDGs) are eight goals to be achieved by 2015 that respond to the main development challenges facing the developing world. They are (1) eradicate extreme poverty and hunger, (2) achieve universal primary education, (3) promote gender equality and empower women, (4) reduce child mortality, (5) improve maternal health, (6) combat HIV/AIDS, malaria and other diseases, (7) ensure environmental sustainability, and (8) develop a Global Partnership for Development. See United Nations Development Programme, *Millennium Development Goals*, <http://www.undp.org/mdg/basics.shtml> (last visited Feb. 23, 2008).

58. David Booth, *Is the New Aid Agenda Anti-Trade?* in *TRADE AND AID: PARTNERS OR RIVALS IN DEVELOPMENT POLICY?* at 41-42 (Sheila Page ed., 2006) (arguing that big infrastructure became less important than social sector spending in mainstream aid thinking in the 1990's due to both ideological and practical reasons).

59. See Amartya Sen, *DEVELOPMENT AS FREEDOM* (1999) (proposing a model of economic development focused on the flourishing of human potential and freedom).

60. Sheila Page, *Bringing Aid and Trade Together*, in *TRADE AND AID: PARTNERS OR RIVALS IN DEVELOPMENT POLICY?* 11, 11 (Sheila Page ed., 2006) (stating that early Poverty Reduction Strategy Papers, country studies that were required for World Bank assistance, mostly did not consider the role of trade).

61. See *id.*

62. See *id.* at 30. One of the reasons this article has relatively few footnotes is because there are so few (virtually none) articles that discuss aid for trade in a systematic way, much less draw from both the aid and trade literatures.

### A. High Levels of Aid Makes Trade Harder

Ironically, aid inflows can make trade more difficult for a developing country. Aid is a cash influx, usually of foreign currency, which affects a country's balance of payments. The increase in the available pool of foreign currency (supply) inevitably leads to a decrease in price (demand). Specifically, in order to cope with the increase in the supply of foreign currency, there is an upward pressure on the value of the domestic currency.<sup>63</sup> Higher domestic currency valuations render that country's exports more expensive, and therefore less competitive. Exporting and trading becomes more difficult. Moreover, for exporters (or for domestic producers competing with imports, which are now a little bit cheaper), the change in the exchange rate reduces the profit they can expect, measured in terms of domestic currency. For large, diversified, and multinational exporters, the effect might be *de minimus*, but that is not so for small-scale and localized firms who do not have the means to hedge against currency fluctuations. Therefore, aid can not only make trading more difficult, but also, in some cases, less profitable.

Aid can also distort the local economy in other ways. In addition to the currency distortions discussed above, economists have identified "Dutch Disease" as a particularly harmful risk.<sup>64</sup> Dutch Disease refers to the adjustment costs in an economy in which the inflow of funds is temporary. It was first used to describe the effects of the discovery of natural gas resources in the Netherlands.<sup>65</sup> When the inflow of capital is temporary, it becomes more difficult to set a long-term development plan. As with permanent capital inflows (derived from changes in trade, say, new exports), the economy has to restructure itself in order to accommodate the new flow of capital, by shifting away from the existing pattern of production to the new one (involving exports). There may be some difficult adjustment costs, including potential social displacement, but at least it should occur only once. However, when the change is not permanent (as in aid), both the public and private adjustment mechanisms become more uncertain and costly. The economy must accommodate the new flow of capital in the same way. But, it must do so again once the flow stops, shifting to yet another pattern of production. Likewise, the public policy challenges are greater as well, as decision-makers have

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63. This assumes that the domestic currency is strong relative to the foreign currency transferred via aid. More realistically for many developing countries, the result is not so much an increase in the valuation of the domestic currency, but rather an evening out, such that the domestic currency falls less relative to the foreign currency than it otherwise would. The result, however, on the cost of exports, is still the same. Trading becomes a little harder.

64. The term "Dutch Disease" originated during the 1960s in reference to the natural gas discoveries in the North Sea which led to an appreciation of Dutch real exchange rates and subsequent adverse effects on Dutch manufacturing. See W.M. Corden, *Booming Sector and Dutch Disease Economics: Survey and Consolidation*, 36 Oxford Economic Papers No. 3, at 359 (1984); Christine Ebrahim-zadeh, *Dutch Disease: Too Much Wealth Managed Unwisely*, 40 FIN. AND DEV. NO. 1 (2003).

65. Even though the name is derived from the Dutch experience with natural gas, the Dutch example is less temporary than most examples. While natural gas exploitation is in fact temporary, in the sense that it is a non-renewable, finite resource, one that the Netherlands, a small country, will eventually run out of, it is nonetheless less temporary than aid inflows, which could end more abruptly and unpredictably.

to grapple with the social costs of the adjustment multiple times. The setting of long-term development agenda becomes more difficult due to uncertainty in the flow of funds and inability to predict the social costs once aid stops. Even though policy-makers try their best to maximize the benefits of the aid without incurring unnecessary costs of adjustment, they may not be able to do so effectively.

However, one should not exaggerate the effects of Dutch Disease. If aid flows are temporary in the medium rather than the short term, and if the economy needed to be jolted out of its existing patterns of production in order to develop, then the increase in costs of adjustments may not be that significant.<sup>66</sup> Even if aid flows are one-time payments, the benefits of aid that spurs economic development or leads to a reduction in poverty may ultimately outweigh the costs of adjustments, unless all the aid is squandered. Dutch disease may be in fact less a disease than a "Discount: the benefits from aid are reduced."<sup>67</sup>

Trade experts and scholars can learn much from the experience of aid specialists with exchange rate fluctuation and Dutch Disease. I think there are clear prescriptions for structuring aid for trade to minimize or avoid both problems. With respect to Dutch Disease, any aid for trade project should explicitly incorporate a discount rate for effectiveness to account for the adjustment costs of the aid. Making the discount explicit is important for the proper calibration of donor expectations. Donors, both private and governmental, can become discouraged and lower their aid commitments if they do not see the results they hope to achieve. Setting more realistic expectations about the effects of aid may help keep donors in the game and attract more donors. It may also enhance public acceptance of aid as a longer term endeavor.

Aid literature has also shown that the impact of Dutch Disease is greatest where aid is temporary, and much less severe if medium to long term. This suggests that where possible, aid for trade endeavors should be structured for the medium to longer term. Obviously, this is not possible for all projects, such as technical assistance to bring a developing country into compliance with WTO rules within the deadline negotiated in that country's accession agreement. Such projects are time-sensitive and should not be spread out. Others can, and should, be treated differently. For example, infrastructural projects could be "packaged" together and disbursed over time with the input of the receiving country. Thus, a donor might pledge \$50 million over a period of five years for the construction of roads. The recipient, with the assistance of the donor and the disbursing agency, would decide how and when to spend the money, focusing on strategic needs (build near ports and transport hubs first), social needs (build in the poorest regions first), or economic needs (build closest to the area with a critical mass of manufactured goods suitable for exports first) as determined by the recipient country. Giving the recipient country the ability to make spending decisions is critical because it removes some of the uncertainty and unpredictability problems described above. By being able to allocate resources over a period of time to meet

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66. See Page, *supra* note 60, at 23.

67. *Id.*

local strategic, social, or economic needs, the recipient is better able to make longer term development plans as well.

The solution for the exchange rate/balance of payments problem is much thornier. There is no simple solution - the best prescription is to be attentive to the effects in setting policy, setting aside a portion of aid to deal with the currency evaluation fluctuation effects. One way to do this is to set aside a portion of aid to use to counter-act such costs, essentially the equivalent of adjustment assistance for workers maintained by the U.S. Department of Labor.<sup>68</sup>

### *B. The Role of the State*

Another tension is trade-targeted aid is that donors want to control how their money is spent (only for trade related capacity building projects, for example). However, too much donor control may be counter-productive. The aid literature seems to be unanimous in the view that the role of the aid recipient state is critical to development success.<sup>69</sup> For instances, studies of the success of the newly industrial countries in Asia (Korea and Thailand in particular) show that those governments played a critical role in setting policies that promoted economic growth through efficient administration and boosted efficiency in domestic production.<sup>70</sup> In contrast, the failure of many African countries to develop in a similar fashion is at least partially attributable to failures in government policy.<sup>71</sup> As a result, aid scholarship shares a common thread that recipient "country ownership" is essential for the success of any aid program.<sup>72</sup> How country ownership might look in the aid for trade context is explored *infra* in the roadmap section.

### *C. Distribution and Targeting*

Aid is targeted, trade is not. While aid can be used to specifically target a problem (e.g., prenatal health or building rural roads), the benefits/costs of trade are much more diffuse. Aid can be structured, at least on paper, in order to deliver benefits to a specific group (e.g., mothers and infants or rural farmers). Generally, delivery of such benefits is overseen by the public sector. Trade works quite differently. Even though the government initially sets trade policy, perhaps in response to supra-national norms imposed by the WTO, it is ultimately up to the private sector to respond to the trade policy by changing its behavior. If firms change their behavior and exports increase, the distribution of any benefits (or losses) would also be primarily based on market forces. The public sector may play a limited role, through taxation for example. In large part, the distribution of

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68. See generally MICHAEL TREBILCOCK, MARSHA CHANDLER & ROBERT HOWSE, *TRADE AND TRANSITIONS: A COMPARATIVE ANALYSIS OF ADJUSTMENT POLICIES* 104 (1999); Harold Bratt, *Issues in Worker Certification and Questions of Future Direction in the Trade Adjustment Assistance Program*, 14 *LAW & POL'Y. INT'L. BUS.* 819, 823 (1982-1983).

69. See Booth, *supra* note 58 at 45 (describing the need for the recipient country to play a strong role in the coordination, prioritization, and sequencing of aid investments as a critical component of country ownership).

70. *Id.* at 40-41.

71. *Id.*

72. *Id.* at 45.



trade gains will be determined based on both objective factors (costs of materials, production, and transport) and bargaining (expressions of power relations among the relevant actors). To put it another way, governments can exercise more control over the use of funds from aid than they do over trade. This usually means that governments are more eager to use aid for targeted policies than trade, which is more diffuse in its effect. The problem inherent in the distribution versus targeting conflict is that some governments may be resistant to aid for trade, preferring non-targeted aid that would go directly into its general operating budget instead. The best way to ensure aid for trade is welcomed by recipient countries is to ensure it does not diminish the levels of other more general aid.

*D. Balance of Power Issues between Donors and Recipients*

Aid creates an inherent power imbalance between donors and aid recipients. The donor exercises virtually complete discretion over whether or not to give, how much to give, and, to a lesser but nonetheless significant extent, how aid funds are to be spent. Donors, and the multilateral agencies responsible for aid disbursement, are also largely in charge of assessing the outcomes of aid. The recipient, on the other hand, may complain (perhaps loudly enough to shame the donor into action)<sup>73</sup> if aid is diminished or cut off, but is helpless to do much beyond that. Certainly, the recipient can not rely on any enforcement mechanisms to restore or guarantee aid. The international trade regime only exacerbates this “beggars can’t be choosers” problem.

Aid beneficiaries must negotiate with their benefactors at the WTO level for trade concessions. The result is that many developing nations heavily reliant on aid, such as many of the poorest least developed countries, must take antagonistic negotiation positions against their most generous benefactors, such as the U.S., U.K., E.U., and Japan, who are also often the most active players in the WTO. That can be at best awkward and at worst incapacitating.

In some cases, the level of aid can hinder a developing country’s development through trade. This is true for the most economically vulnerable countries like Malawi, for example, in which aid comprises from 20 percent to 27 percent of gross national income in the 1990s to 2002 and Uganda, in which aid accounted for in between 11 percent to 16 percent of gross national income in the same period.<sup>74</sup> Even more starkly, in both Malawi and Uganda, the inflows of aid have been equal to or greater than the value of their total exports in goods and services, so that dependence on aid is just like the dependency of a country on its principal export.<sup>75</sup> As one scholar has noted:

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73. See e.g., C. Cora True-Frost, *The Security Council and Norm Consumption*, 40 N.Y.U. J. INT'L L. & POL. 115, 172 (2007) (describing the naming and shaming tactics of the U.N. Security Council with respect to the recruitment of children in armed conflict); Annette Burkeen, *Private Ordering and Institutional Choice: Defining the Role of Multinational Corporations in Promoting Global Labor Standards*, 6 WASH. U. GLOBAL STUD. L. REV. 205, 237-38 (2007) (discussing the use of shaming in urging governments to enforce international labor standards).

74. See Page, *supra* note 60, at 25.

75. *Id.* at 24.

This problem has not been sufficiently recognised by those who advise countries to develop through trade, and then try to assist them to do so through aid, partly because it is a new problem... This was not true of Asian or Latin American countries when they were major aid recipients, so that any such effect was much less significant, although countries such as Bangladesh approached this level of dependency; aid was greater than its exports in the late 1970s and in some years up to the early 1990s; it is now 10 per cent. For India, however, the highest level was under 15 per cent, and it is now below 2 per cent. In contrast, for Malawi the figure was almost 80 per cent in 1990; for Uganda it was over 90 per cent; and it remains high in these countries.<sup>76</sup>

Countries dependent on aid are *prima facie* weak. They lack political and economic power, which translates into a weak negotiating position. Countries like Malawi and Uganda are even worse off because their heavy reliance on aid over trade renders any bargaining power they might possess over trade issues virtually meaningless. Ironically, the pragmatic strategy of representative participation and coalition building that developing countries have engaged in recent years may disenfranchise aid-dependent nations even more. The strategy, which has been successful in enabling developing countries to play a more active role in multilateral negotiations than in the past, involves heavy brokering of national interests among developing nations before advancing a unified negotiating position to the larger WTO membership. These representative negotiation positions are often offered under the auspices of coalitions like the G-20 and the G-90.<sup>77</sup> The smallest and most vulnerable developing countries in these coalitions are subject to tremendous pressure to subjugate their national interests to the greater goals of the coalition. The overlap between those with little political power among the G-90 and those most heavily dependent on foreign aid further dilutes the bargaining positions of the weakest.

Despite these power asymmetries, it is critical that developing nations seeking to develop through trade do participate in trade negotiations and learn about the workings of WTO institutions so that they can leverage what power they do possess to their advantage. Developed nations committed to the same goal have pledged large amounts of technical assistance aid in order to make it happen. A significant part of aid for trade enables developing nations' participation in negotiations. Some of such aid is indirect, such as conferences, seminars, and retreats to familiarize officials with WTO rules and institutions, usually organized at the regional level. However, some aid is directly aimed at enabling participation, such as salaries for staff at ministerial conferences, costs of travel, and the costs of representation or maintenance of a mission in Geneva, the WTO's headquarters. However, as necessary and laudable as such assistance might be, it must be difficult for a negotiator, whose office, salary, and travel is paid for by a

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76. *Id.*

77. The G-90 is composed of the African, Caribbean and Pacific (ACP) Group, LDCs Group, and the Africa Group – three overlapping representative groups which are in turn comprised of smaller associations and regional integration coalitions such as Caricom and the Pacific Island Forum.

donor/trading partner, to put the forms of support out of her mind during negotiations. The important point is simply that trade officials and lawyers must be mindful of these power asymmetries created by aid in structuring all aspects of aid for trade. I will make specific prescriptions in the next section, the roadmap, for how the WTO can structure technical assistance aid for trade to minimize the effects of the problem on the most vulnerable economies.

#### V. A ROADMAP FOR SUCCESS

Aid for trade has tremendous potential. If done right, it can help to bring developing nations out of poverty, legitimize and democratize the WTO, and provide the basis for a fertile intellectual exchange between two divergent disciplines. Such is the potential. But there are also many pitfalls, as this article has pointed out. This section provides a roadmap to ensure that aid for trade does live up to its promise. The roadmap is a call to action to four contingencies, the WTO, developing nations, donors, and the legal community, encompassing both academia and trade lawyers. Each of the four subsections in this section provides prescriptions for each of the four contingencies.

##### *A. What the WTO Can Do*

#### **1. Bring Doha to a Successful Conclusion**

The most important thing the WTO can do is bring the Doha Round to a successful conclusion. Even though the outlook is grim, the WTO's Director General and Secretariat must continue to push for the talks to resume and work tirelessly for the round to end in agreements that meaningfully address the core concerns of developing countries. As useful as aid for trade might be, it can be no substitute for a successful Doha Round. The long-term goals of developing countries can only be addressed at the level of multilateral negotiations, not through aid for trade. Even though this point has been acknowledged by the WTO, it is so important that it must be constantly and clearly kept in mind.

#### **2. Assist Developing Countries in Actively Participating in Doha Round and Subsequent Negotiations**

A corollary to the first point is that the WTO must take a lead in giving developing nations the assistance they need to play an active role in the Doha Round and subsequent rounds of negotiations. The WTO can take several concrete steps to do so now. In general, developing countries need help in implementation of WTO rules, negotiation support and training for meaningful participation in multilateral rounds, integration into the day to day mechanisms of the WTO's work, and dispute settlement.<sup>78</sup> Three of the proposals considered in this

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78. The WTO has implemented a series of online courses available for all interested parties, not just developing nations. In May 2007, the WTO began its eTraining program, which currently offers online courses providing a spectrum of information to participants ranging from basic introductory information regarding the WTO generally to an in-depth understanding of technical aspects of specific WTO agreements. In addition, the program offers both thematic and special courses addressing the DSU. Since the program started less than a year ago, thousands of individuals have participated in the courses. During each course, WTO experts provide participants with tutoring and live chats online. See

subsection address the first three needs. The last area, dispute settlement support, is discussed in conjunction with what the legal profession can do. In brief, the WTO should focus aid for trade resources on (a) improving the effectiveness of technical assistance to developing nations by making it more demand-driven, (b) providing all developing nations who are members of the WTO with missions in Geneva, and (c) enhancing the transparency of the overall trade regime. Each of the proposals shall be discussed in turn.

a. Demand-Driven Technical Assistance

A core part of aid for trade is for trade-related technical assistance and capacity building (“TRTA/CB”) initiatives to enhance developing countries’ access to the WTO system and their effective participation in trade negotiations. One of the little-acknowledged accomplishments of the Doha Development Agenda has been to focus attention and resources on the need for such initiatives. The Doha Ministerial Declaration of December 2001 explicitly affirmed:

[T]hat technical cooperation and capacity building are core elements of the development dimension of the multilateral trading system.... The delivery of WTO technical assistance shall be designed to assist developing and least-developed countries and low-income countries in transition to adjust to WTO rules and disciplines, implement obligations and exercise the rights of membership, including drawing on the benefits of an open, rules-based multilateral trading system. Priority shall also be accorded to small, vulnerable, and transition economies, as well as to members and observers without representation in Geneva.<sup>79</sup>

There is widespread agreement that TRTA/CB efforts are a critical part of the Doha Development Agenda (DDA), and that much hinge on their success. This is because TRTA/CB measures are a necessary first step towards full participation by developing nations in the WTO. In other words, TRTA/CB initiatives must work in order for there to be progress in the negotiations of the Doha Development Agenda. Therefore, since 2001, donor countries have committed large amounts of money to TRTA/CB initiatives, and the WTO has spear-headed a number of TRTA/CB projects.<sup>80</sup> All of these efforts are laudable as first steps. However, the results overall have been rather disappointing. The consensus, with respect to the impact of these initiatives, and the DDA in general, seems to be that “we are not where we wanted to be... progress has been slow – much too slow.”<sup>81</sup>

The WTO’s first Global Review of Aid for Trade in late 2007 was in part a response to the frustratingly slow progress of the DDA. As part of the Global

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WTO launches online training courses for 2008, available at [http://www.wto.org/English/news\\_e/news08\\_e/etraining\\_feb08\\_e.htm](http://www.wto.org/English/news_e/news08_e/etraining_feb08_e.htm) (last visited May 8, 2008).

79. World Trade Org., Ministerial Declaration of 14 November 2001, ¶ 38, WT/MIN(01)/DEC/1 [hereinafter Doha Ministerial Declaration], available at [http://www.wto.org/English/thewto\\_e/minist\\_e/min01\\_e/minidecl\\_e.htm](http://www.wto.org/English/thewto_e/minist_e/min01_e/minidecl_e.htm).

80. See Kathy-Ann Brown, *Can Donors Help Countries to Negotiate and Maintain their Rights Under Trade Agreements?*, in *TRADE AND AID: PARTNERS OR RIVALS IN DEVELOPMENT POLICY?* 245, 246-49 (Sheila Page ed., 2006).

81. *Id.* at 246.

Review, donors and agencies, led by the OECD, have embarked on comprehensive review of their TRTA/CB programs. The results of these reviews have just been made available by the WTO and the OECD. The time is ripe for some comprehensive reforms.

One of most striking themes to emerge from the OECD and donor self-assessment reports is that there is no agreement on what constitutes a "successful" technical assistance or trade-capacity building result.<sup>82</sup> This is so despite the fact that there does seem to be agreement about what criteria to use to assess programs.<sup>83</sup> No one seems to be able to tell if the programs are working or not. Trade experts can learn from aid experts here. As discussed in the previous section, modern aid is more demand-driven and state-centered than ever before. Aid experts and scholars understand that aid is more effective when a country (a) actually requests it for a specific purpose and (b) takes "ownership" of it in terms of allocation, policy setting, and accountability. It seems to me that these principles should apply with equal force to trade-related technical and capacity-building aid. The implications are straight-forward distribute and prioritize TRTA-CB aid in accordance with requests from developing countries and give them autonomy in its usage (including the freedom to pool funds from different donor sources for an articulated goal), coupled with accountability to donors as well as domestic constituencies. To the extent attempts to impose TRTA-CB programs from the top-down has not worked, it may be time to try a bottom-up, demand-driven approach.

First, the WTO should establish an office, headed by the Aid for Trade Secretary, whose primary job is to serve as a coordinator between aid beneficiaries, disbursing agencies, the WTO, other multilateral and regional agencies, and aid organizations. The Aid for Trade Secretary would become a clearinghouse of sorts, solely responsible for dissemination of aid for trade preferences to the relevant donors and organizations. The office of the Aid for Trade Secretary need not be very large, four or five staff members should suffice, because its main job is coordinate and maximize the efficiency of the work of the primary aid institutions by centralizing all aid for trade preferences and methodologies.

Having a centralized office to coordinate all aid for trade projects would be lead to much greater policy coherence and ultimately more effective projects, especially in the TRTA/CB arena. It would be a vast improvement over the current approach, in which "trade-related assistance has frequently been delivered randomly, indiscriminately, and more often than not, on a stand-alone basis."<sup>84</sup> The WTO is the logical institution to house the Aid for Trade office because of its expertise on trade capacity building aid and technical assistance to comply with WTO rules and disciplines. It already provides some direct training on these

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82. *Id.*

83. Most agencies evaluate programs on the basis of five agreed upon criteria relevance, efficiency, effectiveness, impact and sustainability and/or institutional development.

84. Susan Prowse, *Mega-Coherence: The Integrated Framework, in TRADE AND AID: PARTNERS OR RIVALS IN DEVELOPMENT POLICY?* 77, 82 (Sheila Page ed., 2006).

issues, and can help other deliver such assistance more effectively. Moreover, in the current climate of uncertainty over the fate of the Doha Round, there is strong political will among many developed nations to promote measures to assist developing countries. The political climate has resulted already in increases in aid giving among developed nations, the U.K. most notably.<sup>85</sup> Donors should be quite amendable to pledging assistance towards a cause that not only benefits developing nations now but may also ultimately result in a successful Doha Round.<sup>86</sup> Therefore, the WTO should be able to divert some of the aid for trade pledges towards the defraying the costs of the Aid for Trade office. Should the WTO not establish the office, perhaps because it does not want to take on the work traditionally associated with development and aid agencies, then the office should be housed within the World Bank, UNCTAD, or UNDP. However, the WTO is a better forum.

Let's look at how such an approach might work. Viet Nam became a member of the WTO in 2007.<sup>87</sup> Soon after joining the WTO, it received over seventy projects related to its accession from over twenty donors, both bilateral and multilateral.<sup>88</sup> Most of the projects were offered as stand-alone programs, without any regard to overlap, duplication, or horizontal integration. Not only is such aid inefficient, it actually creates coordination and administrative headaches for Viet Nam. As a result, authorities in Viet Nam have lamented the lack of a more coordinated approach from its donors.<sup>89</sup> It is possible to deliver aid for trade in a more integrated manner. Assume that Viet Nam has three main areas in which it needs assistance - overhauling its investment regulations to comply with TRIMS,<sup>90</sup>

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85. Mark Landler, *Britain Overtakes U.S. as Top World Bank Donor*, N.Y. TIMES, Dec. 15, 2007, at World, available at <http://www.nytimes.com/2007/12/15/world/15worldbank.html> (stating that the World Bank had raised \$25.1 billion in aid for the world's poorest countries, a record sum that includes donations by China and Egypt, nations that were once recipients of such aid and that for the first time, the U.K. overtook the U.S. as the biggest donor with its pledge of \$4.2 billion).

86. A successful Doha Round would also yield significant advantages for developed nations. Altruism need not be the only motivation for bringing Doha to a successful close. For example, just on the question of market access for agricultural products, developed nations have a lot to gain from improved access to export markets in developing nations, especially for meat products, which are in greater demand as a country becomes more affluent. See comments of Representative Cal Dooley, in Occasional Papers, Dean Rusk Center, University of Georgia School of Law, No. 4 *Agriculture and the WTO: Subsidies in the Cross Hairs* at 38 (2005) ("As incomes rise in the developing world, a significant portion of the increase will be spent on improved diets, which invariably means increased meat consumption.").

87. The General Council approved Viet Nam's accession package on November 7, 2006. Viet Nam became the WTO's 150th member on January 11, 2007. All legal documents, including commitments on tariffs, services, investment, pertaining to Viet Nam's membership are available at the World Trade Organization's site. World Trade Organization, Accession Status: Viet Nam, [http://www.wto.org/english/thewto\\_e/acc\\_e/a1\\_VietNam\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/a1_VietNam_e.htm) (last visited Feb. 5, 2008).

88. Prowse, *supra* note 84, at 82.

89. *Id.*

90. The Agreement on Trade-Related Investment Measures ("TRIMs"), negotiated during the Uruguay Round, applies only to measures that affect trade in goods. Recognizing that certain investment measures can have trade-restrictive and distorting effects, it states that no member shall apply a measure that is prohibited by the provisions of GATT Article III (national treatment) or Article XI (quantitative restrictions). Examples of inconsistent measures, as spelled out in the Annex's

implementing the Sanitary and Phytosanitary Agreement<sup>91</sup> (SPS Agreement) domestically, and maximizing exports in its burgeoning clothing and textile industries. Assume that Viet Nam has a number of other accession related issues that are of lesser urgency. Under my proposal, Viet Nam would be able to make its priorities known to the relevant donors, simply by apprising the Aid for Trade Secretary in the WTO, who would in turn make the information available through the Integrated Framework to donors, other multilateral agencies, NGO's and other interested parties. Viet Nam would then be able to examine all the incoming project proposals to ascertain fit with its three priorities. It would then work with the office of the Aid for Trade Secretary to pool the various projects, combining donor resources where possible, putting off or slow-tracking projects of secondary importance, and coordinate reporting/accountability mechanisms within the various projects.

#### b. Improve Developing Countries' Presence and Participation

The WTO is a completely state-centered system. As such, one might expect that all 151 of its members maintain a presence at its headquarters in Geneva, so that members might be able to monitor the day to day developments in the WTO and advance their national interests in negotiations. Unfortunately, that is not the case. Twenty WTO members (and ten observers)<sup>92</sup> have no mission in Geneva.<sup>93</sup>

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Illustrative List, include local content or trade balancing requirements. The agreement contains transitional arrangements allowing members to maintain notified TRIMs for a limited time following the entry into force of the WTO (two years in the case of developed country members, five years for developing country members, and seven years for least-developed country members). The agreement also establishes a Committee on TRIMs to monitor the operation and implementation of these commitments. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Legal Instruments – Results of the Uruguay Round, available at [http://www.wto.org/english/docs\\_e/legal\\_e/18-trims\\_e.htm](http://www.wto.org/english/docs_e/legal_e/18-trims_e.htm).

91. The SPS Agreement deals with food safety and animal and plant health standards and includes provisions on control, inspection and approval procedures. Governments must provide advance notice of new or changed sanitary and phytosanitary regulations, and establish a national enquiry point to provide information. The agreement complements the agreements on technical barriers to trade. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Legal Instruments – Results of the Uruguay Round, available at [http://www.wto.org/english/docs\\_e/legal\\_e/15sps\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/15sps_01_e.htm).

92. The Observers are Bahamas, Equatorial Guinea, Montenegro, Samoa, Sao Tome and Principe, Seychelles, Tajikistan, Tonga, and Vanuatu. See World Trade Org., WTO Organizes “Geneva Weeks” for Non-Resident Delegations, [http://www.wto.org/english/tratop\\_e/devel\\_e/genwk\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/genwk_e.htm) (last visited Feb. 6, 2008) (providing a list of participating WTO members and observers).

93. See *id.* African countries without permanent representation to the WTO are Central African Republic, Gambia, Guinea Bissau, Guyana, Equatorial Guinea, Lao Malawi, Maldives, Niger, Sierra Leone, and Togo. The Pacific WTO members without missions are Fiji, Papua New Guinea and Solomon Islands. The Caribbean Nations without representation are Antigua & Barbuda, Belize, the Commonwealth of Dominica, Grenada, St. Kitts and Nevis, Saint Lucia, and St. Vincent and the Grenadines. Even those developing nations that do have permanent representation in Geneva suffer human resources constraints that make it hard for them to attend even the most critical meetings and negotiations. The extended negotiation process in the WTO is so demanding that it seriously over-extends the capacity of many developing nations. Even though the problem is somewhat endemic to all developing nations, one of the goals of the TRTA/CB measures discussed above in subsection 2A is to improve the quality of their involvement in WTO processes, which is at least useful in optimizing the

This means that a staggering 16 percent of the WTO membership lacks the ability to participate in the WTO at the most basic level. In addition, many LDCs and smaller countries maintain missions in Geneva with fewer than five professional staff, who are heavily over-burdened with tracking not only issues related to the WTO, but also the activities of all international organizations located in Geneva.<sup>94</sup> Of course, these countries are still better off than those without permanent representation, who can't perform their WTO functions at all.

The WTO must improve its efforts to integrate the non-resident members of the WTO. To be sure, all the non-resident members are developing or vulnerable countries with small economies, and are never going to be major players in the WTO system like Brazil, China, or India, whose sizes and economies dwarf the non-resident members. Nonetheless, these countries should not be left out for a number of reasons. First, even though their economies are small, in the aggregate they are not insignificant. In terms of population affected, they represent large numbers of the poorest in the world. As such, these countries have the most to gain from development and therefore have an important stake in making the WTO system responsive to their needs. Third, and most importantly, the fact that 16 percent of the membership is excluded from the day to day business of the WTO is a sad indictment of a system that claims to be open, transparent, and democratic.

The WTO has recognized the importance of enhancing the participation of non-residents. Prior to the Seattle Ministerial Conference in 1999, it launched an effort, together with twelve other international organizations, to involve representatives from non-resident members by assisting them with preparing for the Seattle Conference and apprising them of technical assistance available to them from the WTO and other agencies. Subsequent to 1999, the practice became institutionalized and is known as "Geneva Week."<sup>95</sup>

Geneva Week currently occurs twice a year. It brings together permanent WTO officers and senior officials from the twenty WTO members and ten Observers without representation as well as representatives from specialized organizations who work with them.<sup>96</sup> Participants in the program learn about recent developments in the WTO. Through seminars, they receive detailed briefings on the progress of the Doha Round agenda items, known as the Doha Work Program. They also receive reports on development issues in general, such as the work of the WTO Sub-Committee on Least Developed Countries on special

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human resources developing nations do possess. With respect to the countries without missions in Geneva, such TRTA/CB measures can be of no help at all. They need help of a different character.

94. See Brown, *supra* note 80, at 264.

95. Funding for the program was permanently secured by the General Council in 2002, pursuant to the Ministerial Declaration. The General Council approved the funding from the regular budget for Geneva Week. See World Trade Org., *supra* note 79, ¶ 40, 43; see also Committee on Trade and Development, *Note by the Secretariat: Annual Report on Training and Technical Cooperation (1 January to 31 December 2004)*, WT/COMTD/W/139 (Apr. 19, 2005), available at <http://www.wtocommerce.org.tw/SmartKMS/fileviewer?id=64342>.

96. See World Trade Org., *supra* note 92 ("The Geneva Week events benefit from regular contributions in the form of seminars organized by the Agency for International Trade Information and Cooperation (AITIC) and occasionally from the Commonwealth Secretariat.").



challenges facing small economies. In addition, participants attend some regularly scheduled meetings of the WTO.

Participants seem to find the programs offered during Geneva Week helpful,<sup>97</sup> but most believe more needs to be done. Once again, this is an area in which responding directly to the requests of developing countries is necessary. Some participants have asked that the WTO organize more than two Geneva Weeks per year.<sup>98</sup> They believe it would be helpful to organize regional briefing sessions in addition to the Geneva-based programs.<sup>99</sup> One commentator has observed that:

An objective assessment would seem to suggest that Geneva Week heightens the awareness of Non-Residents of the fact that they are on the sidelines of a process that will have consequences for them, but it is questionable whether it has been successful in providing a full appreciation of the importance of effective participation.<sup>100</sup>

I don't think there is any reason to believe that WTO members without representation in Geneva do not appreciate the importance of effective participation. Developing nations are generally quite savvy about the importance of the Geneva process and acutely aware of their stake in the world trading regime.<sup>101</sup> Rather, the limited success of the Geneva Week experience is more likely reflective of the fact that two yearly sessions are far from adequate. One of the highest priorities of the WTO's aid for trade agenda must be the establishment of permanent missions for members without representation. In order to minimize costs, each of the twenty non-resident nations need not necessarily have their own missions. As the non-residents can be grouped into African, Caribbean, and Pacific Islands, even three permanent representative missions would be highly beneficial.

There is already a successful model for such a representative mission. In 2001, the European Union funded a non-resident facility operated by the Pacific Islands Forum,<sup>102</sup> which provides representation to fourteen Pacific Countries.<sup>103</sup> The Pacific Island Forum facility has had a positive impact, giving voice to a group of nations seldom heard at WTO proceedings. In 2005, the Forum appointed a joint Ambassador to represent its members in the WTO.<sup>104</sup> The representative mission model can be replicated with success for the African and Caribbean groups as well, although it is likely that the African representative mission may need to be split into two in order to reflect the divergent goals

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97. Brown, *supra* note 80, at 267.

98. *See id.*

99. *Id.*

100. *Id.*

101. *See e.g.*, Inaamul Haque, *Doha Development Agenda: Recapturing the Momentum of Multilateralism and Developing Countries*, 17 AM. U. INT'L L. REV. 1097, 1110 (2002).

102. Brown, *supra* note 80, at 268.

103. *Id.* (listing the fourteen countries as Fiji, Papua New Guinea and Solomon Islands, Samoa, Tonga and Vanuatu, Cook Islands, Federated States of Micronesia, Kiribati, Marshall Islands, Nauru, Niue, Palau, and Tuvalu).

104. *Id.*

relevant to that more diverse group. In conclusion, aid for trade cannot be said to have gotten off the ground if it does not address the appalling problem of members without representation. Only when these small and vulnerable economies have representation in Geneva can they begin to participate in the process and play a role in defining new rules to adequately address their interests.

### c. Enhance Transparency and Democracy in the Multilateral Trading System

The WTO has been progressively moving towards greater openness and transparency in its operations. Until recently multilateral negotiations and dispute settlement proceedings were not open to the public. For example, even the practice of accepting amicus curiae briefs has been hotly contested and controversial.<sup>105</sup> However, the tide seems to be turning. Two pivotal events signaled the sea-change. First, the WTO invited NGOs to attend its Ministerial Conferences beginning in 1996 at the Singapore conference, when 108 NGOs attended.<sup>106</sup> Prior to this, only member state representatives were invited to the Ministerial Conferences. By the December 2005 Hong Kong Ministerial Conference, over 800 NGOs attended.<sup>107</sup> Opening up the ministerial proceedings to NGOs as observers marks quite a stride in the direction of greater transparency. It also enables NGOs to have access to WTO negotiations in real time so that they are able to respond, comment on and possibly affect policy outcomes.<sup>108</sup> Second, on January 8, 2008, at the request of the U.S. and the European Communities, the two parties in the dispute, arguments in front of the dispute settlement panel<sup>109</sup> will

105. See generally Cai *supra* note 29, at 475-489 (discussing the progress the WTO had made towards greater transparency).

106. See World Trade Org., *List of NGO's Who Attended in Singapore*, [http://www.wto.org/english/forums\\_e/ngo\\_e/ngosin\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/ngosin_e.htm) (last visited Feb. 19, 2008).

107. Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT'L L. 348, 372 (2006) (discussing NGO attendance in footnote 148).

108. As part of Pascal Lamy's recent initiatives on greater transparency and an enhanced dialogue with NGOs, the list of NGO Position Papers received by the Secretariat is circulated for the information of members and members and the public may view all the position papers submitted. See World Trade Org., [http://www.wto.org/english/forums\\_e/ngo\\_e/pospap\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/pospap_e.htm) (last visited Feb. 19, 2008) (providing a complete list of position papers related to WTO issues submitted by NGOs to the WTO Secretariat). See e.g., Charnovitz, *supra* note 107, at 369 (arguing that NGOs exert relatively weak influence on the WTO although that may be changing with respect to high-profile trade issues, such as maintaining access to pharmaceuticals and reducing trade-distorting agricultural subsidies); Steve Charnovitz, *WTO Cosmopolitics*, 34 N.Y.U. J. INT'L L. & POL. 299, 353 (2002) (arguing that the WTO needs the input and support of NGOs and citizens groups); Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 58-59 (2005) (arguing that non-state actors can and do influence the WTO political process even without a formal say or vote in WTO decision-making process); On the other hand, some commentators argue that NGOs must push for more formal ways to provide input to the WTO, see e.g., Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. INT'L ECON. L. 123, 131 (1998); Gabrielle Marceau & Peter N. Pedersen, *Is the WTO Open and Transparent?*, 33 J. WORLD TRADE 5, 44-45 (1999).

109. For the first decade of GATT, dispute settlement relied primarily on diplomatic means to stop violations of the substantive agreements. In the 1950s, it became the practice to use panels for dispute settlements. At the end of a dispute settlement a GATT panel would issue a report, which had to be adopted by a positive consensus among all GATT members. Effectively, this meant the losing party could always block adoption of a panel report by voting against it. During the Tokyo Round of trade negotiations (1973-1979), the GATT established codes of conduct for panels, discussed non-tariff

be open to the public.<sup>110</sup> The case is “United States — Continued Existence and Application of Zeroing Methodology” (DS350). The panel will start its meeting with the parties on January 29, 2008 with a session open to public viewing at the WTO headquarters in Geneva. Public viewing will take place via a real time closed-circuit television broadcast. A second public session may follow, depending on the discretion of the panel. The parties will make their oral arguments during these public sessions.

These efforts at enhancing greater openness and transparency in the WTO need to be encouraged. As another step towards addressing the democratic deficit problem, the WTO must take full advantage of the opportunities aid for trade offers for reaching out to both the U.N. and civil society actors. The WTO should cooperate more closely with the World Bank, the IMF, the U.N. General Assembly, and NGOs. Please see *infra* subsection III.A for a fuller description of each of the concrete proposals, particularly with regards to the U.N. and NGOs.

### *B. What Developing Nations can Do*

Aid for trade can provide an invaluable training ground for the type of role developing nations ought to play. There are several ways developing nations can leverage the opportunities opened by aid for trade to advance their agenda. First,

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barriers, and accorded preferential treatment for developing countries. JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS* 200, 257 (4th ed. 2002). The next round of trade talks, the so-called Uruguay Round (1986-1994), aimed at the further development of trade law, led to the idea of creating an umbrella WTO. The round saw the need for a more adjudicative process for dispute settlement, a reformation of trade in textiles and agriculture, and an expansion of the trade agreements to include intellectual property and trade in services. On April 15, 1994, 123 participating countries signed the agreement for the formation of the WTO. Under the WTO, the GATT still serves as the WTO's umbrella treaty for trade in goods. See generally World Trade Organization, *The Uruguay Round*, [http://www.wto.org/English/thewto\\_e/whatis\\_e/tif\\_e/fact5\\_e.htm](http://www.wto.org/English/thewto_e/whatis_e/tif_e/fact5_e.htm) (last visited Feb. 19, 2008). Under the new WTO system, legitimization of panels' decisions no longer depended on the whim of a single nation that could block adoption of the panel report. Rather, decisions are effectively valid upon issuance and take on the force of law unless all member-nations affirmatively act to reject adoption, which is unlikely, and at any rate, difficult. Such reverse consensus eliminates many of the delays in adoption and subsequent non-compliance that plagued the old dispute resolution process. Panel reports are also subject to review by an Appellate Body with power to overturn the legal findings and conclusions of law made by panels. Commentators who have given a generally positive assessment of the WTO dispute settlement system include: William J. Davey, *WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17 (2005); Thomas A. Zimmerman, *WTO Dispute Settlement at Ten: Evolution, Experiences, and Evaluation*, 60 AUSSENWIRTSCHAFT – THE SWISS REVIEW OF INT'L ECON. REL. 27 (2005); John H. Jackson, *The Changing Fundamentals of International Law and Ten Years of the WTO*, 8 J. INT'L ECON. L. 3 (2005). For an economic assessment that presents mixed findings, see Monika Büttler, *The WTO Dispute Settlement System: A First Assessment from an Economic Perspective*, 16 J. L. ECON. & ORG. 503 (2000). Other commentators who give a mixed to negative review of the first decade of the DSU include: Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, 34 LAW & POL'Y INT'L BUS. 109 (2002) and John Ragosta, Navin Joneja, & Mikhail Zeldovich, *WTO Dispute Settlement: The System is Flawed and Must be Fixed*, 37 INT'L L. 697 (2003).

110. See World Trade Org., *WTO Hearings on Zeroing Dispute opened to the Public*, Jan. 8, 2008, [http://www.wto.org/english/news\\_e/news08\\_e/dispute350\\_e.htm](http://www.wto.org/english/news_e/news08_e/dispute350_e.htm).

they need to see aid for trade as a chance to gather the empirical evidence that would convince developed countries of the need for policy changes. No one, no matter how pre-disposed or sympathetic, will change their positions on important issues without compelling evidence. Of course, developing nations have been quite sophisticated in presenting and arguing their cases at Ministerial Conferences. However, those tactics have not worked to date.

Right now, developing nations have two choices. They can opt out of the Doha Round, perhaps placing the blame for the stalling of the Doha Round on developed nations captive to powerful protectionist lobbies, which is at least partially correct. Or, they can choose to focus instead on strategies for success in the next phase of the negotiations. To do so, they must take the monitoring efforts of the Task Force on Aid for Trade seriously, by submitting frank and detailed recipient country assessments. They must also act proactively, by coordinating among themselves to scrutinize all aid for trade projects for patterns and broad themes, which can then become the rallying points for policy change. Each aid for trade project reveals a weakness in the current trading system. Together, the wisdom amassed from all projects can play a major role in reforming the system to make it work better for developing nations.

Organizations like the Cairns Group,<sup>111</sup> an alliance of agricultural producers from both developed and developing countries, should take a lead in the type of information gathering, analysis, and policy setting described above. They may be better positioned to accomplish these tasks than the OECD, the World Bank or the WTO (all of whom already play a role) for several reasons. First, requests from the Cairns Group will not be perceived as top-down orders from powerful elites, as a request from the OECD or the World Bank might. Second, aid recipient countries may provide better and more detailed information to the Cairns Group because the group is seen not only an ally of developing nations, but more importantly, as an entity that is not coercive or evaluative. For example, in situations where aid for trade projects failed, aborted, abandoned, curtailed, or unfinished, a country may refrain from submitting a self-assessment report altogether or submit only a partial one fearing that lack of positive results to report to the World Bank may lead to a decrease in aid funds. Countries may also withhold or distort negative data for fear that it may lead to a net decrease in aid dollars donors will give. Such fears, reasonable in the context of giving feedback to the World Bank, are greatly diminished when the Cairns Group or a similar organization is the intended recipient. Other benefits can accrue as well. The

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111. The Cairns Group, which now has 18 members, is a powerful alliance of some of the world's largest agricultural producers that has played a very active role in pushing for greater liberalization in agricultural products. The Cairns Group itself operates through ministers and officials at a government to government level. Farmer organizations in the individual countries are closely consulted by their governments to frame Cairns Group policies and positions. The great majority of Cairns Group members are developing nations. Current members are Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Pakistan, Paraguay, The Philippines, South Africa, Thailand and Uruguay. See Cairns Group Farm Leaders, *What is the Cairns Group of Farm Leaders?*, <http://www.cairnsgroupfarmers.org/cairnsgrp.html> (last visited Feb. 19, 2008).

Cairns Group may be able to amalgamate country assessments so as to identify systemic failures (such as lack of administrative support for new institutions put in place through aid for trade) in ways that an individual country can not. Thus, I envision a two-tiered process whereby country assessments are performed by aid-recipients, but then given to the Cairns or a similar representative for secondary processing, resulting in the issuance of a supplementary report by such organization focusing on regional trends and containing policy proposals. The results of the supplementary report and the individual assessments would be made available to the applicable multilateral organization.

However, the results of such due diligence and policy setting must also make their way to the membership of the WTO at large. Fortunately, developing nations have already proven themselves quite adept at this aspect of the multilateral trade process, through the G-20, a coalition of leading developing nations that has very proactive during WTO negotiations in recent years.<sup>112</sup> There is no doubt that the G-20 will continue to play an important role in future negotiations. The G-20 is ideally situated to translate the facts and recommendations gathered through aid for trade analysis into policy positions at multilateral negotiations. Aid for trade provides a similar opportunity for the G-20 to play a leadership role in information gather, policy setting, and advocacy.

### *C. What the Trade Legal Community can Do*

#### **1. Joint Research with Aid Experts**

The legal community must also play a role in making aid for trade a success. Critically, trade academics, practitioners, and other experts must engage in a greater dialogue with their aid counterparts. The two fields have thus far developed completely independently of each other, often with a sense of "ignorance and mistrust,"<sup>113</sup> but that needs to change. As I demonstrated in subsection III.C above, trade experts have much to learn from the experience and accumulated knowledge of aid experts. No doubt the inverse is also true, although that is a topic beyond the reach of this article. Aid for trade is an obvious starting point for joint research between trade and aid specialists. The field is very under-theorized and researched. In the current literature, there has been only one article that gives serious treatment to WTO technical assistance and capacity building programs, and the article was written before the WTO announced its aid for trade initiative.<sup>114</sup> On the aid side, there is one laudable monograph, which I relied upon extensively, that discusses aid for trade in great depth,<sup>115</sup> but almost exclusively from a non-legal perspective. If this article accomplishes nothing beyond inspiring

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112. See Sungjoon Cho, *Doha's Development*, 25 BERKELEY J. INT'L L. 165, 170-72 (2007) (describing the strong role played by the G-20 on agricultural negotiations at the Cancun Ministerial Conference).

113. Page, *supra* note 60, at 31.

114. Gregory Shaffer, *Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?* 23 WIS. INT'L L. J. 643 (2005).

115. See generally Page, *supra* note 60. See also Dominic Coppens, *Trade and Aid: Partners or Rivals in Development Policy?*, 10 J. INT'L ECON. L. 413 (2007) (providing a review of Page's book).

one trade expert to undertake empirical or theoretical joint project on aid for trade with an aid specialist, it would have served its purpose.

## 2. Expand Private Sector Pro Bono Legal Assistance

One area in which developing nations need aid for trade assistance is accessing the dispute settlement system of the WTO. For a variety of reasons, many developing countries do not make use of the dispute settlement mechanism at all or do so infrequently.<sup>116</sup> There are a variety of explanations, from lack of experience, lack of familiarity with the system, lack of human resources to pursue lengthy litigation, a sense that the system does not provide meaningful remedies to developing nations with small economies, etc. However, there is no doubt that developing nations face a serious lack of financial resources and legal expertise that may inhibit their ability to make full use of the dispute settlement system.

Trade law is a highly specialized field of practice. The number of competent law firms with a well-established trade law practice is limited.<sup>117</sup> Most of these firms charge high private sector hourly rates, rates which are largely driven by the dominant consumers of their services such as the U.S., E.U., Canada, and Japan<sup>118</sup>

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116. See e.g., Douglas Ierley, *Defining the Factors that Influence Developing Country Compliance with and Participation in the WTO Dispute Settlement System: Another Look at the Dispute over Bananas*, 33 LAW & POL'Y INT'L BUS. 615, 616 (2002) (presenting the five principal factors cited by diplomats as influencing developing country participation in and compliance with WTO panel and Appellate Body decisions as: (1) the dramatic influence of the political and economic strength of developed countries on the dispute settlement process; (2) the effectiveness, at least in principle, of the dispute settlement system in resolving disputes between countries of diverging political and economic power; (3) the non-compliance of developed countries with WTO decisions; (4) the lack of recourse to retaliation; and (5) the lack of financial resources and technical capacity available to developing countries in order to file and defend against complaints). Conventional wisdom holds that it is a waste of time for developing nations to pursue complaints against industrial nations because the remedies available to them are inadequate. Commentators who have weighed in on this question include Robert E. Hudec, *The Adequacy of WTO Dispute Settlement Remedies for Developing Country Complainants*, in DEVELOPMENT, TRADE AND THE WTO: A HANDBOOK 81, 81 (Bernard Hoekman et al. eds., 2002). While Hudec concedes that this conventional wisdom has "a great deal of truth to it," his paper is devoted to showing the complexity of the issues involved. *Id.* See also Marc L. Busch & Eric Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, 37 J. WORLD TRADE 719 (2003) (arguing that developing countries are no better served under the WTO than they were under GATT); Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, International Centre for Trade and Sustainable Development, Resource Paper No. 5, Mar. 2003, available at [http://www.ictsd.org/pubs/ictsd\\_series/resource\\_papers/DSU\\_2003.pdf](http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf).

117. Agency for International Trade Information and Cooperation Documents, Reports on Meetings, *Improving Developing Country Access to the Dispute Settlement Mechanism of the WTO* (Feb. 25, 2000) [hereinafter AITIC Documents], available at [http://www.acici.org/aitic/documents/reports/reports5\\_eng.html](http://www.acici.org/aitic/documents/reports/reports5_eng.html) (stating that lawyers and consultants specializing in WTO dispute settlement cases are found in three main locations: Geneva, Washington and Brussels).

118. The countries that make the most frequent use of the WTO's dispute settlement system as complainants during the period of January 1, 1995 to September 30, 2004 are the United States, Canada, Mexico, European Union, Japan, Korea, India, Thailand, Brazil, Argentina and Chile. See WTO Secretariat, *Statistical Information on Recourse to WTO Dispute Settlement Procedures, Background Note Prepared for the Special Session of the Dispute Settlement Body*, JOB(03)/225/Rev.1

and are therefore out of reach for many developing nations.<sup>119</sup> American lawyers have an ethical obligation to the profession to give pro bono legal assistance.<sup>120</sup> A similar obligation is imposed on lawyers in other countries as well.<sup>121</sup> While pro bono work is usually conceived in terms of assistance to low-income individuals or non-profit organizations, it behooves trade lawyers to think beyond these narrow conceptions to include needy countries as well. In fact, it is smart for law firms and individual practitioners to seek out the opportunity to advise or represent developing countries in WTO dispute settlement proceedings.<sup>122</sup> With some rare exceptions,<sup>123</sup> most WTO dispute settlement proceedings are generally closed to the

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(Oct. 22, 04). The list of the most frequent respondents in WTO cases is identical except for the exclusion of Thailand.

119. See AITIC Documents, *supra* note 117. According to the AITIC Documents, hourly rates for trade lawyers range from \$200 to \$450 per hour, depending on the seniority and experience of the staff member. In addition all incidental costs (e.g. telephone calls, postage), travel costs (business class) and hotels are billable.

120. The first quantified goal articulated by the American Bar Association (ABA) was included in the 1993 version of the Model Rules, when the ABA encouraged attorneys to "aspire to render at least fifty hours of pro bono public legal services per year." MODEL RULES OF PROF'L CONDUCT R. 6.1 (1993). Finally, in 2002, the ABA revised Model Rule 6.1 to its current version, including a sentence that focuses on the idea that lawyers have a "professional responsibility to provide legal services to those unable to pay." MODEL RULES OF PROF'L CONDUCT R. 6.1 (2003). In addition, nearly every state bar has a statement in its ethics rules emphasizing the need for pro bono service. Forty-seven states have adopted Model Rule 6.1 in its original form, 1993 revised form, the 2002 revised form, or a similar form. See American Bar Association, *State-by-State Pro Bono Service Rules*, [http://www.abanet.org/legalservices/probono/stateethicsrules.html#appendix\\_b](http://www.abanet.org/legalservices/probono/stateethicsrules.html#appendix_b) (last updated April 26, 2007).

121. See DEBORAH L. RHODE, *PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS*, 100-24 (2005) (providing an excellent comparative review of the pro bono requirements and recommendations in other countries).

122. A number of law firms and individuals have registered their availability with the Advisory Centre on WTO Law (ACWL) to provide their services to least developing nations and other ACWL members where the ACWL cannot provide representation due to a conflict of interest. The ACWL was founded in 2001 with the goal of enhancing the participation of developing nations in the WTO. An independent agency from the WTO, the ACWL provides free advice on WTO law to its developing country members and to all Least Developed Nations (LDCs) that are Members of the WTO or are in the process of accession. It defends these countries' interests in WTO dispute settlement proceedings at very modest fees and offers their officials free training in WTO law through courses, seminars and internships. Since its establishment in July 2001, the ACWL has prepared over 300 legal opinions, provided support in 25 WTO dispute settlement proceedings (or about 20% of all such proceedings initiated in the WTO during that time) and has conducted six-month courses on WTO law every year since 2002. The ACWL has become an organization that pools the collective experience of its developing country Members and LDCs in WTO legal matters and makes it available to each of these countries. The ACWL has 37 members: 10 developed country members, and 27 members entitled to the services of the ACWL. Two countries, Costa Rica and Georgia, are currently in the process of acceding to the Agreement Establishing the ACWL. The 42 countries that are classified as LDCs and are members of the WTO or in the process of acceding to the WTO that have been designated by the United Nations as LDCs are entitled to the services of the ACWL without becoming ACWL Members. Advisory Centre on WTO Law, *Introduction*, [http://www.acwl.ch/e/about/about\\_e.aspx](http://www.acwl.ch/e/about/about_e.aspx) (last visited Feb. 25, 2008).

123. See World Trade Org., *WTO Hearings on Zeroing Dispute opened to the Public*, *supra* note 110 and accompanying text (describing the opening of WTO dispute settlement proceedings to the public via closed-circuit cameras).

public. Representing developing nations, even as interested third parties and not the primary litigants, affords private law firms and lawyers a valuable opportunity to gain access to and valuable litigation experience in WTO proceedings. Relationships with developing countries are worth establishing because, if things go well, their economies will grow and they may resort more frequently to the dispute settlement system. Moreover, as developing nations continue to coalesce their interests in the ways described in this article, the result should be greater cooperation and pooling of litigation efforts as well, a trend which has already begun with Brazil in the United States – Upland Cotton case.<sup>124</sup> Private law firms and lawyers would gain much in the long term by cultivating relationships with developing nations now. Providing pro bono assistance is a form of privately driven aid for trade that merits closer attention by the profession.

#### *D. What Donors can Do*

What donors should do in order to make aid for trade a success fall into two broad categories. The first, the most obvious, is to continue to contribute aid funds. When the WTO reports that it has secured funds for its Aid for Trade initiative from various donors, it is often unclear if those funds are actually *additional* to existing Official Development Assistance (“ODA”) pledges or merely an allocation of a portion of ODA pledges to aid for trade projects.<sup>125</sup> In order for live up to its full promise, as illustrated in Part III of this article, donors must continue to be generous and give aid for trade funds on top of its existing general aid pledges.<sup>126</sup> Donors must also take into account the effects of Dutch

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124. See generally Appellate Body Report, *United States Subsidies on Upland Cotton*, WT/DS267/AB/R (Mar. 3, 2005), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/267abr\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/267abr_e.pdf) (discussing Brazil’s victorious case against the United States cotton subsidies, and how it was joined by many other nations as interested parties, many of them developing nations. Brazil was joined by Argentina, Australia, Benin, Canada, Chad, China, European Communities, India, New Zealand, Pakistan, Paraguay, Taiwan and Venezuela).

125. For instance, on January 11, 2008, Finland announced a donation of CHF 620,000 (EUR 375,000) to the Doha Development Agenda Global Trust Fund (DDAGTF). Since 2000, Finland’s contributions have reached CHF 4.9 million. The press release described the donation as focused on technical assistance: “This donation will finance technical assistance programmes and training activities for least developed countries. The aim is to better adapt their practices and laws to WTO rules and disciplines, improve the implementation of their obligations and enhance the exercise of their membership rights.” As Finland has traditionally been a strong donor in all areas of development assistance both within and without the WTO, it is not clear from the press release if this donation was on top of its existing pledges. For example, it is not clear if the pledge to the DDAGTF resulted from a reallocation from other aid projects, such as poverty-reduction programs. World Trade Org., *Finland Offers CHF 620,000 to the WTO Training Programme for the Benefit of Developing Countries*, Jan. 11, 2008, [http://www.wto.org/english/news\\_e/pres08\\_e/pr504\\_e.htm](http://www.wto.org/english/news_e/pres08_e/pr504_e.htm).

126. Sometimes it is quite clear that a nation’s aid for trade donation is in fact on top of existing pledges. One of the more heartening trends in the recent WTO aid for trade initiative is that it is bringing in a new generation of donors, many of them developing nations. For example, on January 14, 2008, Romania donated EUR 100,000 to the Doha Development Agenda Global Trust Fund (“DDAGTF”), the first contribution of Romania to the DDAGTF. World Trade Org., *Romania Offers EUR 100,000 to the WTO Training Programme*, Jan. 14, 2008, [http://www.wto.org/english/news\\_e/pres08\\_e/pr505\\_e.htm](http://www.wto.org/english/news_e/pres08_e/pr505_e.htm).



Disease<sup>127</sup> in creating monitoring and assessment structures. Therefore, where possible, donors should spread-put aid for trade in the medium to long term in order to offset the effects of Dutch Disease.

The second category of donor contributions is a corollary to the country ownership points made above in subsections IV.A (with respect to the WTO) and IV.B (with respect to developing nations). Donors must also acknowledge the conventional wisdom in the aid literature that aid is most effective when it is country-driven. Doing so has a number of clear implications for how donors should structure their aid for trade giving. First, recipient nations should have a central role in the aid for trade decision process, a country-driven process that welcomes the participation of civil society organizations and local businesses in determining priorities. This means that aid for trade programs must be structured from the premise of local ownership, knowledge, and participation so that trade strategies are rooted in locally-designed programs and reflective of local development priorities. The logical corollary of a country-driven aid for trade regime is that donors must be willing at times to place their interests second. For example, this might mean allowing a developing country to focus on accessing the dispute settlement system (perhaps not a primary goal of the donor) rather than the full implementation of WTO investment rules (which might be of great interest to the donor). In order for aid for trade to be truly country-driven, the structures for diagnostic, delivery, and monitoring should ensure that developing nations are free to use aid for trade funds to enhance the capabilities most critical to them. Accountability should also begin at the national level. This means that public oversight of national plans and priorities should be assured through the submission of such plans to the national parliament or congress for final approval.

Country-driven aid for trade has some other negative implications for donor behavior as well. First, donors should not attach damaging conditions to the receipt of aid for trade. This may mean not forcing recipient nations to give up other social policy goals in favor of trade-capacity building, as discussed above. But it also extends to forbearing from the imposition of economic policy changes (such as currency devaluation or reducing deficient spending) that would be harmful to those living in poverty. Second, aid for trade should be untied from any requirement that the recipient country purchase donor country products or services, including consultation services in assessment or monitoring. Third, aid for trade must be given as aid, and not in the guise of complex financial arrangements that may result in greater debt for developing countries. Trade-oriented projects are often expected to "pay for itself" through the generation of export revenues. As such, there is a temptation to structure them as a mixture of aid and loans. This can lead to unwarranted increases in debt burdens for developing countries that are already crippled by their debt burdens. It is particularly important to avoid imposing more debt service payments on the most vulnerable economies in Africa.<sup>128</sup> Fourth, aid for trade should be de-coupled from trade negotiation results

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127. See *supra* notes 63-68 and accompanying text.

128. See generally Nsongurua J. Udombana, *The Summer has Ended and We are not Saved!*

and not given as a *quid pro quo* in Doha or future negotiations. Developing nations are already disadvantaged enough in terms of negotiation positions, and at any rate, they are already acutely aware of the dual roles donors/negotiators play, that an explicit linkage between aid and negotiation results is both unnecessary and heavy-handed. Lastly, monitoring and assessment of aid for trade projects should not be conducted by donor countries or donor-driven bodies, but rather by independent civil society or governmental entities.

Donors should also allow developing nations to have some say in determining how much of a share aid for trade should account for as a share of the total aid it would receive. This is particularly critical if aid for trade giving is not on top of existing Official Development Assistance pledges. In such cases, the recipient nation must be allowed to choose to sacrifice funding for other programs (such as poverty-reduction, employment generation, or health care) in order to privilege aid for trade programs. Donors should never make such decisions for them.

This means that the WTO's current system of bundling donations into its general Doha Development Agenda Global Trust Fund ("DDAGTF")<sup>129</sup> may not be optimally responsive to the needs of developing nations. The DDAGTF has two foci: (1) technical assistance to build capacity for developing countries to participate in the multilateral trading system, advance their interests, conclude agreements and implement them and (2) financial and technical assistance to help developing countries participate in the current round of Doha negotiations. Within these two broad areas, it does not differentiate among the different priorities important to developing countries (such as negotiation versus implementation versus dispute settlement). Moreover, it is a completely top-down system that incorporates no mechanisms for recipient country input or direction. Also, there is little transparency about the impact of DDAGTF giving on overall development assistance.

Donors would be well-advised to recall the success of the Multilateral Fund established under the Montreal Protocol discussed above in subsection II.C of this article.<sup>130</sup> Donors and the WTO can solve the lack of country-ownership problem within the DDAGTF in one simple way – create a Executive Committee for the DDAGTF modeled on that of the Multilateral Fund. Recall that all decisions as to fund dispersals and project approvals under the Multilateral Fund were made by an Executive Committee comprised equally of developed and developing nations. All decision making occurs by consensus and a double-majority rule (two-thirds overall, plus a majority of both developed and developing nations) was imposed on any decisions taken by vote. This solution is both elegant and effective.

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*Towards a Transformative Agenda for Africa's Development*, 7 SAN DIEGO INT'L L. J. 5, 18-19 (2005) (describing the external debt burdens of African countries as a "sword of Damocles").

129. "The Doha Development Agenda Global Trust Fund ("DDAGTF") was created following the WTO Ministerial Conference in Doha, in November 2001, which launched a new round of negotiations." World Trade Org., *Denmark to Donate an Extra 600,000 Swiss Francs to WTO Technical Assistance*, Dec. 17, 2003, [http://www.wto.org/english/news\\_e/pres03\\_e/pr369\\_e.htm](http://www.wto.org/english/news_e/pres03_e/pr369_e.htm).

130. See discussion *supra* Parts II.C.

## VI. CONCLUSION

Aid for trade has tremendous potential. It is an area that merits all the attention it has recently receiving from the leadership of the WTO. Opportunities abound in the shaping of aid for trade to benefit many constituencies, including the WTO, developing nations, donors, and the aid and trade legal communities. The international trading system has much to gain from the effective use of aid for trade as a tool for fulfilling the promise of the Doha Development Agenda, alleviating global poverty, and giving developing nations a well-deserved place at the table in the global trade regime. However, each group must also do its share in making aid for trade a success. The roadmap provided in this article will hopefully push all relevant players on the right path to making aid for trade a model a reality and a success.