

# The Doha Round, Justice, and the Transformative Power of Crisis<sup>1</sup>

## I Introduction

The current financial crisis highlights the importance of trade liberalization for continued global economic well-being and may also provide the necessary impetus to get the WTO Doha Round moving again. Concluding Doha is not just important for economic growth – it is important for the larger question of economic fairness. In discussing his goals for the recent London G20 meeting, Prime Minister Gordon Brown stated as follows: “I think that we can show that globalisation need not be a force for injustice but can be a force for justice on a global scale.”<sup>2</sup> Brown thus articulates the theme of my comment – how the Doha Round and our responses to the current financial crisis (the two have become linked for good or ill) can be used to make good on this challenge and help render globalization a force for justice.

The language of global justice has become increasingly prominent in recent years, often in connection with protesting the work of the WTO and other institutions prominently associated with globalization (such as the IMF). Interestingly enough, however, the use of justice language has not been limited to anti-globalization protestors. None other than Valentine Rugwabiza, the current WTO deputy director general, recently said that postponing the Doha Round would be “immoral,”<sup>3</sup> since the global

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<sup>2</sup> “Brown calls for global unity on crisis, IMF reform,” Agence France-Presse, March 28, 2009, <http://newsx.com/story/48740> .

<sup>3</sup> “WTO says G20 leaders must focus on Doha Round,” Reuters India, March 12, 2009, <http://in.reuters.com/articlePrint?articleID=INIndia-38476820090312>.

economic contraction and the tightening of trade credit is reversing anti-poverty gains.<sup>4</sup>

In my view, articulating the debate over trade policy in terms of global justice is both the right approach and long overdue. However, recent comments notwithstanding, the concept of justice has traditionally been kept at arms length from trade law and trade policy, which as I have argued elsewhere, is a mistake.<sup>5</sup> In fact, globalization is clarifying why the international economic law system has always been about justice, necessarily so, even when it has not necessarily been just. For this reason, one of my goals here is to explain why I wholeheartedly agree with the sentiments expressed by Prime Minister Brown, that globalization can be and should be about justice.

First, I am going to say a few words about global justice. I will then, briefly set some of the context within which to evaluate the Doha Round, and highlight some of the legal and financial issues at stake for developing countries in its success. Finally, I will close with an examination of the status of the Round with respect to the current financial crisis.

My prediction is that we will see the Doha Round successfully concluded in the near future, once the new administrations in the U.S., India and the EU settle in.<sup>6</sup> Underlying this prediction is the fact that the financial crisis has increased the need for a market-based stimulus and economies are

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<sup>4</sup> By some estimates, an additional 100 million people have been thrust into poverty, which could lead to the deaths of an additional 500,000 children simply from poverty. "Brown calls for global unity on crisis, IMF reform," supra note 2, citing World Bank reports. 500,000 children is a startling statistic, roughly the equivalent of the death of all the children born in Australia for two consecutive years. A better example of the human stakes involved in global trade is difficult to find. Along these lines, the Australian philosopher Peter Singer has written a new book in which he puts the plight of poverty stricken children at the center of his arguments for global justice. *The Life You Can Save: Acting Now to End World Poverty*. (Random House 2009).

<sup>5</sup> *Trade, Inequality and Justice* (Martinus Nijhoff 2003).

<sup>6</sup> The US administration is relatively new, Indian general elections finished in May 2009, and the EU's Commission and Presidency change over in the fall of 2009.

already contracting, making the trade expansion argument more powerful. This opportunity to conclude the Round, and perhaps in doing so reform the IMF, may well move globalization in a more just direction, illustrating what one writer has called the transformative power of crisis.<sup>7</sup>

## **II. Two Takes on Global Justice**

Global justice is a large topic which could be a lecture of its own. Let me confine myself in this context to making two observations concerning how international trade, and globalization generally, are highlighting questions of justice.

Traditionally, justice has been commonly regarded by political theorists (such as communitarians and social contractarians) as a question within national communities, not between them. For a variety of theoretical and pragmatic reasons, obligations of justice were thought to be confined within states and not to cross national boundaries.<sup>8</sup> Between states, political realism governed. As Thucydides wrote, “the strong do what they will, and the weak suffer what they must.” In the view of many commentators, however, this approach is no longer tenable.

### **A Globalization and Global Social Relationships**

To begin with, as I have argued elsewhere, globalization is changing the nature of our social and political relationships, rendering obsolete the communitarian notion of boundaries to justice.<sup>9</sup> By interconnecting us across the globe in ways that used to be possible only within smaller

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<sup>7</sup> Robert Alter, *The Transformative Power of Crisis* (HarperOne 2000).

<sup>8</sup> See, e.g., David Miller, *Citizenship and National Identity* (Blackwell 2000); John Rawls, *The Law of Peoples* (Harvard University Press 1999).

<sup>9</sup> “Globalization, Global Community and the Possibility of Global Justice,” (February 4, 2005). *Boston College Law School. Boston College Law School Faculty Papers*, Paper 33, <http://lsr.nellco.org/bc/bclsfp/papers/33>.

communities, globalization is laying the foundations for a truly global social space, one in which critics of global justice must confront the permeability of borders, the rise of transnational networks, the rapid global movement of information and capital, and the increasing economic interdependence of our national economies. We understand as we never did before, instantaneously and graphically, how our decisions as citizens, producers, investors and consumers are affecting each other everywhere on the face of the earth. This is a critical element in the emergence of global solidarity, a necessary element in global justice that makes others' suffering around the globe "our" business.<sup>10</sup> Communitarians who view a distinctive normative community as a necessary precursor to justice must recognize in globalization an engine creating that community.

### **B Justice and Distributive Institutions**

Separate from the question of global community, the interdependence of the global economy is another way to understand the claims which justice makes on us. Domestic political theorists (in particular social contractarians) have long maintained that institutions which allocate social goods such as wealth, opportunities, rights, and duties are quite properly the subject of theories of justice. Domestic tax law is often proffered as representative of allocative social institutions, implying that anyone subject to tax law's distribution (and redistribution) of wealth, burdens and opportunities is entitled to just treatment under it.

The international economic system, in particular through its regulatory bodies such as the WTO, the IMF and the World Bank, are precisely such allocative institutions, but at the global level. Wealth, opportunities, rights and duties are allocated among states via the policy

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<sup>10</sup> Id., at 17.

choices and legal instruments of such institutions. Given that this is the case, there is no principled reason why theories of justice should not be applied to the work of such organizations – that is what theories of justice do.

So, under either approach, when we look at the Doha Round, the reasons why it was launched, the issues at stake, and the consequences of failure, it is quite proper to understand that this is a site where global justice is being defined, enhanced or retarded. This is the larger theoretical point which underlies the observations of politicians such as Gordon Brown. A choice to ignore concepts of justice when discussing trade is still a choice, and may well be both counterproductive and immoral.

Insofar as the global economic system is about justice, it also becomes quite important to count the costs of failing to address claims of injustice. Justin Malbon has been doing some very interesting recent work on the subjective aspects of economic fairness, specifically on the costs of creating unequal bargains (such as resentment), which powerful bargainers need to take into account.<sup>11</sup> Putting this into an international context, powerful states can ill afford to ignore claims of injustice due to the instability and resistance such claims can lead to.<sup>12</sup>

With that as background, let's turn to the Round itself.

### **III. History of the Doha Round**

#### **A The WTO as a Member-controlled Organization**

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<sup>11</sup> "Why Parties Enter Into Unfair Deals: The Resentment Factor," unpublished manuscript on file with the author.

<sup>12</sup> Frank J. Garcia, "Trade Justice and Security [Revised Draft Dec. 9, 2005]" (October 28, 2005). *Boston College Law School, Boston College Law School Faculty Papers*, Paper 112, <http://lsr.nellco.org/bc/bclsfp/papers/112>.

It is important to remember that the WTO is a member-controlled international organization. As such, it is relatively weak as compared to other large international institutions. Yes, it has a relatively strong legal system to enforce obligations. But it has no legislative capacity to create rules. Trade rules are created through periodic negotiation sessions called “Rounds.” One can analogize this to a government with executive and judicial branches but no legislature – instead, there are periodic constitutional conventions whenever rules must be created or changed.

This approach has its roots in the GATT, the predecessor to the WTO.

## **B GATT and Developing Countries**

Formed in 1947 as part of the Bretton Woods family of institutions designed to manage the world economy after WWII, the GATT (General Agreement on Tariffs and Trade) was historically an organization which favored developed countries, initially by sheer numbers (developed outnumbered developing members), and later by virtue of the influence of economic size in trade negotiations.

Historically, developing countries have been what we call “rule takers” in trade law.<sup>13</sup> Other countries are rule makers, and developing countries must accept the rules as given. Developing countries were forced to seek other forums (the UN, for example) in which to try and make or change economic rules. They were largely unsuccessful, however, in moving the game into a different forum. Trade regulation stayed in the GATT.

However, at least under the old system (prior to the most recently completed Uruguay Round) they had some flexibility in choosing which

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<sup>13</sup> See generally Robert E. Hudec, *Developing Countries in the GATT Legal System* (Aldershot 1987).

trade agreements other than the primary GATT treaty they would join and which they would not, depending on the level of obligation they were prepared to undertake. All of this changed with the Uruguay Round

### **C Uruguay Round**

As with any Round, the Uruguay Round (which launched the WTO) was a grand bargain with many deals and many trade-offs. Michael Finger (a former World Bank economist) has written that the Uruguay Round Grand Bargain turned out to be a bad bargain for developing countries.<sup>14</sup> While global trade increased to the tune of hundreds of billions of dollars, much of that benefit was realized only by developed nations.

The idea was that developing countries would accept new, more burdensome rules about IP, subsidies and services in exchange for a binding dispute settlement mechanism (the DSU) and reduced barriers to their exports in agriculture and textiles. Most importantly, members had to agree to the single undertaking approach: sign on to all the agreements, or risk getting locked out of the whole thing. They were granted some additional time to implement the new rules, but the time granted was not keyed in any way to their actual capacity to implement and absorb the effects of the new rules.

The reality was that the tradeoffs were poorly understood at the time by developing countries, which have always struggled under limited capacity for trade negotiation. The rules were phased in too quickly and the developed countries failed to deliver in key areas (liberalized agricultural

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<sup>14</sup> “The Unbalanced Uruguay Round Outcome,” World Bank Policy Research Paper 2732, December 2001, [http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2002/01/18/000094946\\_02010904095672/Rendered/PDF/multi0page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2002/01/18/000094946_02010904095672/Rendered/PDF/multi0page.pdf).

trade being the chief example). Moreover, the single undertaking approach meant loss of market protections and policy space for developing countries. A particular issue for developing countries was the language in which many of their most important provisions were drafted.<sup>15</sup> Under the Special and Differential Treatment (S&D) approach, many concessions to developing countries were consigned to weak, imprecise, unenforceable language. This has the real world effect of making developing world concessions binding and enforceable, and developed world concessions illusory.

#### **IV The Doha Round**

Developing countries have been looking for an opportunity to revisit and renegotiate the terms of this bargain since 1994. In Seattle in 1999 they were successful for the first time in halting the trade negotiation process unless their concerns and demands were taken seriously. It is important to keep in mind Justin Malbon's point about the consequences of creating resentment in unequal bargains through the perception of injustice. While the Uruguay Round may have objectively increased trade and wealth the world over, the disproportionate allocation of the gain combined with the perceived unfairness of the bargaining process shaded the Round as a failure in the eyes of the developing nations, making them wary of future negotiations not effectively addressing their concerns – hence, the Doha Round.

##### **A Launch of the Round**

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<sup>15</sup> See generally Frank J. Garcia, "Beyond Special and Differential Treatment," 27 B.C. Int'l & Comp. L. Rev. 291 (2004) (nonbinding language problem).

The Doha Round (launched in Doha, Qatar in 2001) was to be *the* Development Round. Its broad agenda included both developed and developing country concerns, but was framed as an opportunity for developing countries to bargain on a more equal footing, and realize their “fair share” of the expected trade-based wealth increases.

In general, the goals for any Round include negotiating binding concessions on increased market access for the goods one needs to export, hopefully without giving too much away; and changes to particular rules that are posing problems for one’s exporters. As a development round, the focus of Doha was intended to be on the types of market access and legal reform most important to developing countries, with a commitment on the part of developed countries to limited reciprocity, i.e., they were prepared to give more than they demanded from developing countries.

The Doha Round did see some early results with respect to IP issues, HIV/AIDS drugs and the TRIPS agreement. However, the Round became mired in seemingly intractable disputes over agriculture and non-agricultural market access as early as 2005.

## **V. Where the Doha Talks Foundered**

Agriculture is the most sensitive issue in trade today. This is due both to the political power of domestic agriculture lobbies and the high levels of subsidies in developed countries (obviously, the two are intimately related). In particular, levels of US and EU agricultural subsidies are enormous. The effect of such subsidies is to boost exports from developed nations and lower world prices, both of which hurt developing countries. On the export side, developing nations face decreased export opportunities and lower prices in the world market for their own products. On the import side, the domestic

agricultural sectors in net food importers such as India, Indonesia and the Philippines face low cost competition from the big exporters (US, Australia, Thailand, Uruguay, the EU and Canada).<sup>16</sup> Moreover, since agriculture is the primary means by which developing nations can begin to climb up the economic ladder (rain and soil are free, after all) this warping of the international market inhibits the growth potential of the affected developing nations.

The specific impasse which derailed the July 2008 negotiations concerns a very technical point about emergency measures demanded by India and China to protect their producers from high volumes of food imports. The mechanics of special safeguard measures for developing country food producers in net food importing countries seems both minor and uncontroversial, but fears of the effect on developed nations exporters if triggered lead to an impasse. I won't say more about that now, but suffice to say it is not the sort of issue anyone expected would derail an entire negotiation.

The more substantive issues underlying the impasse involve the levels of US and EU subsidy reduction commitments, and their basic negotiation approach. The US took the position that it would not agree to further cuts in domestic farm subsidies and non-agricultural tariffs until advanced developing countries (India, China, and Brazil) further reduced their non-agricultural tariffs. The US also objected (along with the EU) to Indian and Chinese agriculture protection measures.

This approach is at odds with the basic thrust intended, at least ostensibly, for the Doha Round, which was not meant to be fully reciprocal

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<sup>16</sup> The presence of developing countries on both sides of this equation illustrates one of the challenges of agricultural trade liberalization – it cuts across developed/developing lines.

but rather was to favor developing countries; developed nations were not to seek full reciprocity from the lesser developed nations. In return for limited reciprocity, the developed world would diminish the indignation and blowback from previously skewed negotiations (remember Justin Malbon) and reap long-term rewards as increased prosperity in developing nations lead to increased markets for developed nation goods and services. Instead, further industrial tariff cuts, and fewer safeguard mechanisms, were now being asked as the price for agricultural subsidy reductions. In my view, it was that shift, more than the technical impasse, which led to the suspension of the talks.

## **VI. What is at Stake for Developed and Developing Countries if Doha Fails?**

Initial estimates of foregone trade revenues vary wildly (and reflect pre-financial crisis assumptions), but estimates of the costs of a failed Doha range as high as almost 300 billion US dollars a year by 2015. It is now difficult to accurately gauge lost revenue in view of financial crisis, but it is safe to say it would be in the billions of dollars per year. In particular, losses for developing countries are high, and include the loss of enhanced access to wealthy countries' agriculture and merchandise markets and services, loss of the proposed deal on duty free/quota free access for LDC exports, loss of increased south-south trade, and loss of enhanced mobility for service providers (so-called Mode 4). Slower rates of growth mean a slower lift out of poverty (in fact, possible regression by some into more extreme poverty), which aid alone cannot make up for. Developing countries can ill afford any of this.

Moreover, if the goals for any round include binding concessions and binding rule changes, then what is at stake from a legal perspective is the failure of efforts to strengthen S&D language and the failure to reform the DSU (this is a separate, stalled track but the success of Doha would help to resolve this as well).

The primary alternative to multilateral trade liberalization is increased bilateral and regional trade agreements. However, this puts developing countries in their weakest position in terms of leverage. A good example of this would be the US regional FTA program, in which the vast inequality between the U.S. on the one hand and any one of group of Latin American countries on the other sets the scene for one-sided, exploitative agreements.<sup>17</sup> Moreover, such local agreements threaten the entire WTO system by undermining the framework of shared multilateral treaty rules and “most favored nation” obligations across the entire WTO membership.

In addition to their own lost economic opportunities, developed countries lose an important opportunity to make a politically vital commitment to a more equitable trading system. The failure of Doha will make the launch of a subsequent “non-development” round impossible. Putting further trade liberalization on hold is in no country’s interests, developed or developing.

## **VII. Doha and the Global Financial Collapse: The Transformative Power of Crisis**

This brings us to the question of Doha and the current financial crisis.

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<sup>17</sup> Frank J. Garcia, "Is Free Trade "Free?" Is It Even "Trade?" Oppression and Consent in Hemispheric Trade Agreements" (January 17, 2007). *Boston College Law School, Boston College Law School Faculty Papers*, Paper 186, <http://lsr.nellco.org/bc/bclsfp/papers/186>.

When I first spoke on the risks of a collapsed Doha Round last year, the principal consequences of failure were the two I have summarized above: the failure to realize economic and legal benefits expected from the Round and an increase in bilateral/regional trade activity (which, as stated above, is disadvantageous for developing countries).

Now with the advent of the global financial crisis there is a third risk: increased protectionism and further contraction of the global economy. As you know, there is a history of interrelationship between financial crisis and trade crisis: the Great Depression and subsequent tariff escalation led to a longer and deeper economic decline worldwide. However, out of the crisis of the Great Depression and the economic devastation of WWII came Breton Woods and the GATT which, although skewed towards developed nations, unquestionably contributed to the dramatic trade-led global expansion since WWII.

Now many sources indicate that for the first time since 1982, world trade volumes are expected to fall in 2009; the WTO estimates a significant 9% drop in trade volumes, the steepest drop since the Great Depression. The World Bank estimates that the world economy could contract 1-2% this year, again the worst performance since the Great Depression. The successful completion of the Doha Round could help this bleak outlook in various ways.

1. Doha as “Insurance Policy”

First, Doha acts as an insurance policy against a return to protectionism. Current tariff levels are in general significantly below bound levels (bindings – or treaty-based tariff rates - average 33% higher than applied rates for the G20, and as much as 100% higher for developing countries such as India). This means that for many nations there is no legal

impediment to a dramatic increase in tariff rates - a ruinous level of protectionism is just a click away and fully legal under the GATT system. Doha would lower bound tariff rates to bring them more in line with current actual tariffs. This might not have an immediate effect on trade volumes, but it removes the risk of future tariff hikes – hikes which hold the potential to devastate an already crippled world economy. Moreover, exporters factor in such risks when deciding where and what to trade. Lowering the risk lowers their liability and by doing so indirectly encourages increased trade.

Is this risk genuine? At last year's G20 summit on the financial system, all 20 states pledged not to introduce any new trade or investment restrictions for 12 months. However, the World Bank has since reported that 17 out of 20 have violated that promise. The cry for protectionist policies (from "Buy America" to increasing tariffs) grows louder in times of crisis, as they may appear to provide short term benefits to reeling domestic economies. In the long term, however, the inevitable retaliatory measures will create a downward spiral of "beggar thy neighbor" reciprocity.

## 2. Doha Round as a "Stimulus Package"

Moreover, the Doha Round could itself become a sort of stimulus package, consisting of the stimulus effect of increased market access, increased trade finance credit, and the momentum from a concluded Round. In that sense, concluding Doha is stimulus on the cheap; since France and Germany and the British treasury have taken the position that further stimulus spending is unsustainable, states are looking for non-deficit spending approaches to economic stimulus, and trade liberalization is precisely that kind of measure.

This can be politically costly, particularly since it will mean confronting entrenched interests such as agribusiness. However, the

financial crisis may have created just the sense of urgency that might be necessary to remove some of the last obstacles to further reductions.

### 3. The Doha Round and a New Bretton Woods System

This past fall world leaders began calling for a new IMF as part of their response to the deepening financial crisis. Successfully concluding the Round would be an important part of any overall reform to global financial architecture, enabling a positive synergy between reformed global financial regulation and newly invigorated, and more equitable, trade liberalization.

## **VIII. Conclusion**

It is interesting to note that we stand at a juncture very similar to the one in the early 20<sup>th</sup> century, out of which the GATT/WTO system was first created, with a global depression, the risk of increased protectionism, and calls to create a new Bretton Woods. Does this mean the Doha Round might actually succeed? Bretton Woods was only able to succeed because of the extraordinary pressures on the post-war economy. Will Doha benefit from the economic downturn in much the same way? Last year, I would not have said the chances of success were good. Now, in light of the global economy, I would say that the prospects for a conclusion to the Round are significantly improved.

This could have some tangible benefits for all participants in the global economy, developed and developing countries alike, as outlined above. But would it be enough? Is it the right place to put our emphasis? Some commentators argue that Doha is really a distraction from the larger picture of global justice and underlying global economic inequality. Others argue that the Doha agenda (tariff and subsidy reductions in agriculture) is

now marginal, that the real key to moving forward is misaligned exchange rates, energy policy and environmental protection.

For the reasons outlined above, I am not convinced that the Doha Round is marginal, even though the gaps mentioned above are real. Particularly at this time of crisis, I would argue that the benefits of even partial regulatory action outweigh the risks of inaction. This is particularly so, returning to our justice theme, because of the situation of developing countries. Global justice means global social policies must protect the most vulnerable first. Returning to the concerns raised by the WTO deputy director general which began this comment, it would be unconscionable to allow the Round to languish, given that developing countries are the least able to successfully ride out the global downturn, thus allowing more people to slide back into poverty, and more children to die unnecessarily. I think it is important for all of us as citizens to do our part to maintain the pressure on our leaders to keep global justice and the concerns of the most vulnerable states at least in the rhetoric of globalization, and hopefully through the decisions taken in 2009 and 2010, as part of the reality of globalization.