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The High Stakes of WTO Reform

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BEHIND THE SCENES AT THE WTO: THE REAL WORLD OF TRADE NEGOTIATIONS/THE LESSONS OF CANCUN. By *Fatoumata Jawara and Aileen Kwa.* London: Zed Books. Updated Edition, 2004. Pp. vi, 329. Cloth, $58.95; paper, $19.95.

INTRODUCTION

Behind the Scenes at the WTO definitively exposes how the trade-negotiation process makes it possible for a few rich countries to dominate the trade agenda at the expense of all other countries. It is one of the first studies that authoritatively shows how trade negotiations have developed into "a game for high stakes, between unequally matched teams, where much of the game is played with few rules and no referee" (p. 50). The book attributes the deadlocked nature of the Doha Round of multilateral trade negotiations and the recent disruptions of the World Trade Organization's ("WTO") ministerial meetings to the secretive and noninclusive nature of negotiations and decisionmaking at the WTO.[1] Authors Jawara[2] and Kwa[3] base their conclusions on semistructured interviews with a broad cross-section of trade officials from all over the world who represent their governments in thirty-three missions at the WTO, on interviews with staffers of the WTO Secretariat, and on their own research.[4]

Through numerous examples, the authors show why developing countries in the past have been unable to prevail over the big trading countries at the WTO (pp. 150–83). The authors conclude that to be effective, low-income developing countries must either unite as a bloc (p. 182) or hang on to the hope that they will prevail by virtue of the strength or merits of their arguments (p. 150). By captivating their readers with the intrigues behind the scenes at the WTO, the authors introduce a welcome realism about how

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1. While the 2003 edition of the book focuses primarily on the 2001 Doha Ministerial and the lead-up to it, the 2004 updated edition also includes an extensive introduction focusing on the 2003 Cancun Ministerial and its aftermath.

2. Freelance International Trade and Development Analyst.

3. Trade Analyst, Focus on the Global South (a policy research and activist organization).

4. Pp. 1–2. To their credit, the authors note that the sources of the information on which the book is based "are well-informed, reliable sources inside the WTO system; most observed the events they described at first hand; and their accounts have been independently corroborated wherever possible." Pp. 148–49.

trade negotiations actually work[5] and how developing countries "find themselves locked in a vicious cycle of political impotence, unfair trading rules and weakening trade performance" (p. 182).

It is a book that the theoreticians of the WTO cannot afford to ignore because while it confirms much of the theoretical literature, it also adds significant insights. First, I will examine this literature before showing how Jawara and Kwa go beyond it. This literature, based on anecdotal evidence but primarily driven by theory, has sought to explain the disruptions and deadlock in multilateral trade negotiations, particularly since the collapses of the Seattle Ministerial meeting in 1999 and the Cancun Ministerial in 2003. The basic premise in this literature has been that the WTO faces a democratic deficit arising from lack of transparency in the negotiating process and lack of diverse participation of stakeholders within the WTO.[6] Previous scholarship on multilateral trade negotiations has similarly noted the "pyramidal bargaining" model of great power dominance; others have referred to it as "vertical multilateralism."[7] During the cold war, the United States supported multilateralism and international economic institutions as a strategy to persuade industrial nations to join a U.S.-led alliance in support of free markets and against the Soviet Union.[8] From this vantage point, multilateralism was not a commitment to cooperating on issues of third world development, but rather to establishing a U.S.-led commitment in favor of free markets and U.S. geopolitical interests.

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5. Gregory C. Shaffer's article, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1, 4 (2001), also advocates the adoption of a sociolegal approach that focuses on a micro, rather than a macro, understanding of those elements that actually shape legal outcomes in connection with the trade regime. *See also* GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION, at ix–xi (2003).

6. Robert Keohane and Joseph Nye point out that this lack of participation and transparency amounts to a democratic deficit. Democratic deficit thus reflects what they argue is a "lack of effective politicians who link organizations to constituencies." Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, *in* EFFICIENCY, EQUITY AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 264, 265 (R. Porter et al. eds., 2001).

7. GILBERT R. WINHAM, INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION 354 (1986) (arguing that pyramidal bargaining during the Tokyo Round "whereby negotiations were initiated by the major nations . . . only after important decisions had been made and compromises had been struck . . . . caused resentment, particularly among the developing countries which were most frequently excluded from the process"); Miles Kahler, *Multilateralism with Small and Large Numbers*, *in* MULTILATERALISM MATTERS 295, 302–05 (John Gerard Ruggie ed., 1993) (describing pyramidal bargaining in the early years of the General Agreement on Tariffs and Trade ("GATT")); *see also* WINHAM, *supra*, at 64–65, 174–75, 177–78. Kahler notes that "hegemonic power has often been portrayed as the only solution to multilateral collective action dilemmas after 1945 . . . ." Kahler, *supra*, at 299. Kahler is skeptical of this view; for his proposed solutions for negotiating in big numbers, see *id.* at 316–21.

8. MELVYN P. LEFFLER, A PREPONDERANCE OF POWER: NATIONAL SECURITY, THE TRUMAN ADMINISTRATION, AND THE COLD WAR 17 (1992); *see also* Gautam Sen, *The United States and the GATT/WTO System*, *in* US HEGEMONY AND INTERNATIONAL ORGANIZATIONS 115, 117 (Rosemary Foot et al. eds., 2003) ("US paramountcy and the challenge to it from communism defined the politics of the post-Second World War world. The political, economic, and military primacy of the US was the most significant influence on the negotiations over the post-war international economic order.").

In the late 1980s, when the United States enhanced its controversial § 301 unilateral powers to punish violators of its trade rights without recourse to the multilateral GATT framework, some scholars argued that this version of "muscular" or great-power leadership is permissible as long as it increases trade liberalization, even if such unilateralism is inconsistent with the letter and spirit of the WTO's compulsory dispute settlement system.[9] Thus multilateralism within the GATT was for the most part limited to what the United States regarded as its core values. In the absence of agreement among its allies, the United States often abandoned these values for outright U.S. leadership. Medium- and low-income countries that dissented from these values or rejected U.S. leadership often felt the brunt of U.S. will.[10]

Behind the Scenes at the WTO insightfully exposes how pyramidal bargaining works within a highly secretive organization in which decisionmaking processes are still dominated by its richest members: the United States, the European Union, Canada, and Japan (referred to as the Quad), just as in the old GATT (pp. 56–59, 149). Thus, decisions on important issues are made without broad-based consultation with the entire WTO membership[11] and the domestic constituencies of member countries. The decisionmaking process at the WTO is further hobbled by the fact that most of the least-developed countries are not even represented in Geneva, where these decisions are made (pp. 22, 274, 293). Even developing countries that have representation in Geneva are stretched too thinly to attend the more than one thousand formal and informal meetings, symposia, workshops, and seminars held under the auspices of WTO bodies to negotiate or discuss new or existing trade rules or disputes about the application and interpretation of these rules (p. 22). In this and many other ways, *Behind the Scenes at the WTO* exposes some of the theoretical literature's mythical depiction of the WTO as a faceless, bureaucratic, and technocratic institution. *Behind the Scenes at the WTO* also sheds new light by exposing the manner and extent to which the views of many in its membership are underrepresented, if not entirely absent from the table.

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9. Robert E. Hudec, *Thinking About the New Section 301: Beyond Good and Evil*, *in* AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM 113 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990). A WTO panel later declined to find the powers in § 301 to be inconsistent with the WTO's compulsory dispute settlement system under which only the dispute settlement body can find violations of a member's WTO obligations. *See* Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, ¶ 7.22, WT/DS152/R (Dec. 22, 1999).

10. *See* GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER (2004); James Thuo Gathii, *Humanizing the Pax-Americana Global Empire*, 4 WASH. U. GLOBAL STUD. L. REV. 121 (2005) (book review).

11. The exclusion of developing countries from behind-the-scenes negotiations and the disquiet among them dates as far back as the Kennedy and Tokyo GATT rounds. *See* WINHAM, *supra* note 7, at 354 (noting that pyramidal bargaining caused resentment among developing countries). Winham also notes:

> The major political difficulty in concluding the Tokyo Round was the opposition of the developing countries. This opposition was a product of several specific disputes and of a more generalized belief that the overall benefits of the accords were not sufficiently in the interests of developing countries to warrant their acceptance.

Id. at 303.

Ultimately, *Behind the Scenes* goes one step beyond the current theoretical literature on the nature of reforms needed at the WTO. The major premise in this literature has been that organizational and procedural reforms at the WTO will resolve its legitimacy crisis. Jawara and Kwa recognize that while transparency and organizational reforms are important for the legitimacy of the WTO, reform must also focus on the manner in which the WTO agenda is currently biased in favor of the interests of its most-developed members at the expense of less affluent members.

Behind the Scenes shows the tactics deployed by developed countries to inhibit developing countries from negotiating for more favorable rules or to incapacitate them from changing preexisting rules that are rigged against them, such as the rules in the agricultural sector.[12] These tactics include "divide and rule" strategies against coalitions opposed to developed-country interests, arm-twisting countries and pressuring delegates into submission, black-listing ambassadors opposed to the agenda of the Quad countries and the United States in particular, and drafting and directing texts while ignoring the views of developing countries (pp. xxxv–xlvi, 148–83, 272–76). These tactics help developed countries to push through their agendas over the objections of developing countries. By exposing these tactics, the book recognizes that power imbalances between powerful and less powerful countries in setting the agenda is a factor in the crisis at the WTO. Most simply put, it is not that developing countries are suspicious of freer trade, as a former Director General of the WTO has argued,[13] but rather that they are suspicious of the rigged and distorted nature of the decisionmaking process and its outcomes, which—contrary to what the WTO stands for—often look little or nothing like free-trade rules.

Like Jawara and Kwa's book, this Review proceeds from the premise that the ascendant analysis of WTO reform, which focuses on efforts to increase public involvement and to improve transparency and reduce secrecy, may be insufficient to counterbalance the dominant trade interests at the WTO that currently favor the richest countries in the world.[14] If undertaken in isolation from some of the pressing needs of developing countries, such as comprehensive agricultural reform, well-meaning transparency and participatory reforms will prove ineffectual to resolve the legitimacy crisis at the WTO. Indeed, if the trade agenda continues to expand into areas in which developed countries have a comparative advantage while leaving unaddressed outstanding issues within existing agreements that are currently inimical to the interests of developing countries, such expansions will likely erode the gains of any reforms aimed at the effective and full participation

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12. I develop these arguments in James Thuo Gathii, *Process and Substance in WTO Reform*, 56 RUTGERS L. REV. 885 (2004).

13. MIKE MOORE, A WORLD WITHOUT WALLS: FREEDOM, DEVELOPMENT, FREE TRADE AND GLOBAL GOVERNANCE 133 (2003).

14. *See* Gathii, *supra* note 12. Jawara and Kwa note that even if all the procedural reforms they propose "were implemented in full, while they might help to *limit* the major developed countries' abuse of their political and economic power, they would fall far short of *preventing* it." P. 278.

of developing countries and their citizens in the decision- and policymaking of the WTO.

Thus, while increasing public involvement and improving transparency are critical to give all WTO members fair representation in decisionmaking, there is an equally compelling case for addressing the bias by which the industrial and service sectors are more liberalized than agriculture and other sectors important to developing countries. It is my basic claim that organizational and procedural deficiencies at the WTO only partially account for the collapse of the ministerial conferences in Seattle and Cancun and the legitimacy crisis of the WTO in general. Substantive issues such as the exclusion of agricultural and commodity trade from the free-trade mandate of the GATT and WTO and the bias favoring sectors in which developed countries have a comparative advantage further exacerbate the legitimacy crisis of the global trade regime. I therefore join with Jawara and Kwa when they regard as interrelated and inseparable their proposals for reforming the negotiation framework by making it more transparent on the one hand, with reforms aimed at addressing substantive issues of interest to developing countries—such as development and access to essential medicines—on the other. As Ann Capling has persuasively argued, internal governance reforms are "intrinsically linked" to "developing country problems in the WTO."[15]

In Part I, I summarize the main themes in *Behind the Scenes at the WTO*. In particular, I focus on Jawara and Kwa's discussion of the breakdown of the negotiation process and inattention to questions of development within the WTO. In Part II, I discuss how the dispute-settlement system and the rigged nature of the rules relating to agricultural trade compound the legitimacy crisis in the WTO. In the Conclusion, I reflect on some reform proposals.

I. Major Themes in *Behind the Scenes at the WTO*

A. *Problems with the Negotiating Process*

The authors contend that the 1994 Uruguay Round agreements as well as the 2001 Doha negotiating mandate (p. xv) were imposed on developing countries by developed countries (pp. 62–64, 67, 78). The result has been that the playing field of the trading regime—its benefits and its negotiating framework—has been lopsided, favoring developed countries and harming the interests of developing countries (pp. xi, 93, 118–27, 269–71). On the very first page of the book, the authors argue that while developing countries "profoundly *dis*agreed" with the negotiating agenda at the 2001 Doha Ministerial conference, developed countries beat them "into submission" after a night-long meeting held after the scheduled end of the ministerial and after "the departure of some developing-country delegations" (p. xv; *see*

15. Ann Capling, *The Multilateral Trading System at Risk?: Three Challenges to the World Trade Organization*, *in* The WTO and the Doha Round: The Changing Face of World Trade 37, 50 (Ross P. Buckley ed., 2003); *see also* Gathii, *supra* note 12.

also p. 103). In addition, delegates from francophone countries participated in the Doha Ministerial meeting without simultaneous interpretation or French translations of the documents under discussion (pp. 97–98). The book traces the tactics that developed countries and the WTO Secretariat have used to ensure that their agenda prevails. The Cancun (pp. lvii–lxxii) and Doha (pp. 196–215, 222–23, 227–30, 275–77, 304–06) Ministerial meetings are the most important case studies examined in the book. The Hong Kong Ministerial of December 2005 was held after the publication of the 2004 edition of Jawara and Kwa's book and is not therefore examined in this Review.

Jawara and Kwa argue that in return for allowing the Doha Round of talks and to avoid the lopsidedness of the Uruguay Round agreements, developing countries were promised three concessions: first, that a development agenda would be at the heart of the new negotiations; second, that explicit consensus would be a prerequisite to negotiating new trade agreements to encompass transparency in government procurement, trade facilitation, competition, and investment ("the Singapore issues"); and third, that there would be an agreement on a Ministerial Declaration on the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs") and public health, addressing problems of access to essential medicines and focusing on permitting compulsory licensing. The authors argue that in light of the events surrounding the failure of the Cancun Ministerial meeting in September 2003, "all three [promises] were worthless" (p. xv).

The authors celebrate the fact that at the Cancun Ministerial, developing-country unity—particularly through the coalition of twenty developing countries that formed ("the Group of 20")—prevented developed countries from extending the Cancun Ministerial into the wee hours and playing "last-minute brinkmanship to ram through their agenda" (p. xvi; *see also* pp. 110–12, 135) as they did at the Doha Ministerial (pp. 102–05). By announcing the end of the Cancun Ministerial conference at 2:30 P.M. on its last scheduled day, September 14, 2003, the Mexican Foreign Affairs Minister was acquiescing to the "disbelief, acrimony and anger"—especially within the Group of 20—that the positions of developing countries had been "entirely disregarded" in the September 13 draft of the Ministerial Declaration that would otherwise have emerged from Cancun (p. xvi). For example, the draft included a negotiating mandate on the Singapore issues although there was no explicit consensus on proceeding with any of them.

Pascal Lamy, the European Communities Trade Commissioner at the time of the Cancun Ministerial and now the Director General of the WTO, summarized the failure of the meeting in the following terms: "The WTO remains a medieval organization. . . . The procedures and rules of this organization have not supported the weight of the task. There is no way to structure and steer discussions amongst 146 members in a manner condu-

cive to consensus. The decision-making needs to be revamped."[16] Although the authors are skeptical of his specific reform proposals insofar as he seeks to create a Security-Council-like executive arm within the WTO as proposed in the Sutherland Report,[17] they certainly share his assessment that the WTO's negotiating process has broken down and—like some developing-country delegations—they propose a more democratic and transparent process through which all views will be taken into account (pp. xxii, 222–27).

Jawara and Kwa then consider how the Cancun Ministerial exemplified the breakdown of the negotiating process through a discussion of how the Singapore issues, agriculture, cotton, TRIPs and public health, and development issues were addressed. A key objection to opening negotiations on the Singapore issues—besides lack of explicit consensus—was the fact that developing countries had not had an opportunity to examine the proposals put forward as annexes to the proposed Cancun Ministerial Declaration (p. xxv). The position taken by developed countries regarding the Doha negotiating mandate was that it was sufficiently flexible to permit proposals for commencing negotiations or for setting a negotiating agenda on some or all of the issues (pp. xxiii–iv). This position was in direct contradiction to the understanding of developing countries that "explicit consensus" in the Doha negotiating mandate meant that unanimity among all countries was a prerequisite for negotiating any new commitments or even for discussing negotiation modalities (p. xxv). Jawara and Kwa note that the European Union's insistence on proceeding with negotiations on all or some of the Singapore issues may very well have been the "poison pill"[18] that killed Cancun by diverting attention away from the more contentious issues of agriculture on which the European Union was unwilling to yield (p. xlviii).

It is not at all clear that the European Union was willing to make any meaningful concession in agriculture. Like the United States, the European Union's lack of commitment to genuine agricultural trade reform is evidenced by its refusal to commit to specific tariff reduction targets, to reduce its huge domestic support programs, such as cotton subsidies, and to end export subsidies. Even with huge reductions in bound levels of trade-distorting support, the European Union and other huge subsidizers would still have little to lose since the bound levels of support are substantially higher than actual levels of support.[19] These refusals to genuinely reform agricultural

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16. P. xxii (quoting Pascal Lamy, Press Conference Closing the World Trade Organization's Fifth Ministerial Conference in Cancun, Mexico (Sept. 14, 2003)) (alteration in original).

17. *See* PETER SUTHERLAND ET AL., CONSULTATIVE BD. TO THE DIRECTOR-GENERAL SUPACHAI PANITCHPAKDI, THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM 71 (2004), *available at* http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf (proposing a consultative body among Trade Ministers in which major trading nations "would inevitably be permanent members").

18. *See* Editorial, *The Cancun Failure*, N.Y. TIMES, Sept. 16, 2003, at A24. Jawara and Kwa note that by contrast, the European Union blamed the United States for scuttling the talks, p. xlix, while the United States blamed developing countries and the G20 in particular, pp. li–lii.

19. *See The July 31st 2004 WTO Agreement on Agriculture: A Critical Review*, AGRITRADE NEWS UPDATE (Technical Center for Agric. & Rural Cooperation ACP-EU, Wageningen, Neth.), Aug. 6, 2004, http://agritrade.cta.int/alert040806-wto.htm.

trade were a direct reason for the formation of the Group of 20 at the Cancun Ministerial (p. xxvii). With the support of the Group of 20 and most developing and least-developed countries, West and Central African countries affected by cotton subsidies proposed a separate agreement ending all cotton subsidies, but opposition by developed countries, particularly the United States, killed the initiative that had become the flagship development issue at the ministerial (pp. xxvii–xxxi). Unbelievably, the U.S. Trade Representative ("USTR") at the time, Robert Zoellick, argued that these countries should diversify away from cotton, notwithstanding the fact that cotton subsidies are contrary to both the spirit of liberalizing agricultural trade—and were recently found to be against various WTO agreements by the WTO's Appellate Body ("AB")[20]—as well as to the development objectives that ought to be central in the Doha Round. To suggest that these countries should diversify away from cotton although they are the most efficient producers of cotton demonstrates the United States' intransigent refusal to make any meaningful concessions in agriculture.

On access to essential medicines, Jawara and Kwa reveal how secret negotiations between the United States and its developed-country allies, on one side, and four developing countries, on the other, hammered out a compromise solution known as the Motta text (pp. xxxii, 249–57). What is striking about the Motta text is that it was publicized as a historic agreement, notwithstanding its restrictions on the importation and exportation of generic drugs that made it as burdensome as Article 31 of the TRIPs agreement, which it was intended to moderate (p. xxxii). The restrictions it imposed on compulsory licensing undermine such a rosy view. The burdensome requirements of the Motta text, which include a requirement that the TRIPs Council have authority to monitor individual compulsory licenses, resulted in a "cosmetic," "painful two-year exercise" to make the United States "appear sympathetic towards development and deflect international criticism, while in reality protecting its own commercial interests" (p. xxxiii). Jawara and Kwa uncovered evidence that Kenyan negotiators, among others, objected to the Motta text and that Kenyan consent was procured by a call placed to the Kenyan Trade Minister, who was informed that Kenya was the only holdout nation on the deal.[21]

In October 2005, the U.S. offered to cut its agricultural subsidies as a signal to other WTO members of its commitment to continuing the deadlock in the Doha Round. However, the U.S.'s proposal to cut its huge subsidies would have merely reallocated the amounts given to farms as subsidies to other types of grants. *See* Press Release, Oxfam, U.S. Farm Subsidies Offer Smoke and Mirrors (Oct. 10, 2005), *available at* http://www.oxfam.org.uk/press/release/trade_ussubsidies101005.htm.

20. *See* Appellate Body Report, *United States—Subsidies on Upland Cotton*, WT/DS267/AB/R (Mar. 3, 2005).

21. Jawara and Kwa also describe how U.S. negotiators called the president of an African country following objections by a negotiator from that country to an issue of particular interest to the United States. The U.S. negotiator then told the African negotiator that the president of their country was supportive of the U.S. position since the president recognized that supporting the issue would translate into continued access to the U.S. market under the African Growth and Opportunity Act. Pp. 86–87. For a discussion of the actions of a Ugandan ambassador who pushed a developing

Ultimately, it is not only that the negotiating process at WTO ministerial meetings has broken down; there is more. Jawara and Kwa note, for example, that "the preparatory process for Cancun was even less transparent than those for Seattle and Doha—and, it seemed, deliberately so" (p. xxxv). In addition, the book discusses "green room" meetings, which are closed meetings between a select group of countries—often with Quad countries at the center—where no minutes are kept, yet important decisions are made and imposed on the rest of the membership (pp. 17–18, 75, 133–35).

There are other pressures brought to bear in the negotiating process that those responsible have no reason to continue except to undermine the multilateral nature of negotiating under the WTO umbrella. For example, powerful WTO members like the United States and the European Union have used their development assistance programs and preferential trading programs as a carrot and stick to prevail upon developing countries with objections to their agendas (pp. 152–59). These powerful countries also sometimes threaten the careers of developing-country diplomats at Geneva who object to their agendas by contacting their superiors in order to pressure them into acquiescing (pp. 150–52). Such actions create an atmosphere of intimidation and facilitate the ability of powerful countries to push through objectionable policies.

Tactics that question the integrity and threaten the careers of otherwise committed diplomats were also used by powerful countries against small countries in the run-up to the vote on United Nations Security Council Resolution 1441, relating to Iraq.[22] The United States has used a variety of other pressures and incentives, including signing bilateral trade deals with compliant countries to undermine the ability of developing countries to take a common position on matters of mutual interest in WTO negotiations (pp. 163–64), promises of technical assistance to buy off countries with views different from the United States (pp. 169–70, 176–77), and rewards of financial assistance for cooperation with the United States in nontrade areas such as debt relief and security arrangements for the U.S. war on terrorism (pp. 174–75, 272). These pressures buy support from countries otherwise hesitant to back the United States' WTO agenda (pp. 164–66, 173).

The WTO's negotiating process is simply in a total mess. Developed countries have opposed the adoption of clear negotiating rules governing how all WTO members arrive at decisions in a transparent, inclusive and participatory manner. Ministerial meetings are held over the space of a few days with the result that the negotiations are conducted in a pressure-cooker atmosphere. In addition, developed country members use a panoply of negotiating strategies including threats towards poorer countries. These and other problems with the negotiating and decisionmaking process at the WTO has

country agenda in Geneva and was not sensitive to the U.S. agenda, and the resultant calls to President Museveni to ensure that the ambassador toed the U.S. line, see pages 179–80.

22. *See* Henry J. Richardson, III, *U.S. Hegemony, Race, and Oil in Deciding United Nations Security Council Resolution 1441 on Iraq*, 17 TEMP. INT'L & COMP. L.J. 27, 53–58 (2003).

unsurprisingly contributed to the two failed ministerial meetings as well as the start-stop nature of the Doha Round.

B. *Inattentiveness to Issues of Development*

The GATT was originally signed by thirty-three countries.[23] For these largely industrial economies, the goal of the GATT was to liberalize trade in industrial products while ensuring that liberalization did not adversely impact their commitment to a welfare state at home.[24] In the 1960s and 1970s, a number of developing countries just freed from colonial rule joined the GATT. These countries "sought to use the organization to gain preferential trading arrangements consistent with their development needs. Such demands conflicted with the trading interests of the industrialized nations that had originated the GATT, and thus a fundamental change was established that continues to be central to the politics of the organization."[25] The central tension in the mission of the WTO is between its trade liberalization mandate—which is supported by its most powerful members—on the one hand, and ensuring that trade contributes to the development goals of developing countries, such as raising standards of living, on the other. Efforts to mediate the tension between trade liberalization and development are incorporated in the preamble to the 1994 Marrakesh Agreement, which acknowledges that the optimal use of the world's resources must be in accordance with the principle of sustainable development and must be with a view to raising standards of living.[26] Despite these efforts, little has changed in the tension between liberalization and development within the WTO.

Behind the Scenes points to long-standing issues that continue to frustrate developing nations, such as lack of access to largely closed Western markets for developing countries' products and produce (pp. 55–56); faded emphasis on the principle of special and differential treatment (pp. 46–47, 264–65); reduced commitment to making development and reform agriculture central components of the Doha agenda (pp. xxxv, 257–59); extension of the trading regime into protecting intellectual property rights as well as liberalizing trade in services,[27] resulting in a reduction in the kind of policy

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23. Elaine S. Povich, *New Era in World Trade Begins as Senate Approves GATT Treaty*, CHI. TRIB., Dec. 2, 1994, at N1.

24. *See* John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG., 379, 392–96 (1982).

25. WINHAM, *supra* note 7, at 21.

26. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, *in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 5, 6 (1994). The view that sustainable development was a central part of the WTO's mandate was affirmed by the Appellate Body in Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 152, WT/DS58/AB/R (Oct. 12, 1998). For an excellent discussion of making trade sensitive to development issues, see U.N. DEV. PROGRAMME ET AL., MAKING GLOBAL TRADE WORK FOR PEOPLE (2003).

27. Other outstanding issues include the obligations on technical barriers to trade and sanitary and phytosanitary measures in the complex agreements imposed on these countries in the Uruguay Round.

space that was an essential component of the institutional innovations associated with the economic success of East Asian economies;[28] and how the implementation of the WTO's trade mandates in developing countries undermine critical development goals, including the food security and general livelihood of ordinary people (pp. xiii, 4–5).

What is really new in the traditional split between developed countries' support for free-trade rules and policies on the one hand and developing countries' support for trade development issues on the other is the unprecedented unity of developing countries, particularly in Cancun. The Group of 20 served as an effective bulwark against the pyramidal bargaining strategy of the United States and the European Union. The Cancun Ministerial was scuttled by the inability of the European Union and the United States to overcome the concerns of the Group of 20, particularly to the extent that the views of developing countries and the issues of concern to them, such as development, had been excluded in the draft Ministerial Declaration (p. xvi).

Behind the Scenes therefore tells a story that is not only about the inattentiveness to questions of development that are of concern to developing countries, but that also challenges theoretical work that has argued that developing countries are incapable of banding together in trade negotiations because "nations formulate their negotiating positions primarily on the basis of economic interests, and these are usually not similar over a large number of nations,"[29] or because the ideological conflict over expanding liberalization "has never been part of the trade negotiations conducted under the GATT."[30]

After Seattle and Cancun, one wonders when, if at all, trade negotiations were ever ideologically neutral and dependent on "individual national interest."[31] The beauty of *Behind the Scenes* is that it explodes the myth that expansion of liberalization is a technocratic process barren of normative and contentious and even ideological contests. The myth that trade negotiations are technocratic goes back to the days of the old GATT. It was informed by the attitude of developed countries and some scholars that issues of development were disconnected from the goal of liberalizing trade. Thus, when developing countries brought up questions of development within GATT, developed countries and scholars sympathetic to the narrow view of GATT as an institution committed only to trade liberalization frowned upon such efforts as evidence of the extent to which trade negotiations "had become a general forum for a debate on international trade policy."[32] Such views, so skeptical of the utility of issues of development within trade negotiations,

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28. Pp. 3–4, 31–39, 260–63. For an excellent overview of how policy flexibility outside the orthodoxy of IMF and World Bank reforms led to exponential export-led growth, see ALICE H. AMSDEN, ASIA'S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION 14–18, 76–78 (1989).

29. WINHAM, *supra* note 7, at 274–75.

30. *Id.* at 275.

31. *Id.*

32. *Id.* at 137.

are eerily similar to present-day critiques of addressing developing-country issues in the WTO.

Unfortunately, some of the critics of negotiating development issues within the WTO equate a more democratic and development-sensitive WTO with the United Nations Conference on Trade and Development ("UNCTAD")—a talking shop rather than an effective international trade organization, that presumably does the bidding of the most developed members even if doing so is inimical to the interests of its developing and least-developed members.[33] Only through political deliberation can trade problems related to developing and least-developed countries be seen within the context of development. For developing and least-developed countries, trade problems are not simply a set of technical issues in which predetermined choices are applied to separate facts from values and where generalizable theories and policies, such as those of comparative advantage and economic efficiency, are wholly independent from the particular social context in which they are sought to be applied.[34]

I will illustrate the foregoing approach to trade and development with an example. Although the TRIPs agreement provides for more compliance time for least-developed countries, these countries must still come into full compliance with the agreement when it becomes effective for them. The extremely strong protections for patents in the TRIPs agreement have been identified as barriers to affordable antiretroviral medicines for millions of HIV–AIDS infected people, particularly in sub-Saharan Africa. Advocates for flexible interpretations of patent protection for pharmaceuticals in developing and least-developed countries, which are to be exempt from the TRIPs agreement in the field of pharmaceuticals, in particular argue that flexibility

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33. According to such critics, the democratization of the WTO through measures such as empowering the Ministerial Conference to engage in genuine negotiations rather than as a forum to endorse predetermined decisions would transform the WTO into a debating club like UNCTAD, where global trading and commercial rules cannot be hammered out pragmatically without the overlay of political cache that the legitimacy crisis has created. This in turn, these critics argue, will lead the WTO to abandon issues of importance to the Third World. *See* Rienhard Rode & David A. Deese, *WTO Governance—Lost in the Doha Round?* (Hallenser IB-Papier 2/2004, 2004), *available at* http://www.politik.uni-halle.de/rode/texte/IB-PapierGovern0204.PDF. For a view arguing that the UNCTAD-ization of the WTO will be bad for trade, see David Hartridge CMG, Speech at the World Trade Post-Cancún Conference (Oct. 21, 2004), http://www.sitpro.org.uk/policy/wto/conf03/hartridge.html; *see also infra* note 64 and accompanying text.

34. This holistic approach has been the traditional manner in which developing countries have approached trade issues even within the old GATT. According to one commentator:

> [D]eveloping countries started from the premise that underdevelopment, even more than individual nationhood, was the most profound determinant of their identity. They sought to create a status of underdevelopment, and to seek involvement with GATT on what appeared to be permanently preferential grounds. They focused on the perpetuating and unchanging aspects of their underdevelopment, and they were keenly aware of how economic disadvantages led to disadvantages in other aspects of international life. Implicit in the status of underdevelopment was their belief that economic benefits were owed them by right rather than by mutual exchange, and they approached bargaining in GATT more as an exercise in collective development planning and less as a search for individual quid pro quo. From this perspective, the notion that the developing nations should be absolved from expectations of reciprocity in GATT negotiations was a cardinal tenet.

WINHAM, *supra* note 7, at 96.

is justifiable in light of the HIV–AIDS pandemic that is sweeping across many developing and least-developed countries, not to mention malaria and tuberculosis, particularly in sub-Saharan Africa. According to this view, the TRIPs agreement must be seen in light of the fact that more than twenty-five million people have died and another twenty-five million are living with the HIV–AIDS.[35] By contrast, developed countries have rejected interpreting the TRIPs agreement in a manner that affects its central commitments to intellectual property protection. The Motta text is an example of the kind of empty concession developed countries are willing to give in that it does not unsettle or disrupt the protection of pharmaceutical patents even in the face of the largest and quickest-spreading public health pandemic in history (p. xxxii).

If the WTO fails to confront and, to the extent possible, resolve the basic value conflicts, such as those relating to the protection of patents and access to essential medicines, the WTO will continue to remain irrelevant to the needs and concerns of developing and least-developed countries. For this reason, the WTO's legitimacy crisis will continue until it squarely addresses how questions of long-standing and immediate relevance to developing countries can be accommodated or become a central part of the trade agenda.

II. A CRITICAL APPRAISAL OF *Behind the Scenes at the WTO*

Having laid down the major themes in *Behind the Scenes at the WTO*, I now proceed to assess its contribution to the debate on reforming the WTO. I do so by exploring two issues. First, I will show that while the book discusses the decisionmaking process at the WTO, it ignores the equally untransparent nature of the WTO's Dispute Settlement Body ("DSB"), although the DSB has contributed to the WTO's legitimacy crisis as much as the opaque negotiating process that the book explores.[36] Second, I will argue that while the book thoroughly explores the downside of the WTO's procedures and methods of negotiating new trade treaties, the framework of the book's analysis does not lend itself to tracing the bias against the interests of developing countries to problems in the way the liberalizing mandates of the WTO are implemented, such as the exclusion of agriculture and commodity trade from its liberalization; instead, it traces the bias to the liberalizing mandate generally.

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35. I discuss these issues in James Thuo Gathii, *Construing Intellectual Property Rights and Competition Policy Consistently with Facilitating Access to Affordable AIDS Drugs to Low-End Consumers*, 53 FLA. L. REV. 727 (2001), and James Thuo Gathii, *The Structural Power of Strong Pharmaceutical Patent Protection in U.S. Foreign Policy*, 7 J. GENDER RACE & JUST. 267 (2003). *See also* Obijifor Aginam, *From the Core to the Peripheries: Multilateral Governance of Malaria in a Multi-Cultural World*, 3 CHI. J. INT'L LAW 87 (2000).

36. The authors acknowledge this problem when they note, "[w]hile it has not been discussed in detail in this book, the dispute settlement mechanism is an important factor in the power of the WTO." P. 292.

A. *On the Dispute Settlement Body*

The DSB's role in construing WTO agreements by mobilizing the expert knowledge of a group of trade-law specialists substantially contributes to the increasingly undemocratic nature of the WTO. Because of the compulsory and binding nature of its decisions, the DSB is the most powerful institution among the various bodies of the WTO. By making the DSB so powerful, the members of the WTO effectively channeled the organization's most controversial issues away from guidance through democratic deliberation. In other words, a cadre of experts with "technical knowledge" about the text of WTO law have become the most important factor in decisions that would otherwise be entrusted to the political representatives of WTO member states. In addition, the DSB hears cases in secret, away from public view, and the criteria for the selection of its panelists are unclear. The inadequacy of administrative procedures and safeguards to ensure the accountability of the DSB is objectionable.[37]

These objections to the absence of clear procedural rules or their enforcement are strengthened by the fact that the otherwise laudable institutional design of having a powerful WTO judiciary may be said to reflect a choice against empowering the WTO's decisionmaking process through deliberation and broad-based bargaining among WTO members. A powerful WTO judiciary arguably exists at the expense of an equally powerful WTO legislative body that would be regarded as more representative and legitimate. Since the DSB is not the subject of *Behind the Scenes at the WTO*, we do not learn in the book how the WTO shields controversial issues from a political process of deliberation by entrusting decisionmaking to an opaque and powerful judiciary.

The DSB favors the interests of its most powerful members through its interpretive role. It does so by applying or interpreting rules of the international trading regime in favor of developed countries while foreclosing equally plausible applications and interpretations that are favorable to de-

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37. *See* Susan Esserman & Robert Howse, *The WTO on Trial*, FOREIGN AFF., Jan./Feb. 2003, at 130, 138. Esserman and Howse note that the secrecy of the WTO's dispute settlement submissions and hearings is "an unacceptable vestige of the old days of cloak-and-dagger diplomacy." *Id.* The Global Administrative Law Project at New York University Law School has noted the systematic absence of such safeguards in a variety of multilateral institutions that have regulatory impact within countries. *See* Benedict Kingsbury et al., *The Emergence of Global Administrative Law* (Int'l Law and Justice, Working Paper No. 2004/1, 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=692628. The absence of safeguards to ensure the accountability of the DSB or mechanism for their enforcement is reflected by the fact that in at least one case, a panelist in a DSB case had a conflict of interest. In the *Tuna-Dolphin II* case, panelist Alan Oxley was found to have represented the Brock Group, which, according to the company's brochure, lobbied on behalf of the Mexican government for NAFTA. Mexico had a direct interest in the outcome of the case as it was the initiator of the *Tuna-Dolphin I* case that *Tuna Dolphin II* sought to enforce. *See* Lori Wallach, *Testimony of Lori Wallach Regarding U.S. Preparation for the World Trade Organization's 1999 Ministerial Meeting*, PUB. CITIZEN, May 14, 1999, http://www.citizen.org/trade/wto/Qatar/seattle_mini/articles.cfm?ID=5468.

In September 2005, the WTO for the first time opened up panel proceedings of the dispute settlement body to the public. Press Release, World Trade Organization, WTO Opens Panel Proceeding to Public for the First Time (Sept. 12, 2005), *available at* http://www.wto.org/English/news_e/news05_e/openpanel_12sep_e.htm.

veloping countries and are entirely consistent with the rules of the international trading regime. Thus in two different cases raising exactly the same question under Article 15 of the Anti-Dumping Agreement,[38] which was consciously designed to benefit developing countries, the DSB reached two different interpretations: one favoring developing countries and the other favoring developed countries.[39]

Article 15 of the Anti-Dumping Agreement provides for "constructive remedies" as an alternative to the imposition of anti-dumping duties.[40] This "special regard" remedy is applicable where "the essential interests of developing country Members" would be affected.[41] In the Doha negotiations, developing countries have therefore argued that before a developed country applies an anti-dumping measure that would adversely affect the essential interests of a developing country, constructive remedies should be explored.[42] This was India's argument in the *Anti-Dumping and Countervailing Measures on Steel Plate from India Case* ("*Steel Plate Case*"). India argued that the United States had violated "the first sentence of Article 15 of the Anti-Dumping Agreement, which states in relevant part that '[i]t is recognized that *special regard must* be given by developed country Members,' by failing to give special regard to India's status as a developing country when considering the application of anti-dumping duties."[43] According to India, the mandatory first sentence in Article 15 imposed an obligation, the parameters of which would be determined based on the facts and circumstances of each particular case.[44]

The Appellate Body of the DSB held that the first sentence of Article 15 did not impose any "specific or general obligation on Members to undertake any particular action."[45] This departs from a tradition under which Article 17.6(ii) of the Anti-Dumping Agreement allows a member state to construe favorably provisions such as Article 15 that are broad and general and are capable of admitting different possible interpretations if the member state

38. Agreement on Implementation of Article VI of GATT, Apr. 15, 1994, *in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, *supra* note 26, at 168 [hereinafter Anti-Dumping Agreement]. The purpose of the Anti-Dumping Agreement "is to counteract the effects of price discrimination in sales by a foreign producer which results in injury to the industry of the importing country." James Thuo Gathii, *Insulating Domestic Policy Through International Legal Minimalism: A Re-Characterization of the Foreign Affairs Trade Doctrine*, 25 U. PA. J. INT'L ECON. L. 1, 53 (2004).

39. I draw this example from an earlier paper. *See* James Gathii, *Fairness as Fidelity to Making the WTO Fully Responsive to All Its Members*, 96 AM. SOC'Y INT'L L. PROC. 157 (2003).

40. Anti-Dumping Agreement, *supra* note 38.

41. *Id.*

42. *See generally* Victor Mosoti, *In Our Own Image, Not Theirs: Damages as an Antidote to the Remedial Deficiences in the WTO Dispute Settlement Process; A View from Sub-Saharan Africa*, 19 B.U. INT'L L.J. 231 (2001).

43. Anti-Dumping Agreement, *supra* note 38, at art. 15; *see* Panel Report, *United States—Anti-Dumping and Countervailing Measures on Steel Plate From India*, ¶ 7.104, WT/DS206/R (June 28, 2002) [hereinafter *Steel Plate Case*].

44. *Steel Plate Case*, *supra* note 43, ¶ 7.110.

45. *Id.*

acted in accordance with "one of those permissible interpretations."[46] The AB's interpretation is consistent with an approach that conceptualizes claims made by developing countries in the international economic realm of trade, investment, and finance as occupying no more than a vague, nonlegal, and at times political status.[47] By contrast, this conceptualization ineluctably favors claims couched in the protective garb of WTO law, which developing-country members are less likely to have the expertise and experience to do.[48]

It is important to observe here that it was open to the AB to, for example, consider Article 15 as requiring no more than a balanced trading framework given the propensity of developing-country anti-dumping law to target developing countries, which are unable to retaliate against those "most capable of dumping their exports"[49] on them. In fact, in the *Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India Case* ("*Bed Linen Case*"),[50] the European Union agreed with India's view that the second sentence of Article 15 imposed a legal obligation on developed-country members to explore the possibilities of constructive remedies before applying anti-dumping duties where they would affect the essential interests of developing-country members.[51] Although the AB concluded that the second sentence of Article 15 does not predetermine any particular outcome, it nevertheless observed that the "'exploration' of possibilities *must be actively undertaken* by the developed country authorities with a willingness to reach a positive outcome."[52]

In addition, in the *Steel Plate Case*, the AB held that simply because the Indian company was operating in a developing country "does not mean that it somehow shares the 'special situation' of the developing country Member."[53] This holding raises a rhetorical question: what would it take to have Article 15 construed in favor of a developing country? It is important to note here that in the *Steel Plate Case*, U.S. Department of Commerce officials had orally informed Indian officials that the U.S. steel industry and Congress would oppose an agreement under Article 15.[54] Although the AB

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46. Anti-Dumping Agreement, *supra* note 38, art. 17.6(ii).

47. The characterization of the issue of access to essential medicines as a nontrade or a political issue that cannot be accommodated within the TRIPs agreement is another example of such a disempowering characterization that disproportionately affects developing-country populations adversely.

48. *See infra* note 59 and accompanying text; *see also* James Thuo Gathii, *The Legal Status of the Doha Declaration on TRIPS and Public Health Under the Vienna Convention on the Law of Treaties*, 15 HARV. J. L. & TECH. 291, 315 (2002).

49. Alexander Roitinger, *Antidumping Reform, Trade Policy Flexibility, and Compensation* (Univ. Saint Gallen, Discussion Paper No. 2002-18,. 2002).

50. Panel Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R (Oct. 30, 2000).

51. *Id.* ¶ 6.221.

52. *Id.* ¶ 6.233 (emphasis added).

53. *Steel Plate Case*, *supra* note 43, ¶ 7.111.

54. *Id.* ¶ 7.105.

agreed that the United States did entertain the proposal and that it therefore was in compliance with Article 15, the effect of the decision was to read out of the Anti-Dumping Agreement the apparent effect of Article 15 for developing countries.

It is not surprising therefore that the United States favors price undertakings[55] as an alternative to anti-dumping measures under Article 15 and, as it argued in the *Steel Plate Case*, it does not believe Article 15 of the Anti-Dumping Agreement imposes "any specific legal obligations on developed country Members."[56] Price undertakings are allowed as a substitute to anti-dumping measures under Article 8, which provides:

> Proceedings may be suspended or terminated without imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease its exports to the area in question at dumped prices that the authorities are satisfied that the injurious effect of the dumping is eliminated.[57]

These opposing interpretations of Article 15 demonstrate that there is more at stake than simply making anti-dumping investigations more transparent. There are choices that have to be made between alternative proposals regarding the implementation of anti-dumping measures, especially against developing countries. Indeed, a group of developing countries has raised the need to clarify various provisions of the Anti-Dumping Agreement, including the specific meaning of "ordinary course of trade," "constructed value," and "the lesser duty rule." Developing countries have also sought a formal ban on the practice of zeroing, which two AB decisions have struck down.[58] A call for outlawing a practice already found to be inconsistent with the agreement indicates the level of legal insecurity that developing countries experience at the WTO. Some developing-country members have also proposed reducing the application of anti-dumping measures against developing

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55. Price undertakings are import price minima or thresholds. *See* Michael O. Moore, *VERs and Price Undertakings Under the WTO*, 13 REV. INT'L ECON. 298 (2005).

56. *Steel Plate Case*, *supra* note 43, ¶ 7.106.

57. Anti-dumping Agreement, *supra* note 38, at art. 8.

58. Position papers were presented prior to Doha by South Africa, Colombia, Korea, Guatemala, India, and Romania. *See* Communication from South Africa, *South African Development Community Ministers' Agreed Negotiating Objectives for the Third WTO Ministerial Conference*, WT/L/317 (Oct. 1, 1999); Communication from Colombia, *Preparations for the 1999 Ministerial Conference*, WT/GC/W/315 (Sept. 14, 1999); Communication from Korea—Revision, *Preparations for the 1999 Ministerial Conference*, WT/GC/W/235/Rev.1 (Oct. 11, 1999); Communication from Guatemala, *Preparations for the 1999 Ministerial Conference*, WT/GC/W/330 (Sept. 23, 1999); Communication from India, *Preparations for the 1999 Ministerial Conference*, WT/GC/W/200 (June 14, 1999); Communication from Romania, *Preparations for the 1999 Ministerial Conference*, WT/GC/W/319 (Sept. 15, 1999).

Since Doha, communications from Canada and India have raised similar concerns. *See* Communication from Canada, *Improved Disciplines Under the Agreement on Subsidies and Countervailing Measures and the Anti-Dumping Agreement*, TN/RL/W/1 (Apr. 15, 2002); Submission by India, *Proposals on Implementation Related Issues and Concerns*, TN/RL/W/4 (Apr. 25, 2002); *see also* Paper from Brazil, Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Thailand and Turkey, *Anti-Dumping: Illustrative Major Issues*, TN/RL/W/6 (Apr. 26, 2002).

countries.[59] Japan and Chile have proposed even further-reaching changes that would limit the application of anti-dumping measures to predatory pricing practices.[60]

Given the growing importance of anti-dumping, especially among developing countries,[61] and its continuing role to soothe domestic industries in industrial economies such as the United States that suffer at the hands of international competition,[62] compromise will not be easily realized. In particular, the U.S. Congress has now given the nonnegotiability of trade remedy laws legislative blessing in the 2002 Trade Act.[63] A bargaining position that precludes renegotiation of the anti-dumping regime gives the DSB enormous authority since its interpretations are the only avenue by which developing countries can hope to check the abuses of developed countries. Yet, as the foregoing decisions show, the DSB cannot be trusted to consistently check developed countries' abuses of anti-dumping, even when the rules allow for checking such abuses. Crucially, developing countries have not been able to shape the emerging DSB jurisprudence to favor their interests in the way that developed countries have been able to do because they lack the legal expertise necessary to challenge a developed country at the DSB, not to mention the resources to support the prohibitive cost of such services.[64]

Because of the opaqueness of its decisionmaking process and the susceptibility of its rules to be construed in favor of some countries and against others despite the availability of alternative interpretations, the DSB is not

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59. Communication from Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka and Uganda, *Preparations for the 1999 Ministerial Conference*, WT/GC/W/354 (Oct. 11, 1999).

60. Communication from Japan, *Preparations for the 1999 Ministerial Conference: Proposal on Anti-Dumping Measures*, WT/GC/W/240 (July 6, 1999); Communication from Chile, *Preparations for the 1999 Ministerial Conference: Proposal on Anti-Dumping Measures*, WT/GC/W/366 (Oct. 12, 1999).

61. *New Antidumping Investigations Decline But More Measures Imposed, WTO Reports*, 19 INT'L TRADE REP. 1860. Although there were eighty-two fewer anti-dumping investigations started in the second half of 2002 compared with the first half of 2002, developing countries are using the anti-dumping regime even more. For example, India retained its premier position in initiating new anti-dumping investigations while countries such as Argentina, Egypt, Mexico, and Thailand had become popular users.

62. Sharyn O'Halloran argues:

> [I]nterest group influence has already been incorporated into the regulatory process through the procedures that govern administrative decision making. That is, the standards by which industries qualify for government assistance, whether it be anti-dumping actions or trade adjustment assistance, are themselves the result of the political process. Thus interest group influence may be apparent not at regulatory proceedings, but rather in the standards of proof applied at these proceedings.

SHARYN O'HALLORAN, POLITICS, PROCESS, AND AMERICAN TRADE POLICY 181 (1994).

63. Trade Act of 2002, Pub. L. No. 107-210, § 2102(b)(14), 116 Stat. 933, 1001 (2002).

64. Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, *in* INT'L CTR. FOR SUSTAINABLE DEV., TOWARDS A DEVELOPMENT-SUPPORTIVE DISPUTE SETTLEMENT SYSTEM IN THE WTO 1 (2003), *available at* http://www.icstd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf.

an appropriate forum to decide the broad range of questions confronting the WTO.

B. *Market Failure and Asymmetrical Application of Market Norms*

My second major critique focuses on the nonrecognition of market failure and the asymmetrical application of market norms in *Behind the Scenes at the WTO*. The book traces bias against developing countries predominantly to the methods of negotiating trade agreements among countries[65] and to the WTO's "free trade ideology," which the authors recommend should be reconsidered and "thrown out" (p. lxxi). The book understates the fact that bias against developing countries is not simply the inevitable outcome of free-market ideologies, but that it is also due to the manner in which market norms have or have not been mobilized.[66] For more than fifty years, global trade negotiations reduced tariffs on the manufacturing and industrial sectors in which developed economies led the world, while areas such as agriculture, textiles, and clothing—where low-cost developing countries have the comparative advantage—were heavily protected and subsidized by rich industrialized countries. For example, the United States and the European Union each give more than one billion dollars in agricultural subsidies annually, undermining the comparative advantage that developing countries enjoy in agricultural trade.[67]

This reluctance to extend market principles to areas in which developing countries had a comparative advantage is not the inexorable outcome of the application of free-market principles, but rather is due to their selective application. The free-trade mandate of the WTO does not apply equally to industrial and agricultural products. *Behind the Scenes at the WTO* overstates the effect of relations of domination and dependence (p. 305). While this dynamic certainly exists, as evidenced by the reasons given for Nigeria's and the Philippines' recent threats to pull out of the WTO,[68] the book understates the extent to which biased applications of market norms are an essential aspect of the legitimacy crisis at the WTO.

Although the United States and countries in the European Union are not the lowest-cost producers of cotton, they have continued to be effectively insulated from having a legal obligation not to subsidize their own high-cost producers of cotton. U.S. and E.U. cotton farmers receive billions of dollars in subsidies, at the expense of much lower-cost producers in developing countries. Despite victories against cotton and sugar subsidies in the DSB

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65. *See supra* Part I.

66. For an excellent analysis of how market norms do not have a fixed natural and necessary meaning but are rather contingent, see Joel M. Ngugi, *Re-Examining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised By Land Registration*, 25 MICH. J. INT'L L. 467, 468–75 (2004).

67. U.N. DEV. PROGRAMME ET AL., *supra* note 26, at 123.

68. Pp. 177, 183. These threats arise from these countries' sense that the global trading regime is rigged against them.

recently,[69] developing countries cannot vigorously enforce anti-subsidy rules in the same way that the United States and the European Union can. Developing countries simply lack the market power that developed countries have by virtue of their lion's share of global trade. Since developing countries rely on the openness of developed-country markets to generate foreign exchange, they do not have the market power to sanction or even threaten developed countries that use their power to manipulate the rules of the trading framework. By contrast, the mere threat of sanctions by a developed country against a developing country often creates the result desired by the developed country.[70]

The United States' market power enables it to continue heavily subsidizing its farmers, yet only three percent of the U.S. population is engaged in agriculture compared to over seventy percent of the population engaged in agriculture in developing countries. The cotton subsidies in the United States and the European Union have, in effect, pushed the livelihoods of over ten million otherwise lowest-cost cotton farmers in Central and West Africa to the poverty line, if not below it. Subsidies also make it impossible for poor countries to get their share of global trade.[71]

Cotton subsidies are simply the tip of the iceberg. The GATT–WTO treaty framework is full of examples of a basic lack of fidelity to making the basic rules of the global trading framework apply equally to all products. This has been a major reason for the current deadlock in WTO negotiations. For example, the 1948 GATT and the 1994 Agreement on Agriculture have legalized exceptions to market access and the nondiscrimination norms of the trading framework.[72] Article XI:2(c)(i) of the 1948 GATT exempted quantitative restrictions in agriculture from the GATT's nondiscrimination mandates. In 1955, the GATT waived the preconditions of discriminating against imported products under Article XI:2(c)(i), giving the United States a free hand to restrict agricultural imports. GATT Article XVI:3 authorized agricultural subsidies although no such subsidies were allowed for industrial goods.[73] These exceptions introduced double standards for developed and developing countries by allowing agriculture to be treated outside the nondiscrimination disciplines of the GATT framework. The 1994 Agreement on Agriculture, while an improvement over the 1948 GATT, also introduced its own legalized exceptions exempting agriculture from full liberalization.

In addition to these legalized exceptions, markets are imperfect because they are subject to problems such as externalities, information asymmetries,

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69. Appellate Body Report, *European Communities—Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (Apr. 28, 2005); Appellate Body Report, *United States—Subsidies on Upland Cotton*, WT/DS267/AB/R (Mar. 3, 2005).

70. Gregory Shaffer, *Power, Governance, and the WTO: A Comparative Institutional Approach*, *in* POWER IN GLOBAL GOVERNANCE 130 (Michael Barnett & Raymond Duvall eds., 2005).

71. WORLD BANK, GLOBAL ECONOMIC PROSPECTS: REALIZING THE DEVELOPMENT PROMISE OF THE DOHA AGENDA 107–08 (2003), *available at* http://sitesources.worldbank.org/INTRGEP2004/Resources/gep2004fulltext.pdf.

72. Gathii, *supra* note 12, at 911 n.129.

73. *Id.*

and other types of market failure. Markets are therefore susceptible to manipulation, with the result that outcomes at odds with the virtues associated with free markets are commonplace. For example, the WTO's trade liberalization mandates often work at cross purposes with the World Bank's poverty reduction programs implemented by poor countries.[74] Another type of market failure is evidenced by the fact that the costs of implementing Uruguay Round commitments such as the TRIPs agreement have been so costly that they have undermined any potential benefits they may confer on developing and least-developed countries. This is not to mention that the TRIPs agreement results in wealth transfer on the order of $5.8 billion annually from developing countries to the United States.[75]

These examples demonstrate that the WTO is caught on a seismic fault line. On the one side are its most powerful members, bent on ensuring that the global trading agenda continues to create new and profitable opportunities for their citizens while preserving old opportunities. On the other side of the fault line are developing and least-developed countries and their direct and urgent demands to have the trading regime address questions of poverty and social division, especially by removing distortions in global agricultural trade. The rich countries seek to protect current WTO privileges while extending obligations into new areas where they have a comparative advantage. For developing countries, by contrast, negotiations should focus on lightening existing obligations while paying more attention to issues of development. These conflicting goals of the rich and poor members of the WTO have generated fierce discussions and stalled negotiations in the Doha Round. Unsurprisingly, the tensions produced by these conflicting visions of the future of the WTO led to the collapses of the 1999 ministerial conference in Seattle and the 2004 ministerial conference in Cancun.

A basic problem with how the WTO has addressed the concerns of developing and least-developed countries is that it has sought to interpret their demands for reform in ways that do not disturb the rigged rules of global agricultural trade. The WTO has failed to squarely address the possibility that the continuation of distorted and unfair global agricultural trade rules informs the disenchantment of developing and least-developed countries with the global trading system. Instead, the WTO has sought to simply adjust its trade liberalization agenda at the margins to accommodate developing and least-developed countries. Ultimately, a major task in WTO reform is to determine how to encourage its members, especially the richest countries and their citizens, to act beyond the immediacy of their local needs and regard the needs of others—even if they live across national

74. J. Michael Finger & Philip Schuler, *Implementation of Uruguay Round Commitments: The Development Challenge* 1, 1 (World Bank, Working Paper No. WPS 2215, 1999), *available at* http://econ.worldbank.org/docs/941.pdf.

75. Keith E. Maskus, *Intellectual Property Issues for the New Round*, *in* THE WTO AFTER SEATTLE 137, 142 (Jeffrey J. Schott ed., 2000).

boundaries—with some empathy and compassion.[76] Only then would it be possible to ensure that market norms applied to all products and produce, irrespective of their origin.

CONCLUSION

If the WTO is really a member-driven organization in which decisions are made by consensus, as it claims to be, then it ought to open itself up to competing ideas and viewpoints about its role, particularly with reference to issues of concern to developing and least-developed countries. As Jawara and Kwa have shown, the WTO Secretariat in particular cannot be trusted to be an "honest broker," listening to the diverse views of the WTO membership (pp. 221, 228). By usurping the role of overseeing negotiations inconsistently with the Doha Ministerial Declaration, WTO members end up negotiating with the Secretariat rather than with each other (pp. 63–64, 224–28, 255–56, 259). The Secretariat has demonstrated itself to be incapable of facilitating the open debate that would ensure that all views are represented and taken into account in arriving at new agreements, resolving outstanding implementation issues raised by members, or addressing such other issues as genuine liberalization of global agricultural trade (pp. xli–xliii).

To correct these shortcomings, all the members of the WTO must come up with a democratic decisionmaking framework within which there are clear criteria for inclusive decisionmaking. These criteria would replace the current consensus model adopted by the WTO, which Jawara and Kwa have demonstrated is both a charade and a convenient mask for pushing through the agenda of the most powerful members of the WTO. It would also mean abandoning the criticisms that have been leveled against debating the agenda of the WTO as recommended by developing and least-developed countries. Such criticisms are exemplified by the remarks of the then USTR, Robert Zoellick, after the collapse of the Cancun Ministerial. Zoellick argued that the rhetoric of "won't do" countries overwhelmed the willingness of "can do" countries to work out a compromise at Cancun.[77] I agree with Richard Steinberg when he dismisses such claims[78] precisely because they seek to undermine the very things that could rebuild trust within the trading framework amongst all its members.

How can the WTO rebuild trust? After the collapse of the 1999 ministerial in Seattle, the WTO adopted nonbinding guidelines on how to proceed with negotiations, but these guidelines were not followed at the Doha Ministerial and certainly not at the Cancun Ministerial (pp. 278–79). Developing

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76. *See* RAJ BHALA, TRADE, DEVELOPMENT, AND SOCIAL JUSTICE (2003); James Gathii, *International Justice and the Trading Regime*, EMORY INT'L L. REV. (forthcoming 2005).

77. Robert B. Zoellick, *America Will Not Wait for the Won't-Do Countries*, FIN. TIMES (London), Sept. 22, 2003, at 23; *see also* RODE & DEESE, *supra* note 33; *WTO Chair Suggests Developing Countries Overplayed Hand on Cotton Issue*, 20 INT'L TRADE REP. 1889, 1889 (Nov. 13, 2003).

78. *See* Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247 (2004).

countries proposed that the Trade Negotiations Committee ("TNC") that was set up at the Doha Ministerial conference in 2001 to oversee the Doha negotiating mandate should oversee the Doha negotiations rather than the Secretariat.[79] Under the Doha mandate, the TNC supervises negotiations "under the authority of the General Council."[80] Developing countries have argued that it is the prerogative of the members, through the TNC, rather than the General Council and the Secretariat, to oversee negotiations (pp. 227–28). According to these countries, Article VI:4 of the Marrakesh Agreement[81] precludes the staff of the Secretariat from being involved in the negotiating process and, in particular, from directing the process by having the Chair of the General Council simultaneously serving as the Chair of the TNC. This position is also informed in part by a desire not to repeat the experience of the Uruguay Round, at which the members of the WTO ended up negotiating with the Secretariat rather than amongst themselves (pp. 221, 228).

These countries, therefore, proposed putting in place clear and binding rules to govern the negotiating process not only before the TNC, but also in the conduct of the business of the various councils established under a variety of treaties and plurilateral agreements, as well as all committees, working parties, groups, and monitoring bodies that comprise the entire WTO machinery. With regard to the TNC, the following rules would apply under this proposal: the roles of the TNC and the General Council would be separated; all negotiations would take place in formal sessions without concurrent informal meetings; selection of the chair of the TNC and all negotiating groups would be by consensus and would be made from the membership of the General Council; minutes of all meetings would be kept and made available within ten days of the meeting; all drafting of texts would be done in open meetings with all language in disagreement appearing in brackets; and finally, negotiating texts would be made available to member delegations in the three official languages of the WTO two weeks in advance, to enable them to study them and consult with their capitals for instructions.[82]

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79. *See* World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 46, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) ("The overall conduct of the negotiations shall be supervised by a Trade Negotiations Committee under the authority of the General Council. The Trade Negotiations Committee shall hold its first meeting not later than 31 January 2002. It shall establish appropriate negotiating mechanisms as required and supervise the progress of the negotiations.").

80. *Id.*

81. Article VI:4 of the Marrakesh Agreement provides in part that "the staff of the Secretariat shall be exclusively international in character." Anti-Dumping Agreement, *supra* note 38, art. VI, ¶ 4. This provision somewhat coincides with article V(5)(c) of the Articles of Agreement of the International Bank for Reconstruction and Development (World Bank), which provides that the "President, officers and staff of the Bank, in the discharge of their offices, owe their duty entirely to the Bank and to no authority." Int'l Bank for Reconstruction & Dev., Articles of Agreement, art. V, ¶ 5(c) (Feb. 16, 1989), *available at* http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf. "Each member of the bank shall respect *the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties*." *Id.* (emphasis added).

82. *See* pp. 219–24; Communication from Cuba, Dominican Republic, Egypt, Pakistan, Tanzania, Uganda and Zimbabwe, *Establishment of the Trade Negotiations Committee and*

Reforms such as these, aimed at improving transparency, accountability, and openness, are critical to restoring trust among the members of the WTO. Unfortunately, developed countries prefer fewer and vaguer guidelines, to give them maximum leverage in negotiations.[83]

Making clear rules for the participation of nonstate actors within the WTO's decisionmaking process is important. Facilitating the participation of nongovernmental organizations ("NGOs") based in developing countries and representing the interests of those most adversely affected by trade is particularly crucial.[84] Such participatory rules ought to be made without romanticized conceptions that overstate the importance of NGOs in creating accountability and transparency at the WTO.[85] While NGOs are often portrayed as grassroots alternatives or antidotes to a state-centric and market-oriented trading framework that is insensitive to the concerns of the poor and those displaced by trade, this is not always true of all NGOs. First, not all NGOs incorporate a pro-poor agenda. They may represent the conflicting interests of different "losers" in global trade. For example, the NGOs that represent the interests of agriculture in the United States or in Europe have different agendas than those that represent the displaced cotton farmers of Central and West Africa.[86] Focusing on the common loss due to free trade may underplay national, gender, class, and other differences.[87]

Inclusion of NGOs as part of WTO reform must be done cautiously, guarding against the possibility that increased participation by nonstate actors will simply intensify the struggle over which set of forces will constitute a reformed WTO. Most importantly, reforms aimed at greater

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Related Issues WT/GC/58 (Dec. 21, 2001), *available at* http://www.tradeobservatory.org/library.cfm?refID=25737.

83. P. 278. An important recent report argues that "[w]e do not believe a set of inflexible rules for the conduct and preparation of Ministerial conferences is the answer." SUTHERLAND ET AL., *supra* note 17, at 71. The report also endorses a continuation of green-room meetings to which only a few countries are invited. *Id.* at 72–73.

84. As Daniel C. Esty argues, NGOs are the connective tissue between the WTO and civil society. Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. INT'L ECON. L. 123 (1998).

85. Local and transnational networks and alliances are not necessarily pro-poor. *See* Gillian Hart, Paper for the Conference on Creative Destruction at CUNY Graduate Center: Denaturalizing Dispossession: Critical Ethnography in the Age of Resurgent Imperialism (Apr. 15–17, 2004), *available at* http://geography.berkeley.edu/PeopleHistory/faculty/GHart_CreativeDestruction.pdf.

86. Thus according to Raustiala:

> [N]ot all states benefit, nor in the aggregate can NGO participation be considered an unmitigated good. Lobbyists in the U.S. Congress, for instance, provide many of same services to legislators—information, political cover, monitoring of deals, and so forth .... Yet few applaud the role of lobbyists in American politics. ... Civil society is not inherently "good" and state power "bad." Enhanced participation by civil society in governance may enhance the power of self-interested groups that are already powerful—in resources, organization, political influence—and this may undermine the political processes and lead to a low level of regime effectiveness.

Kal Raustiala, *States, NGOs, and International Environmental Institutions*, 41 INT'L STUD. Q. 719, 726 (1997).

87. For a similar critique, see Giles Mohan & Kristian Stokke, *Participatory Development and Empowerment: The Dangers of Localism*, 20 THIRD WORLD Q. 247, 264 (2000).

transparency must go hand in hand with a commitment in principle as well as in praxis to address issues of development and the liberalization of agriculture. Such reforms will go furthest in resolving the present crisis at the WTO. As a strategy, developing countries must emphasize the procedural aspects of the reform agenda, since they will shape and form the discursive terrain within which the inextricably linked issues of agricultural trade reform and inclusion of development issues will play out.[88]

Strengthening the WTO's negotiating framework and the DSB by committing to reforms aimed at greater transparency and inclusiveness will restart multilateral negotiations—as developed countries wish to do—and would strengthen the WTO by giving developing countries a space within which to collectively negotiate with developed countries. Thus, reforms aimed at rebuilding trust will benefit both developing and developed countries. Such reforms would also refocus attention away from forum-shifting into bilateral and regional trade treaties, in which individual countries bargaining with the United States may not have much leverage.[89]

Behind the Scenes at the WTO proceeds from the premise that bias against developing-country interests at the WTO is *necessarily* the discernible and determinate outcome of the WTO's market-based trade liberalization model as well as its undemocratic decisionmaking methods. In this Review, I have shown that by tracing bias against developing countries as such, Jawara and Kwa overemphasize the origin of the bias in the public realm of intersovereign relations among the WTO's member states. In so doing, they understate how the private-law norms of free trade, including the market, are deployed in a manner that benefits the interests of the WTO's richest members at the expense of its poorest members. Thus, while I agree

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88. As Gillian Hart argues:

> Discourses and processes of globalization are inextricably linked—indeed dialectically—connected with one another, and deeply infused with the exercise of power. Precisely because the categories and discursive strategies that we use to describe processes have real effects—defining and delimiting terrains of practical action and the formation of political identities—discourses of globalization actively shape the very processes they purport to describe. The discursive power of globalization is most clearly evident in practices of meaning-making that portray neoliberal forms of capitalism as natural, inevitable, and beyond question.

GILLIAN HART, DISABLING GLOBALIZATION: PLACES OF POWER IN POST-APARTHEID SOUTH AFRICA 293 (2002).

89. WTO mini-ministerials also fall in this category of forum shifting. *See* pp. lxiii, 59–62. Former USTR Robert Zoellick has justified regional/bilateral agreements for exactly the opposite reasons. After the conclusion of such an agreement with the Dominican Republic he commented:

> It is my firm belief that if we enter into an agreement in which the developing countries feel that they have actually negotiated the agreement as opposed to having had an agreement thrust upon them, that it will be both more stable, more satisfactory, and it will provide a platform for real positive growth, an economic partnership over the coming years.

Emmy B. Simmons, *Conference: Linking Trade and Sustainable Development: Keynote Address*, 18 AM. U. INT'L. L. REV. 1271, 1301; *see also* WORLD TRADE ORG., A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM 109 (2004) (arguing that bilateral trade agreements give developing countries more bargaining viz à viz developed countries like the United States because the WTO's dispute settlement system is intricate and its substantive law difficult for developing countries to master with a view to bringing a complaint). *But see* Shaffer, *supra* note 70 (arguing that such forum shifting leads to the isolation of dissenting countries until they relent).

with Jawara and Kwa that the decisionmaking processes of the WTO must become more inclusive, transparent, and participatory, I also maintain that expanding the WTO's stated organizational mandate of free trade to agriculture and other areas in which developing countries have a comparative advantage ought to be an integral part of the reform agenda at the WTO. By paying attention to the differential application of free-trade norms as between developed and developing countries within the WTO, both in the enactment of new rules and in the application of existing ones by the dispute settlement body and by developed country members, I have sought to give a more complete picture of the high stakes of the WTO reform. At the end of the day, extending liberalization to agriculture and limiting the expansion of the trading regime only into areas in which developed countries have a comparative advantage, among other challenges facing developing countries in the trading regime, are challenges inextricably linked to reforming the undemocratic and untransparent decisionmaking process at the WTO.