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Process and Substance in WTO Reform

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PROCESS AND SUBSTANCE IN WTO REFORM

*James Thuo Gathii**

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I. INTRODUCTION

There is a broad consensus that the World Trade Organization ("WTO") is ripe for broad-ranging reform.¹ The collapse of the Seattle and Cancun WTO Ministerial meetings and the near-collapse of the Doha Ministerial in 2001 strongly suggest the need to revamp the WTO.² The appointment of the Sutherland Commission by the WTO's Director General in mid-2003 confirms the message has reached the WTO Secretariat although exactly what types of reforms the Commission will recommend is anyone's guess.³ The pitfalls of

1. See Fatoumata Jawara & Aileen Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations* 269-70 (2003) (suggesting the WTO to reform its power structure and vested interests); *The WTO and the Doha Round: The Changing Face of World Trade* (Ross P. Buckley ed.) (2003); Steve Charnovitz, *The Emergence of Democratic Participation in Global Governance (Paris, 1919)*, 10 *Ind. J. Global Legal Stud.* 45, 49-50 (2003); Steve Charnovitz, *WTO Cosmopolitics*, 34 *N.Y.U. J. Int'l L. & Pol.* 299, 299 (2002); Daniel C. Esty, *The World Trade Organization's Legitimacy Crisis*, 1 *World Trade Rev.* 7, 11 (2002); Gregory C. Shaffer, *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, 1 (2001); Luisa Bernal, et al., *South-South Cooperation in the Multilateral Trading System: Cancun and Beyond* 29 (South Centre, Trade-Related Agenda, Development and Equity ("T.R.A.D.E.") Working Paper No. 21, May 2004); Stephen Byers, *Comment, Developments*, <http://www.developments.org.uk/data/comment00.htm> (last visited Oct. 10, 2004) (promising to address the issue of overhauling the WTO); AMRITA NARLIKAR, *WTO Decision-Making and Developing Countries* 14-19 (South Centre, T.R.A.D.E. Working Paper No. 11, Nov. 2001); Sylvia Ostry, *The World Trading System: In the Fog of Uncertainty*, Presented at Lehigh University (April 2004), available at <http://www.utoronto.ca/cis/WorldTradingSysteminUncertainty.doc> (last visited Sept. 22, 2004); European Commission Directorate-General for Trade, *The Doha Development Agenda After Cancun* 8 (Sept. 25 2003), <http://www.ictsd.org/ministerial/cancun/docs/COMMISSION-Cancun-and-Beyond-Sept-03.pdf> (last visited Sept. 28, 2004); World Trade Organization, *Establishment of the Trade Negotiations Committee (TNC) and Related Issues: Communication from Cuba, Dominican Republic, Egypt, Honduras, Kenya, Pakistan, Tanzania, Uganda and Zimbabwe*, WT/GC/58 (Dec. 21, 2001). http://docsonline.wto.org/GEN_viewerwindow.asp?D:/DDFDOCUMENTS/T/WT/GC/58.DOC.HTM (last visited Oct. 15, 2004).

2. Catholic Agency for Overseas Development, *The Cancun WTO Ministerial Meeting, September 2003: What Happened? What Does It Mean For Development?*, <http://www.cafod.org.uk/archive/policy/cancunanalysis20030924.shtml> (last visited Aug. 3, 2004) [hereinafter CAFOD].

3. Daniel Pruzin, *WTO: WTO Chief Sets Up Advisory Group on Future of Multilateral Trading System*, 20 *Int'l Trade Rep. (BNA)* 1125 (July 3, 2003). According to this report, the advisory body of experts was set up to "advise the WTO chief on how to strengthen the global trade body to deal with future challenges to the multilateral trading system." *Id.* The Chair of the Advisory Board is a former WTO Director General, Peter Sutherland and presently CEO of British Petroleum ("BP"). *Id.* Members are:

Cancun are in large part the outcome of the "closed-door and secretive nature"⁴ of the General Agreement on Tariffs and Trade ("GATT") regime and its isolation and insulation from some of the substantive problems encountered particularly by developing country members. But there is a more fundamental and related problem, 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 today. If undertaken in isolation of some of the pressing needs of developing countries, such as agriculture, well-meaning transparency and participatory reforms will, in my view, prove ineffectual to resolve the legitimacy crisis at the WTO. Indeed, if the trade agenda also continues to expand into only those areas in which developed countries have a comparative advantage while leaving unaddressed outstanding issues within existing agreements that currently are inimical to the interests of developing countries, this expansion will erode the gains of any reforms aimed at the effective and full participation of developing countries and citizens in both the decision and policy making aspects of the WTO.⁵

Thus, while increasing public involvement and improving transparency is critical to give all WTO members fair representation in decision making, there is an equally compelling case to address the bias in favor of further liberalizing the industrial and service sectors and to introduce new regimes of trade governance⁶ in which rich countries have a comparative advantage at the expense of agriculture and other sectors in which developing countries have a comparative advantage. Thus, 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

Professor Jagdish Bhagwati of Columbia University. . . ; Dr. Kwesi Botchwey, former finance minister of Ghana . . . ; Niall W. A. FitzGerald, co-chairman and CEO [of] Unilever; Koichi Hamada, professor of economics at Yale University; John Jackson, professor of law at Georgetown University; Celso Lafer, former Brazilian foreign affairs minister and ambassador to the WTO; and Professor Thierry de Montbrial . . . of the French Institute for International Relations.

Id.

4. Daniel C. Esty, *The World Trade Organization's Legitimacy Crisis*, 1 World Trade Rev. 7, 11 (2002).

5. See Monica Araya, *Lessons from the Stalemate in Seattle*, J. Env't & Dev. No. 2 183, 186 (2000) (arguing that "those outside the trade community still consider" the WTO's increased transparency over GATT "insufficient to counterbalance the WTO's closed door-oriented tradition.").

6. The examples here include the Singapore Issues: trade facilitation, competition, transparency in government procurement and investment measures.

legitimacy crisis of the WTO in general. Substantive issues, such as the exclusion of agricultural and commodity trade from the free trade mandate of GATT/WTO and the bias favoring sectors in which developed countries have a comparative advantage, further exacerbates the legitimacy crisis of the global trade regime. As I see it, developing countries are inhibited from effectively participating in the negotiating framework for more favorable new rules and are equally incapacitated from changing pre-existing rules that are rigged against their comparative advantage in areas such as agriculture. This paper, therefore, departs from accounts that primarily associate the WTO's legitimacy crisis with the deficiencies in the process of negotiating trade rules⁷ and the general lack of transparency, accountability and inclusiveness in conducting its trade governance mandate in general or exclusively in the organizational structure of the WTO.⁸ In my view, ending the closed-door, secretive and technocratic nature of the WTO decision-making and the trading regime bias in favor of industrial products⁹ and services, including extremely strong protection of pharmaceutical patent rights to the exclusion of counterbalancing considerations,¹⁰ will only partially resolve the WTO's legitimacy crisis. These issues must be simultaneously addressed alongside the bias against agriculture and other developing country concerns, such as those relating to implementation of existing agreements, to adequately address the WTO's legitimacy crisis.¹¹ In short, the WTO must stop

7. See generally Brian Hocking, *Changing the Terms of Trade Policy Making: From the 'Club' to the 'Multistakeholder' Model*, 3 *World Trade Review* 3 (2004). The primary claim is that:

The changing character of the trade agenda has simply served to *stress the significance of process* . . . [and that] the transparency-legitimacy debate directed towards international institutions such as the WTO is shadowed at the domestic level by *intensive discussions as to how the processes of national trade policy-making might best be adapted to the demands of the new environment*.

Id. at 3-4 (emphasis added).

8. It is fair, for example, to note that while the WTO's compulsory and binding dispute settlement system evidences a 'strong judiciary', the WTO lacks an equally effective 'executive arm.' For this point, see Ostry, *supra* note 1, at 6.

9. 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).

10. See James Gathii, *The Structural Power of Strong Pharmaceutical Patent Protection in U.S. Foreign Policy* 7 *J. Gender Race & Just.* 267, 268 (2003) (demonstrating that the United States motives in supporting strong international pharmaceutical patent protection limits access to HIV/AIDS drugs outside of the United States).

11. According to Fatoumata Jawara and Aileen Kwa, the bias in favor of free markets and as such the interests of developed country corporations is 'deeply ingrained' in the WTO secretariat while the WTO mission to pursue sustainable

being seen as both a first world club¹² and an undemocratic one at that – process and substance, therefore, ought to have equal weight in the reform agenda.

This paper proceeds as follows. In Part One, I address the procedural and organizational problems besetting the WTO particularly as reflected in the collapse of the Ministerial meetings in Seattle and Cancun. In Part Two, I examine the example of exclusion of agriculture from the liberalizing mandate of the WTO over the last fifty or so years as an example of a substantive issue awaiting resolution that would make the WTO much more representative of all the interests of its members. The basic claim made in Part Two is that developing countries have been demanding greater representation, participation and accountability at the WTO because they do not see it to be designed to promote their interests particularly in the areas where they have a comparative advantage relative to developed countries.

II. PROCESS AND ORGANIZATIONAL DEFICIENCIES OF THE WTO: THE EXAMPLE OF THE NEGOTIATING PROCESS IN CANCUN

A. *A Synoptic Overview of the Organizational Structure of the WTO and Its Negotiating Process*

At the top of the hierarchy in the decision making and negotiating process is the Ministerial Conferences, which are empowered to “take decisions on all matters under any of the

development has taken a backseat. See Ajit Singh & Branislav Gosovic, *Preface to Jawara & Kwa, supra note 1*, at xvi (describing generally the culture of the WTO Secretariat).

12. See R.O. Keohane & J.S. Nye, *The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy*, in *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium*, 313-67 (R. Porter et al. eds. 2001). There are invariable problems in overcoming this club model. There is a view that democratizing the WTO to overcome its Club Model nature is going to make the WTO 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, according to this view, 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* 12-15 (Mar. 2004), available at <http://www.politik.uni-halle.de/rode/texte/IB-PapierGovern0204.PDF> (last visited Aug. 2, 2004) (discussing future WTO governance scenarios). However, Robert Steinberg discounts such heretic prophesies. See generally Richard H. Steinberg, *Judicial Law- Making at the WTO: Discursive, Constitutional, and Political Constraints*, 98 *Am. J. Int'l L.* 247 (2004). For a view supporting that the “UNCTADisation” of the WTO will be bad for trade, see David Hartridge, *Speech at World Trade Post-Cancun Conference*, <http://www.sitpro.org.uk/policy/wto/conf03/hartridge.html> (last visited Aug. 2, 2004).

Multilateral Trade Agreements.”¹³ Every WTO member is represented in the Ministerial Conference which is held every two years.¹⁴ However, a practice has developed in the recent past where mini-ministerials between the rich and powerful members of the WTO are held in advance of the biannual Ministerial Conferences. In these mini-Ministerials, negotiating positions are adopted and then submitted at the Ministerial Conferences to the rest of the WTO membership for adoption without much further input.¹⁵ Below the Ministerial Conference is the General Council in which all the members of the WTO are represented.¹⁶ It reports to the Ministerial Conference and it is based at the WTO Headquarters in Geneva.¹⁷ The General Council, the Ministerial Conference and all bodies of the WTO as a matter of practice make decisions by consensus¹⁸ although that does not guarantee equal voice or weight in decision making between all member countries. The General Council also sits as the Dispute Settlement Body as well as the Trade Policy Review Body.¹⁹

13. Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, art. IV, para. 11, 33 I.L.M. 1143, 1145 (1994), available at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf (last visited Oct. 29, 2004) [hereinafter WTO Agreement].

14. World Trade Organization, Understanding the WTO: The Organization, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm (last visited Oct. 29, 2004).

15. See, e.g., Jawara & Kwa, *supra* note 1, at 59-62 (describing the Mexico mini-Ministerial of 2001, which was overwhelmingly attended by the richest members of the WTO with only one country out of thirty-one representing the least developed countries and only two countries representing the entire group of sixteen low-income countries); see also *id.* at 230-31 (discussing further mini-ministerials and the pressuring on developing countries); Robert Wolfe, *Informal Political Engagement in the WTO: Are Mini-Ministerials a Good Idea*, Trade Policy Res. (forthcoming 2004) (manuscript at 9) (stating that the number of mini-ministerials is on the rise, with only seven such meetings held during the first six years of the WTO, and eight meetings held “in the two years between Doha and Cancún”).

16. WTO Agreement, *supra* note 13, art. IV, para. 2.

17. Government of British Columbia, Ministry Home Page, World Trade Organization, <http://www.cse.gov.bc.ca/ProgramsAndServices/Trade/WTO.htm> (last visited Oct. 29, 2004).

18. WTO Agreement, *supra* note 13, art. IX, para. 1. Art. IX(2) provides that the “Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of . . . [WTO] Agreements.” It further provides that interpretations of WTO Agreements, such as Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), would be made on the recommendation of the Council overseeing the implementation of that Agreement. *Id.* art. IX, para. 2.

19. The Dispute Settlement Body, (DSB), is charged with overseeing the determination of disputes under GATT/WTO Agreements. Its decisions are binding unless the entire membership of the DSB votes not to adopt them. Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Agreement, Annex 2 (1994), http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (last visited Nov. 2, 2004). The Trade Policy Review Body is charged with engaging in a peer review of the

Below the General Council is the Trade Negotiations Committee ("TNC") that was set up in the Doha Ministerial Conference in 2001 to oversee the Doha negotiating mandate.²⁰ Under the Doha mandate, the TNC supervises negotiations "under the authority of the General Council."²¹ Developing countries have objected to having the General Council, which is part of the Secretariat, interfere with the negotiation process, which developing countries argue is the prerogative of the members through the TNC rather than General Council and the Secretariat.²² According to these countries, Article VI:4 of the Marrakesh Agreement²³ precludes the staff of the Secretariat from being involved in the negotiating process and, in particular, directing the process by having the Chair of the General Council simultaneously serving as the Chair of the TNC.²⁴ This position taken by developing countries is in part informed by a desire not to have the experience during the Uruguay Round where the members of the WTO in effect ended up negotiating with the Secretariat rather than amongst themselves.²⁵ These countries, therefore, proposed putting in place clear and binding rules to govern

trade practices and policies of WTO members. Trade Policy Review Mechanism, WTO Agreement, Annex 3 (1994), http://www.wto.org/english/docs_e/legal_e/29-tpm.pdf (last visited Nov. 2, 2004).

20. See Doha Ministerial Declaration, WT/MIN(01)/DEC/1 para. 46 (Nov. 20, 2001). The Declaration states:

[t]he 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.

Id.

21. *Id.*

22. World Trade Organization, *supra* note 1; see also Jawara & Kwa, *supra* note 1, at 227-28 (stating that developing nations see involving the Secretariat in negotiations as a dangerous precedent).

23. Article VI:4 of the Marrakesh Agreement provides in part that "the staff of the Secretariat shall be exclusively international in character." WTO Agreement, *supra* note 13, art. VI, para. 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." Agreement of the International Bank for Reconstruction and Development, Feb. 16, 1989, art. V, para. 5(c), <http://web.worldbank.org/WBSITE/EXTERNAL/ESTABOUT/US/0,,contentMDK:20049604~pagePK:43912~menuPK:58863~PiPK:36602,00.html#16> (last visited Sept. 28, 2004). "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).

24. Jawara & Kwa, *supra* note 1, at 221, 228

25. *Id.*

the negotiating process not only before the TNC,²⁶ 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.²⁷ With regard to the TNC under this proposal the following rules would apply: 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 from the membership of the General Council; minutes of all meetings shall be kept and made available within ten days of the meeting; all drafting of texts be done in open meetings with all language in disagreement appearing in brackets; and finally negotiating texts 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.²⁸

These reform proposals were also prompted by the appointment of Mr. Stuart Harbinson by the Director General of the WTO to serve as the Chair of Agricultural negotiations.²⁹ As Chair of the General Council in 2001, Mr. Harbinson routinely omitted the views and objections of developing countries in the draft Doha Ministerial Statement, which he drafted to reflect the views and interests of the most powerful countries of the WTO.³⁰ By contrast to the positions of developing countries outlined above, developed country members blocked the adoption of specific rules of procedure preferring instead to retain flexibility in the negotiating process.³¹ These issues of lack of a definite negotiating procedure, distrust, and the authority and relationship between the TNC and the General Council in part make it uncertain if this new trade round will be completed by the January 1, 2006 deadline. Developing countries have sought to address these questions of authority by referring to the Doha negotiating mandate's requirement that:

The negotiations shall be conducted in a transparent manner among participants, in order to facilitate the effective participation of all. They shall be conducted with a view to ensuring benefits to all participants and to achieving an overall

26. World Trade Organization, *supra* note 1.

27. I do not discuss these other forums in this paper. For a diagrammatic representation of all these fora, see Jawara & Kwa, *supra* note 1, at 14-15 (noting, in particular, figure one and accompanying text).

28. World Trade Organization, *supra* note 1.

29. Jawara & Kwa, *supra* note 1, at 224-28.

30. *Id.* at 63-64, 255-56, 259.

31. *Id.* at 224.

balance in the outcome of the negotiations.³²

Developed country members have by contrast emphasized that transparency would be achieved not through a set of rules that would slow or bog down the negotiating process as developing countries were proposing, but rather through a set of negotiating principles that would retain flexibility and decision by consensus.³³ Developed countries, such as the United States, imposed political pressure on developing countries to abandon 'obstructionist' tactics for insisting on a mutually agreeable set of negotiating rules!³⁴ This sort of back-room wheel-dealing which also involves calls to developing country capitals from Washington and Brussels threatening retaliatory action, such as aid cutoffs, are examples of extra-trade measures available to bully developing countries to comply with the agenda of developed countries.³⁵ Thus, an effort to make the negotiations more systematic, predictable and, in fact, more efficient was defeated in favor of a vague, if not opaque, process that has in the long run given developed countries an upper hand in continuing to exclude developing country concerns in the go-stop Doha Round.³⁶

The negotiations are restricted to members of the WTO, States and customs unions seeking accession to the WTO.³⁷ While at a formal level non-governmental groups, business groups and other non-State actors are excluded, in reality as we shall see below, the interests of these groups are represented in State delegations at the negotiating table or in their respective trade mission office in Geneva.³⁸ Developed countries and upper low income countries are

32. Doha Ministerial Declaration, *supra* note 20, at para. 49.

33. Jawara & Kwa, *supra* note 1, at 220, 224.

34. *See id.* at 222-23 (noting the most powerful WTO countries exerted political pressure causing many countries to remain silent or switch positions).

35. *Id.* at 180-81, 275-77 (noting that "[a]rm-twisting, through a combination of threats and inducements to countries and ambassadors, was a key feature of the process leading to the 'agreement' in Doha").

36. Kanaga Raja, *North's Tactics to Divide Developing Country Alliances Exposed*, Third World Network, <http://www.twinside.org.sg/title2/5623c.htm> (last visited Sep. 2, 2004).

37. Doha Ministerial Declaration, *supra* note 20, at para. 48.

38. In the United States, Congress has mandated trade negotiators to work closely with the public and private sector by in part establishing extensive consultative forums. For example Congress provided that "[t]he Assistant United States Trade Representative ["USTR"] for Industry and Telecommunications shall be responsible for ensuring [that] the interests of small business are considered in all trade negotiations . . ." Trade Act of 2002, Pub. L. No. 107-210, § 2112, 116 Stat. 933, 1021 (2002). An earlier draft of the bill had provided that the USTR pursue the identification of a small business advocate at the WTO Secretariat in Geneva "to examine the impact of WTO agreements on the interests of small- and medium-sized

fairly effectively represented in ongoing negotiations and at the WTO by their mission offices in Geneva. By contrast, the vast majority of low income and least developed countries are poorly represented or not represented at all both in Geneva and in periodic and ongoing trade negotiations.³⁹ This adds to the disparity in the negotiating abilities between countries and certainly contributes towards the skewed nature of the trade agenda in favor of the interests of the rich countries and against the interests of poorer countries. To understand additional process bottlenecks in trade negotiations, I examine some of the primary reasons accounting for the failure of the Cancun Ministerial meeting of September 2003.

B. Are Informality and Flexibility Good For Developing Countries?

While Richard Steinberg has definitively shown that informality and flexibility in the negotiating procedure definitely favors developed countries,⁴⁰ a view that is now confirmed by a recent extensive field study in Geneva,⁴¹ there are those who argue that lack of clear negotiating rules is not tragic for developing countries since these broad and vague rules can be supplemented by other mechanisms of consultation and information exchange among developing countries that could enhance their bargaining power.⁴² This contrasts sharply with calls for clear rules protecting trading rights and interests, such as intellectual property rights, that are advanced by developed countries. Thus, one may surmise that in some contexts, developed countries favor clear rules agreed to in advance while with regard to negotiating new rules, developed countries do not favor clear negotiating rules that build transparency into the process. So why would informality and flexibility be good for developing countries in negotiating new rules if, as the Cancun and

enterprises, address the concerns of small- and medium-sized enterprises, and recommend ways to address those interests in trade negotiations involving the World Trade Organization." An Act to Extend the Andean Trade Preference Act, H.R. 3009, 107th Cong. § 2111 (1998). The influence of big business in determining the agenda of the Uruguay Round of Negotiations especially in the intellectual property area is addressed in James T. 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).

39. See Jawara & Kwa, *supra* note 1, at 18-22 (arguing that the WTO, though a democratic institution on paper, has an agenda created solely by developed countries).

40. Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 Int'l Org. 339, 342 (Spring 2002).

41. See Jawara & Kwa, *supra* note 1, at 304-06 (noting that developed countries are extremely cognizant of any attempts to minimize their control "over the decision-making process").

42. Bernal et al., *supra* note 1, at 28.

Seattle Ministerials in particular illustrate, such informality and flexibility give developed countries room to exert economic, political and other types of pressure on developing countries that result in outcomes that disfavor developing countries? This question is all the more important given that developing countries' proposals for reforming the negotiating process are premised on the view that informality and flexibility in the negotiating process are a reflection of lack of transparency and their exclusion in designing new rules, changing old ones and in defining the direction of the WTO in general.

The South Centre has argued that informality and flexibility may not be tragic for developing countries for a number of reasons. First, because developing countries are by their very character diverse and therefore as a group they represent different and sometimes conflicting interests. Second, because when negotiating positions among WTO members shift quickly, a rigid negotiating system would handicap developing country ability to respond expeditiously. Third, because regular meetings of developing country alliances, among other coordinating and consultative mechanisms, would facilitate the exchange of information necessary to resolve deadlock amongst themselves and strengthen their common negotiating positions vis-à-vis developed countries.⁴³

Thus, even while favoring informality and flexibility, the South Centre does not subscribe to a continuation of a non-transparent and exclusionary negotiating process.⁴⁴ This is particularly true of the "pressure cooker" nature of negotiations during Ministerial meetings during which an overloaded agenda over a few days is put on the table for resolution.⁴⁵ This is exacerbated by the fact that the Doha Ministerial adopted the Single Undertaking rule⁴⁶ under which every country is obliged to commit to all the agreements arrived at during

43. *Id.* at 29-30.

44. Robert Wolfe's article may be wrongly read to the effect that the South Centre paper subscribes to doing nothing about the current negotiating process since informality and flexibility may, under some circumstances, be good for developing countries. See Robert Wolfe, *Still Foggy After All These Years: Reform Proposals for the WTO* (Draft) 6 (July 2004), available at <http://silver.queensu.ca/~wolfer/Papers/reform.pdf> (noting that "[o]ne study . . . concludes that efforts to formalize the system would be a mistake—informality and flexibility serve developing countries well") (citation omitted).

45. See European Public Health Alliance, *The Cancun Ministerial Conference of the WTO: What Went Wrong?* (Sept. 2003), http://www.epha.org/article_texte.php?id_article=747 (last visited Oct. 8, 2004) [hereinafter EPHA] (noting that the Cancun ministerial conference had an overloaded agenda).

46. See Doha Ministerial Declaration, *supra* note 20, at para. 47 (noting the use of the Single Undertaking rule).

the Round without the option of opting out of agreements inimical to that particular country.⁴⁷ Such built in rules that potentially compel developing countries to assume obligations inimical to their interests, particularly following a process that is less than transparent, goes to the heart of the illegitimacy crisis the WTO faces.

Finally, it is important to note that guarantees of fair process and equal rights to historically disempowered or minority communities living within majority communities who denied the disempowered or minority communities equal rights, opportunities and fair process are a treasured and central tenet of their relationship with dominant communities.⁴⁸ In my view, it is not any different with regard to the negotiating process at the WTO. It must be reformed to make it more transparent, inclusive and participatory to guarantee that developing countries overcome the barriers that inflexibility, informality and rules, such as the Single Undertaking rule, put in their way to shape new agreements, redesign old ones and partake in determining the direction of the WTO. Thus, even though formal amendments to the governing law of the WTO may not be easily achievable as a matter of political reality, processes to open it up and make it more inclusive and transparent so that it can and indeed will be seen to work to the benefit of all members are imperative.⁴⁹

C. *How the Negotiating Process in Cancun Contributed to a*

47. Chanrakant Patel, *Single Undertaking: A Straitjacket or Variable Geometry 2* (South Centre, T.R.A.D.E. Working Paper No. 15, May 2003), available at <http://www.southcentre.org/publications/workingpapers/paper15/toc.htm> (last visited Aug. 3, 2004).

48. *Introduction to Critical Race Theory: The Key Writing that Formed the Movement* xxiii (Kimberle Crenshaw et al. eds., 1996) (noting in part that progressive race analysis in the United States guards against the skepticism that rights are unimportant; rights, they argue, hold a "transformative value in the context of racial subordination that transcended the narrower question of whether reliance on rights alone could bring about any determinate results"); see also Patricia J. Williams, *The Alchemy of Race and Rights* (1991); J. Oloka-Onyango, *Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa*, 18 *Am. U. Int'l L. Rev.* 851 (2003).

49. Ralf Dahrendorf, *Can European Democracy Survive Globalization?*, *National Interest* 17, 19 (Fall 2001) (arguing that since parliamentary democracy is in the foreseeable future not likely in international institutions such as the WTO, that the creation of effective checks and balances is necessary); see also Robert Howse, *How to Begin to Think About the 'Democratic Deficit' at the WTO*, in *International Economic Governance and Non-Economic Governance and Non-Economic Concerns: New Challenges for the International Legal Order* 10-12, 19-21, 79-101 (S. Griller ed., 2003), available at http://faculty.law.umich.edu/rhowse/Drafts_and_Publications/howse7.pdf (last visited Aug. 2, 2004) (advocating for *inter alia*, inclusion of non-governmental organizations to act as monitors of the trade negotiation and appeal processes); Ostry, *supra* note 1.

Failed Ministerial

1. Unresponsiveness to Developing Country Concerns

A major problem in Cancun was that the commitment made in the Doha Ministerial meeting in September 2001 with regard to making development objectives central in the new round of negotiations⁵⁰ was largely disregarded by the developed countries. This was simply a problem of the inability of developed countries to hear and respond to the concerns of developing countries.⁵¹

This unresponsiveness is most evidenced by the insistence, especially by the European Union ("E.U."), to initiate negotiations on the Singapore issues (transparency in government procurement, trade facilitation, competition and investment) notwithstanding the opposition on opening new negotiations by developing countries prior to the resolution of existing implementation difficulties of existing GATT/WTO commitments.⁵²

2. Lack of Transparency in Producing a Draft Text

On Saturday September 13, 2003, when a draft text of the Cancun Ministerial was produced, developing countries were disappointed to find that their views on various issues had not been taken into account.⁵³ In addition, on cotton - the flagship issue for developing countries at Cancun - the draft text did not reflect the promises the United States had made in cajoling the developing countries at Cancun to be agreeable to a variety of other agricultural reforms.⁵⁴ The inclusion of the Singapore issues in the draft text, on which there had been strong developing country opposition, further

50. Doha Ministerial Declaration, *supra* note 20, at para. 6. The Declaration states: We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive.

Id.

51. CAFOD, *supra* note 2.

52. CAFOD, *supra* note 2. On outstanding implementation issues, see *Implementation Related Issues and Concerns*, WT/MIN(01)/10 (Nov. 14, 2001).

53. See CAFOD, *supra* note 2; see also World Dev. Movement, *Collapse of WTO Talks In Cancun* (Sept. 17, 2003), at <http://www.wdm.org.uk/campaign/cancun03/cancunanalysis.htm> (last visited Oct. 8, 2004) [hereinafter WDM] ("Not only did the text simply not reflect the views of developing countries, it was also a step backward on some development issues.").

54. See CAFOD, *supra* note 2.

highlighted the lack of transparency in producing the draft text.⁵⁵ It is important to note that the Doha Ministerial Declaration made 'explicit consensus' a prerequisite to negotiating on the Singapore Issues,⁵⁶ and that by the Cancun conference no such consensus had been reached.⁵⁷

The chair-driven negotiating process at the Cancun Ministerial added to the lack of transparency in the process of producing a draft at Cancun.⁵⁸ This problem is in part related to the practice of automatically having a senior government official of the country hosting the Ministerial becoming the overall chair of the entire ministerial meeting.⁵⁹ At the opening session of the Ministerial, the Mexican Foreign Affairs Minister, who chaired the meeting, announced the negotiation process without giving the various representatives an opportunity to discuss it or to seek clarification.⁶⁰ The draft Ministerial Declaration presented by the Chair of the General Council, Perez de Castillo, had not been the result of deliberative and inclusive process of all the membership, but rather was the result of his work together with the WTO Director General most likely in consultation, if not with the approval, of Brussels or Washington.⁶¹

At the opening session, five facilitators were announced, without election or discussion, to chair discussions: George Yeo (Singapore for agriculture); Mukhisa Kituyi (Kenya for development issues); Pierre Pettigrew (Canada for Singapore issues); Clement Rohee (other issues including Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") and Services); Henry Tang (Hong Kong for Non-Agriculture Market Access or NAMA).⁶² These chairs directed meetings in rooms that gave the delegates no microphones or name

55. *See id.*

56. Doha Ministerial Declaration, *supra* note 20, at paras. 20, 23, 26-27.

57. *See* Martin Khor, *Behind the Collapse of the Cancun Ministerial*, Third World Network, Sept. 14, 2003, <http://www.twinside.org.sg/title/twninfo76.htm> (last visited Oct. 8, 2004).

58. CAFOD, *supra* note 2.

59. *Id.*

60. *Id.*

61. *See* Chakravarthi Raghavan, *Process and Substance Caused Failure at Cancun* Third World Network, Sept. 16, 2003, <http://www.twinside.org.sg/title/5420a.htm> (last visited Oct. 8, 2004).

62. *See Cancun Summary of 11 September 2003*, <http://elpl.kiep.go.kr/project/dda.nsf/webview1/F24D54609B42310049256DA9000C1C4F> (last visited Oct. 8, 2004); *see also* Pascal Lamy, *The Future of the WTO*, Speech given at the European Parliament Kangaroo Group, (Jan. 17, 2004), available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/04/42&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited Aug. 3, 2004).

plates.⁶³ They had directions to emphasize consultations on the text through informal consultations otherwise known as green room meetings.⁶⁴ Facilitators were encouraged by the Director General to engage in bilateral negotiations (otherwise known as confessionals) with the ostensible goal of encouraging members to openly, but secretly express their views to the Facilitator.⁶⁵ The process also included meetings every morning with delegation heads.⁶⁶ The structure of the negotiating process, therefore, invariably promoted the exclusion of open discussion particularly given the secretive nature of green room meetings and confessionals as the primary decision-making forums.⁶⁷

It was also not clear from the announced procedure whether delegations would participate in shaping the draft ministerial declaration, which was scheduled to be announced on 12th or 13th of September, 2003, only four clear days following the beginning of the Ministerial on September 10, 2003.⁶⁸ In addition, no information was provided regarding whether delegations seeking to comment on the submitted draft or seeking clarifications on whether the draft reflected the views of the members would be possible.⁶⁹

Green room meetings are notorious at the WTO since it is in such meetings that important decisions are made, yet attendees of such meetings are often undisclosed to the entire WTO membership and there are no minutes taken at these meetings.⁷⁰ In the final analysis, green room meetings disadvantage a majority of countries at the WTO by excluding them from shaping the decisions that are adopted irrespective of whether they concurred with such decisions.⁷¹ As a matter of legal process, the absence of a formal grant of authority through delegation to such informal and important consultations undermines the legitimacy of decisions that arise from

63. CAFOD, *supra* note 2.

64. See WDM, *supra* note 53.

65. CAFOD, *supra* note 2.

66. Martin Khor, *Cancun Ministerial Starts in the Shadow of Protests and an Untransparent Process*, Third World Network, Sept. 11, 2003, <http://www.twinside.org.sg/title/update2.htm> (last visited Nov. 4, 2004).

67. Even E.U. Trade Commissioner Pascal Lamy has been critical of green room meetings. See Lamy, *supra* note 62; see also Pascal Lamy, Keynote address at a conference on *Global Policy Without Democracy?*, available at <http://www.dse.de/ef/parlmnt/lamy.htm> (last visited Aug. 3, 2004).

68. Khor, *supra* note 66.

69. *Id.*

70. Jawara & Kwa, *supra* note 1, at 18.

71. *Id.*

such processes.⁷² In the highly polarized negotiations that have characterized the WTO since the Seattle Ministerial, green room meetings among a select number of countries with largely concurrent goals give them a platform to symbolically expel delegates from countries that are regarded as having an opposing agenda.⁷³

The lack of transparency in producing a draft text is typical since both the proposals from Brussels and Washington do not expand to developing countries as quickly as they do to members of the OCED, the G7, then to twenty to thirty mostly developed countries in green room meetings after which middle-income countries, following low income countries and finally least developed countries which are consulted last.⁷⁴ This strategy dis-empowers opposing countries from establishing an effective coalition against the enveloping consensus as the draft text expands from the most powerful to the least powerful countries.⁷⁵

3. Failure of the Developed Countries to adopt a Constructive Negotiating Tone Towards Developing Countries

There was lack of constructive dialogue at the Cancun Ministerial not only because the United States and the E.U. underestimated how well organized the developing countries were on their agreed positions, but also because these large countries did not adopt a constructive tone towards negotiating with developing countries.⁷⁶ Developing countries also adopted difficult negotiating positions with regard to liberalizing industrial tariffs. Hence, the United States and E.U. presumed, like in prior negotiations, that agreement between developed countries would precede the concurrence of developing countries, whose acquiescence was presumed to automatically follow the agreement of the developed countries.⁷⁷ At Cancun, this model of producing agreement proved

72. See Steve Charnovitz, *The Emergence of Democratic Participation in Global Governance (Paris, 1919)*, 10 *Ind. J. Global Legal Stud.* 45, 49 (2003).

73. For a discussion on symbolic expulsion, see Bruce M. Patton, *The Role of Agents in International Negotiation*, in *Negotiating on Behalf of Others* 151 (Robert H. Mnookin & Lawrence Susskind, eds. 1999). The G-28 at Cancun fits the profile of a group regarded as having such an opposing agenda at Cancun.

74. Steinberg, *supra* note 40, at 354-55; see also Jawara & Kwa, *supra* note 1, at 56-59.

75. See Jawara & Kwa, *supra* note 1, at 56-59.

76. See *Bangladesh Fails to Gain Expected Benefit from WTO Cancun Meeting*, *Xinhua News*, Sept. 28, 2003, http://news.xinhuanet.com/English/2003-09/18/content_1086710.htm (last visited Oct. 30, 2004) (noting that developed countries did not expect the developing countries to be so strongly united).

77. See Steinberg, *supra* note 40, at 355 (noting their dominance in advancing

unworkable because developing countries sought greater inclusivity in the decision-making process through the G 22 and other regional and interest groups.⁷⁸ The inclusivity demanded by developing countries at Cancun is consistent with the view that a multilateral trading framework should “be built on broad based popular support” among the members.⁷⁹

Rather than seek such broad based support, developed countries, especially the United States and the E.U., did not take the concerns of developing countries seriously. This attitude among developed countries is not new.⁸⁰ Some reports indicate that governments such as the E.U. thought that developing country opposition to the Singapore issues was tactical,⁸¹ an attitude that revealed a complete lack of good faith in addressing developing country issues. Developed country intransigence on proceeding with the Singapore issues without the support of developing countries and at the expense of issues of importance to developing countries was one of the central events leading to the collapse of the Cancun Ministerial.⁸²

Yet, after the collapse of the conference, developed-country governments, such as the United States, blamed developing countries for overplaying the cotton issue and maintaining their insistence on abolition of agricultural subsidies.⁸³ Robert B. Zoellick of the U.S. Trade Representative (“USTR”) blamed the collapse of the Cancun Ministerial on the “rhetoric of the ‘won’t do’” countries.⁸⁴ The proposition that the rhetoric of “won’t do” countries overwhelmed the willingness of “can do” countries to work out a compromise at Cancun is at best a partial explanation. Peter Gaemelke, the head of the European Farmers Group, by contrast, noted that Zoellick “had done his job a little too well” to ensure the re-election of President Bush –

initiatives).

78. See CAFOD, *supra* note 2.

79. See also Lawrence Summers, *Comment & Analysis: A Trade Round that Works for People*, *Fin. Times*, (Nov. 29, 1999) (making the same point after the failed Seattle Ministerial meeting).

80. For an example, see Chakravarthi Raghavan, *Closing the Opportunity to Reform the WTO System?*, *Third World Econ.* No. 284 (July 2002), at <http://www.twinside.org.sg/title/twe284a.htm> (last visited Aug. 3, 2004).

81. CAFOD, *supra* note 2.

82. See Raghavan, *supra* note 61.

83. See WDM, *supra* note 53 (noting that the E.U. took minor action on developing countries' proposals, but forced negotiation on a array of new issues).

84. U.S. Trade Representative Robert B. Zoellick, *Statement at the Final Press Conference of the World Trade Organization Fifth Ministerial Meeting* (Sept. 14, 2003), <http://www.usda.gov/news/releases/2003/09/0318.htm> (last visited Sept. 29, 2004); see also, *WTO Chair Suggests Developing Countries Overplayed Hand on Cotton Issue*, 20 *Int'l Trade Rep.* 1889 (2003).

that the real reason for the failure of the talks was that the United States could not promise to cut its multi-billion dollar farm subsidies because the states that benefit most from those subsidies voted for Bush in 2000 and would be unwilling to support Bush if the administration committed to substantially reducing the subsidies.⁸⁵ For the E.U., the Singapore issues became the “poison pill” to scatter the Cancun talks.⁸⁶ Even the E.U. was afraid of facing the wrath of their powerful farm lobbies that were greatly opposed to reforming E.U. farm subsidies.⁸⁷

4. Lack of Adequate Attention to Development and Implementation Issues

Cancun was characterized by a lack of attention to the questions of development⁸⁸ and of outstanding implementation issues, which the Doha Ministerial had made central to a new round of talks.⁸⁹ The

85. Elizabeth Becker, *Coming U.S. Vote Figures In Walkout at Trade Talks*, N.Y. Times, Sept. 16, 2003, at A6 (also noting that most of the subsidies go to agribusiness whose political contributions jumped to fifty-three million dollars in 2002 from thirty-seven million dollars in 1992, with the Republican Party share rising to seventy-two percent up from fifty-six percent).

86. *The Cancun Failure*, Editorial, N.Y. Times, Sept. 16, 2003, at A24.

87. *See id.* (noting that the European position on farm subsidies was “protectionist”).

88. *See* Doha Ministerial Declaration, *supra* note 20, at para. 6 (putting development at the center of trade). The lack of sufficient attention to issues of development in general and sustainable development in particular at Cancun was a betrayal of this commitment and it aroused an atmosphere of suspicion and mistrust of the developed countries by developing countries. *See* CAFOD, *supra* note 2 (noting that the conference “witnessed a clash of visions”).

89. Doha Ministerial Declaration, *supra* note 20, at para. 12. The Declaration provided that:

We attach the utmost importance to the implementation-related issues and concerns raised by Members and are determined to find appropriate solutions to them. In this connection, and having regard to the General Council Decisions of 3 May and 15 December 2000, we further adopt the Decision on Implementation-Related Issues and Concerns in document WT/MIN(01)/17 to address a number of implementation problems faced by Members. We agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme we are establishing, and that agreements reached at an early stage in these negotiations shall be treated in accordance with the provisions of paragraph 47 below. In this regard, we shall proceed as follows: (a) where we provide a specific negotiating mandate in this Declaration, the relevant implementation issues shall be addressed under that mandate; (b) the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee, established under paragraph 46 below, by the end of 2002 for appropriate action.

Id. at para 12.

Yet, the proposed Cancun Ministerial reflected little of this commitment. *See* Martin Khor, *Cancun Draft is Imbalanced, Say Developing Countries*, Third World Network,

commitments made in Doha with regard to least developed countries,⁹⁰ special and differential treatment,⁹¹ and technical cooperation and capacity building⁹² received little or no attention in Cancun among the developed countries.⁹³ In addition, questions of food security and rural development in the negotiations on agriculture, and issues of access to developed country markets for produce and products from developing countries within the realm of agricultural negotiations equally received little attention.⁹⁴ Given that for developing countries increased trade flows are almost always acutely associated with increased vulnerability particularly for women and groups, they lose out to winners within both their national and international economy, these concerns are critical to make participation in the WTO mean something for these countries.⁹⁵

In addition, developing countries are suspicious of a form of development that equates progress primarily with economic growth achieved through export-led growth, which excludes attainment in meeting social objectives like education and health.⁹⁶ Indeed, it does seem that the emphasis on proceeding with some of the Singapore issues in the Doha Round is premised on a view of development that would support allocating resources away from supporting social services on the assumption that by giving the private sector maximum freedom, it shall become an engine of growth that will eventually trickle down to people.⁹⁷ While developed countries and development specialists often favor a view of development predicated

Aug. 26, 2003, <http://www.twinside.org.sg/title/twinfo69.htm> (last visited Oct. 8, 2004) (noting that implementation was a concern shared by various countries).

90. Doha Ministerial Statement, *supra* note 20, at paras. 42-43.

91. *Id.* at para. 44.

92. *Id.* at paras. 38-41.

93. See Khor, *supra* note 89 (noting criticism of the draft Cancun Ministerial text because it did not adequately address the concerns of developing countries falling short of the Doha mandate).

94. CAFOD, *supra* note 2.

95. See generally Kamal Malhorta, United Nations Dev. Programme, Making Global Trade Work for People 1 (2003) (providing an excellent analysis on the fact that "an evaluation of the multilateral trade regime should be based on whether it maximizes possibilities for human development—especially in developing countries").

96. See Basil Davidson, *Can Africa Survive?* 101-04 (1974) (suggesting that African nations should not follow the European model of industrial development).

97. See James Gathii, A Critical Appraisal of the NEPAD Agenda in Light of Africa's Place in the World Trade Regime in an Era of Market Centered Development, 13 *Transnat'l L. & Contemp. Probs.* 179, 183 (2003) (explaining "market-centered development" as a view "that equates development primarily with economic growth by giving the private sector maximum freedom as the engine of growth").

on improved market access and national policy reforms such as deregulation, privatization and liberalization, developing countries favor re-balancing the rights and obligations under existing trade agreements, such as in agriculture and access to essential medicines to arrive at a level playing field that would benefit them as much as developed countries.⁹⁸ It is these competing visions of development that are at stake in the Doha Round and that amply reflect the indivisible relationship between process reforms seeking greater transparency on the one hand, and substantive reforms seeking a fairer and balanced trading framework for developing countries, on the other.⁹⁹ Unless the problems of process and substance are conceptualized as inextricably linked, there is a danger that focusing exclusively on questions of process/transparency will bracket out questions of social justice and equity embedded in the substantive reforms labeled development. In short, while reforms in the process of negotiation are critical, they, in and of themselves, may be insufficient to challenge the institutional assumptions, praxis and commitments to a free trade dogma insensitive to issues of social justice and equity.¹⁰⁰

*D. What is to Blame for the Cancun Failure?¹⁰¹ Part
National/Part Transnational*

The problems highlighted above, in my view, demonstrate that the problems are not simply or only at the WTO as an international institution. To put it simply, the undemocratic nature of the processes of the WTO is not simply an international organizational problem—it is a problem at the intersection of the national policies of powerful western governments and a WTO that is not truly or even fully global.¹⁰² In fact, to understand the crisis at the WTO, one has to think more broadly of all the actors involved, including not just the

98. See Kenneth W. Abbot, Development Policy in the New Millennium and the 'Doha Development' Round 16-17 (2003), available at <http://www.globalpolicy.org/soecon/trade/2003/05abbottdoha.pdf> (last visited Sept. 29, 2004) (listing suggested market and trade reforms shaped by complimentary social and economic policies for developing countries).

99. See *id.* (recognizing the imbalance in WTO policies at the Doha Round in favor of trade reforms favorable to developed countries at the expense of trade reforms in favor of developing countries such as in agriculture).

100. For a related argument in the context of the World Bank, see James Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 Buff. Hum. Rts. L. Rev. 107, 170 (1999) (describing the approach in terms of the World Bank).

101. It is important that the question is not simply who is to blame, but what happened that made agreement impossible.

102. For an exploration of this idea, see Saskia Sassen, *The Participation of States and Citizens in Global Governance*, 10 Ind. J. Global Legal Stud. 5, 5 (Winter 2003)

WTO Secretariat in Geneva, but also how the trade ministry officials in countries around the world contribute to the WTO policy making process and decision making.¹⁰³

It is the hybrid form of authority of institutions which implement international trade rules within states in conjunction with international institutions like the WTO that partly explain the Cancun failure.¹⁰⁴ In the regional/national institutional context, the E.U. Commission and the office of the USTR have arguably become powerful arenas in determining the agenda of the WTO, yet these two bodies share authority over the international trade agenda with the WTO—an institution itself that is not fully international except in its membership. Consider, for example, the importance of institutions like the U.S. International Trade Commission or even federal district courts in the United States that are involved daily in negotiating and mediating the intersection of domestic implementing legislation and the international trade treaties of the GATT/WTO framework.¹⁰⁵

There was also too little time at Cancun to resolve all the issues on the table.¹⁰⁶ It was impracticable to arrive at a consensus where the issues were far too controversial and in a context where developing countries had in an unprecedented fashion worked out a common negotiating platform and were seeking to be fully included in the negotiating process.¹⁰⁷

However, the most significant reason for the failure of the Cancun Ministerial was that developing countries determined it was not in their interest to continue negotiations within an organization whose most powerful members did not support the stated organizational mission of free trade being extended to agriculture as

103. See Daniel K. Tarullo, *Law and Governance in a Global Economy*, 93 ASIL Proc., 105, 106-07 (1999) (explaining how the WTO has moved away from traditional principles of international liberalism and domestic autonomy).

104. Anne-Marie Slaughter, *A New World Order* (2004) (explaining that government networks currently characterize international relations contrary to conventional wisdom that focuses almost exclusively on states as unitary actors).

105. See Sassen, *supra* note 102, at 12-13 (noting that the state remains crucial in the global order in terms of giving globalization "operational effectiveness and legitimacy"); see also James Thuo Gathii, *Safeguarding Domestic Policy Through International Legal Minimalism: A Re-Characterization of The Foreign Affairs Trade Doctrine*, 25 U. Pa. J. Int'l Econ. L. 1 (2004) (showing the predisposition of courts in the United States, and of the WTO's Dispute Settlement Bodies in upholding the interests of the United States at the expense of its trading partners even where the rules would have permitted different outcomes).

106. See CAFOD, *supra* note 2.

107. See *id.* ("The number of players involved in making decisions was... significantly greater, complicating any attempt to extract quick concessions and last minute climb-downs.").

it has been for industrial products for over fifty years.¹⁰⁸ It is a question about the WTO's commitment to the principle of the equal application of its basic commitments that most accounts for Cancun's failure and that without resolution will continue to haunt the WTO in the future. I address this issue more fully in Part II.

E. What Needs to be Done to Address Organizational and Procedural Problems at the WTO?

To begin, let me note there is no magic bullet that will resolve the various organizational and procedural problems at the WTO. However, there are some reforms that would go a long way in addressing the crises. I outline some of the reforms below.

There is need for a more democratic, transparent, participatory and pre-agreed negotiating process at the WTO. In Cancun, developing country delegations invited members of civil society to be official delegates thereby giving developing countries negotiating capacity they often lacked before.¹⁰⁹ However, there is need to have a better process of involving NGOs in the WTO process. Yet, the involvement of NGOs, in and of itself, is not adequate. There is need to examine the way in which those institutions, especially those in the rich industrial countries that to a large extent control the international trading agenda, operate to make the international trading system unfair, biased and undemocratic.

Given the level of technicality and the breadth of issues that WTO negotiations sought to accomplish at Cancun,¹¹⁰ it would be much more preferable to have a rolling negotiating process that realistically seeks to give all countries an opportunity to genuinely participate in making decisions. Additional time for negotiation will allow a fuller consideration of research input into the decision-making process.¹¹¹ The pressure cooker approach to negotiations adopted in Cancun, Seattle and, in fact, in most of the Doha Round so far, works to the disadvantage of the smaller and less powerful

108. See CAFOD, *supra* note 2 (“[W]hile the developing countries advocated a new trading system based on fairness and development need, . . . the EU and US in practice abandoned any pretence that this was a ‘development round’ fundamentally different from its predecessors.”).

109. See *id.* (noting that Brazil, China, India and other developing countries joined together on agricultural issues, which resulted in an increase in their capacity to articulate their position).

110. See *id.*

111. See generally Ostry, *supra* note 1 (arguing in part that “research capabilities, both governmental” and academic, in national capitals that create the means to influence policy decision-making and the diffusion networks of key actors, “both governmental and non-governmental[,] through meetings, conferences, publications [and so on] are essential for developing consensus on policy strategies” at the WTO).

members of the WTO.

F. Can the Sutherland Commission Achieve these Objectives?

In my view, the Sutherland Commission is a reflection of what is wrong with the governance and architecture of the WTO and I fully agree with Professor Howse's critique of it and his suggestions for reform.¹¹² The Sutherland Commission was appointed single-handedly by the Director General and does not have any representatives from the Trade and Justice Movement or even from Civil Society in general.¹¹³ It has no women on it and is headed by a former WTO insider who is/was a CEO of a major oil company,¹¹⁴ whose views about the role of the WTO and the growing power of developing countries gives one room for pause.¹¹⁵

However, there is Commission member Professor Jagdish Bhagwati, who though well-known for his work demonstrating that free trade can benefit developing countries, has shown an open mind about the limits of markets and has written about the protectionism of the developed economies like the United States¹¹⁶ although I know Professor Howse has expressed skepticism about his objectivity in critiquing certain DSB decisions. In fact, it should be noted that notwithstanding the fact that Bhagwati is a well-regarded *laissez-faire* economist whose work has been especially critical of the

112. Robert Howse, Paper in Current Volume of the Rutgers Law Review to be published in Volume 56.

113. See WTO Director General: Peter Sutherland-Biographical Note, available at http://www.wto.org/english/thewto_e/dg_e/ps_e.htm (last visited Oct. 11, 2004).

114. See Peter Sutherland, at <http://www.trilateral.org/membership/bios/ps.htm> (last visited Oct. 11, 2004).

115. See Peter Sutherland, *Doha and the Crisis in Global Trade*, Financial Times, Sept. 4, 2001, at 21 (arguing that the WTO is merely a facilitator of global trading system without which "economic recovery will take a longer time coming, solutions for the problems of the world's poorest countries will be frustrated and the many benefits global trade can bring will be denied"). In fact, it is not necessarily true that a functioning trading system, especially as it is presently constituted, benefits the poorest countries and further contrary to Sutherland's editorial, the Uruguay Round resulted in heavier responsibilities for developing countries that cost more to implement than the benefits they conferred. See Ostry, *supra* note 1. Further, trade liberalization programs have been shown to work to undermine poverty reduction programs that the World Bank requires poor countries to implement. See J. Michael Finger & Philip Schuler, Implementation of Uruguay Round Commitments: The Development Challenge 1 (World Bank, Working Paper No. 2215, Oct. 1, 1999), available at <http://econ.worldbank.org/docs/941.pdf> (discussing the cost of reforms to developing countries). See generally Gathii, *supra* note 97 (arguing that the New Economic Partnership of African Development "adopts a market-centered approach to development primarily financed by flows of Western aid and capital").

116. See generally Jagdish Bhagwati, *The World Trading System at Risk* (1991).

protectionism of developing countries in the period after the Second World War, he has often expressed concern over the exclusion of developing country perspectives on trade law and policy discussions.¹¹⁷

III. SUBSTANTIVE REFORMS OF WTO AGREEMENTS

In this part of the paper, I want to provide a broader context for appreciating the exclusion and disempowerment of developing countries at the WTO and from the WTO's free-trade mission. My basic claim is that organizational and procedural deficiencies at the WTO only partly account for the collapse of the Ministerials in Seattle and Cancun, and that the exclusion of agricultural and commodity trade from the GATT/WTO mandate equally account for the collapse as well as the legitimacy crisis of the global trade regime. The exclusion of agriculture from the trading regime's mandate of free trade or liberalization is just one example of the substantive issues that are part of the WTO's legitimacy crisis. There are many other substantive issues, such as access to essential medicines, that are not discussed in this paper. To address the WTO's legitimacy crisis, there is a real need to make the trading system work for all countries, and that means a good-faith effort to address these substantive issues of concern to developing countries.

I focus on reforming the WTO's agricultural trading rules to demonstrate how these types of reforms of WTO rules can help countries that rely on exports of commodities and would contribute towards resolving the WTO's legitimacy crisis. The justification for this focus is that a majority of developing and least developed countries are commodity dependent, yet the international trading regime is heavily tilted against their interests. That means that the more than fifty developing and least developed countries, which comprise the majority of the poorest countries of the world, depend on export earnings of one or two commodities to earn much needed foreign aid.¹¹⁸ For these countries, it is exporting food products and

117. See, e.g., Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96 Am. J. Int'l Law 126, 134 (2002) (discussing trade liberalization in developing countries).

118. The E.U. has recently stated that there are fifty-four commodity dependent developing countries that earn more than twenty percent of their total export revenues from three or less agricultural commodities, see *EU Commission Proposes Plan to Boost Developing Countries' Access for Crops*, 21 Int'l Trade Rep. 312 (2004); see also, B.S. Chimni, *International Commodity Agreements: A Legal Study* 4, 39 (1987) (listing important commodities of developing countries, and discussing how their stability is directly related to the market of developed countries because if the developed market drops, so does the developing country's exports); Kabir-Ur-Rahman, *The Law and Organization of International Commodity Agreements* 249-78 (1982) (discussing the "integrated programme for commodities" which purpose is to stabilize exports).

other commodities in which they have a comparative advantage that they can get the benefits of participating in global trade. Yet, the subsidies of rich industrialized countries for commodities, like cotton, make it impossible for these countries to get their share of global trade.¹¹⁹ The facts here are straightforward and simple. Planned elimination or reduction of farm subsidies in rich industrial nations will introduce conditions of competition and will give developing countries a chance to earn a fair return on the well-deserved sweat and labor of their farmers.¹²⁰ After all, without the trade-distorting subsidies, developing and least developed countries are the lowest cost producers of commodities, like cotton, without which there is little else at the moment they can sell on the international market.¹²¹

The importance of agriculture is also underlined by the fact that a majority of the world's poor live in rural areas where agriculture is the largest employer.¹²² In addition to the high border protection of developed country economies, the policies pursued by developing country governments impair the ability of the poor to live off the produce of their farms.¹²³ The rate of poverty in largely rural countries¹²⁴ is extremely high and it is worsened by the increasingly subtle protectionism of developed countries' agricultural markets, such as through standards.¹²⁵ Since agricultural exports in the low-

119. World Bank, *Global Economic Prospects: Realizing the Development Process of the Doha Agenda 107-08* (2003), available at <http://www.worldbank.org/prospects/gep2004/full.pdf>.

120. It is important though to acknowledge that abrupt liberalization of agricultural markets will not automatically benefit the poorest countries since growing giants like China are much more likely to sell their products in the economies of rich industrialized countries. That is anticipated to happen with the phase out of import quotas on textiles and apparels in rich industrial countries under the WTO Agreement on Textiles and Clothing by January 1, 2005.

121. Hearing Before the Sub-Committee on Africa of the International Relations Committee, House of Representatives, 108th Cong. (June 24, 2003) (written Statement of H.E. Amadou Toumani Toure, President of the Rep. of Mali), available at <http://www.africaaction.org/docs03/tr0306a.htm> [hereinafter Statement of President Toumani Toure]; see also *The Cancun Failure*, *supra* note 86.

122. World Bank, *supra* note 119, at 103-09.

123. See *id.* at 103-04.

124. *Id.* at 106 (noting that seventy-four percent of the population in least developed countries lives in rural areas; sixty percent of other low-income countries; thirty-three percent in middle-income countries, excluding China and India; sixty-three percent in China; and seventy-two percent in India).

125. *Id.* at 104. According to the World Bank,

[a]lthough official export subsidies may be small and shrinking, *effective* export subsidies created by domestic support are increasing, lending unfair advantage to industrial country producers. Currently, cotton is not classified as receiving export subsidies. Its domestic and export prices in the United States and the European Union are the same—and those prices are less than

income bracket with small urban populations contribute to faster economic growth than can the pace of domestic demand, changes in the international commodity markets are highly correlated with declining household incomes.¹²⁶ Thus, as the World Bank has shown, developed country cotton subsidies depress world cotton prices by forty percent and this in turn results in an overall reduction of rural welfare in rural Benin by six to seven percent and, at the household level, individual farmer welfare declines by nineteen percent.¹²⁷

Therefore, contrary to the conventional wisdom that trade advocacy for developing countries is for the most part based on moral and political arguments, and that developed countries have powerful economic arguments on their side, the strongest economic arguments for reforming international agricultural trade are on the side of developing and least developed countries. Consequently, developing and least developed countries raise legitimate questions of double-standards when developed countries seek to open developing country markets when developed country markets remain closed to developing country goods.¹²⁸ Simply put, the WTO needs to put its money where its mouth is by giving full faith and credit to its free trade commitment in agriculture.

A. *Why and How is the GATT/WTO Trading Framework Rigged Against Agriculture?*

For fifty years global trade negotiations reduced tariffs on the manufacturing sectors in which developed economies led the world, however, areas such as agriculture, textiles and clothing -where low-cost developing countries have the comparative advantage- were heavily protected and subsidized and with virtually no rules.¹²⁹ In

half the cost of production. Similar differences exist in many other products, a gap that will increase as industrial countries move from protection through border measures to support through coupled or partially decoupled subsidies.

Id. (emphasis in original).

Poverty is more common in rural areas. Using the one-dollar a day measure of poverty, most of the world's poor live in India, China and other lower-middle-income countries. *Id.* at 105.

126. *Id.* at 108-09.

127. *Id.* at 108.

128. See, e.g., Harbaksh Singh Nanda, *Zoellick's India Visit Prompts Spat Over Attempt to Ban Outsourcing of Federal Jobs*, 21 Int'l Trade Rep. 314, 314 (2004). This article details a recent claim of double-standards with respect to United States efforts to prevent outsourcing of service sector jobs to countries like India, that offer lower prices for U.S. based corporations as well as for government jobs. *Id.* India's Commerce Minister, Arun Jaitley, is quoted as stating: "It is strange that on the one hand people are talking about opening of markets, and, on the other, the U.S. is banning business process outsourcing. It is difficult for our people to accept the double standards." *Id.*

129. For example, Article XI:2(c)(i) of GATT exempted quantitative restrictions in

short, the GATT/WTO's rules that have liberalized trade in industrial products have not been equally applied to agricultural produce. This is simply to say that for the last fifty plus years of the international trading regime, the global trading rules have been rigged favorably towards removing industrial tariffs while simultaneously legitimizing protectionism of the agricultural markets of industrialized countries

agriculture to protect domestic farm programs from its non-discriminatory disciplines. General Agreement on Tariffs and Trade 1948, Oct. 30, 1947, art. XI, para. 2(c)(i), 61 Stat. A-11, A-32 to A-33 (1947), available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf [hereinafter GATT]; see also Carmen G. Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security and Developing Countries*, 27 COLUM. J. ENVTL. L. 433, 442 (2002). This exception to GATT 1948 was subject to ensuring that restrictions on imports through quotas was accompanied by a simultaneous restriction of domestic production, and subject to ensuring that the domestic product be restricted to the same extent as the imported product. Gonzalez, *supra*, at 442. However, in 1955 the preconditions of Article XI:2(c) were waived for the United States, effectively giving it a free hand to restrict agricultural imports which the U.S. has done since. *Id.* at 443. Further, GATT Article XVI:3 authorized agricultural export subsidies therefore effectively making agriculture a special case (relative to industrial products). See *id.* at 444.

GATT Article VI:7 protected agriculture even further by providing that material injury could not be claimed to have been caused by domestic price stabilization in agriculture. GATT, *supra*, art. VI, para. 7. GATT Article XI:2(a) allowed export restrictions to relieve critical shortages inconsistently with the promise of non-discriminatory, (as between exporting and importing nations embodied in the principles of Most Favored Nation, National Treatment and Transparency), agricultural trade. *Id.* art. XI, para. 2(a). GATT Article XI:2(b) allowed restrictions related to standards "for the classification, grading or marketing of commodities in international trade." *Id.* art. XI, para. 2(b). These restrictions were often used and continue to be used to prevent developing country exports into developed countries. Gonzalez, *supra*, at 444-56. GATT Article XX(b) which continues to allow measures "to protect human, animal or plant life or health" as an exception to the non-discriminatory mandates under certain conditions. GATT, *supra*, art. XX, para. 1(b). Article XX(h) allowed agreements under commodity agreements. *Id.* art. XX, para. 1(h). For example, the 1986 Multi-Fiber Agreement, (MFA), allocated quotas of imports into developed countries by developing countries. Walden Bello, *WTO: Serving the Wealthy, Not the Poor*, Ecologist, (Sept. 2000), http://www.findarticles.com/p/articles/mi_m2465/is_6_30/ai_65653650/print (last visited Nov. 2, 2004). The 1994 Agreement on Agriculture was written with a view to correcting these shortcomings of GATT 1948. Agreement on Agriculture, WTO Agreement, Annex 1A (1994), http://www.wto.org/english/docs_e/legal_e/14-ag.pdf (last visited Nov. 2, 2004). In addition, the Agreement on Textiles and Clothing of 1994 was written with a view to phasing out the MFA and other quantitative restrictions over a ten-year period. Agreement on Textiles and Clothing, WTO Agreement, Annex 1A (1994), http://www.wto.org/english/docs_e/legal_e/16-ag.pdf (last visited Nov. 2, 2004). The 1994 Agreement on the Application of Sanitary and Phytosanitary Measures was enacted to restrict the use of safety rules to exclude agricultural products. Agreement on the Application of Sanitary and Phytosanitary Measures, WTO Agreement, Annex 1A (1994), http://www.wto.org/english/docs_e/legal_e/15-ag.pdf (last visited Nov. 2, 2004). For an extensive review of how the 1994 Agreement on Agriculture and other rules disadvantage developing countries, see Gonzalez, *supra*.

to the detriment of low-cost developing country agriculturalists.

By subsidies, I simply mean cash payments or other forms of government support paid to producers with a view to protecting such producers from competition from low-cost producers. Thus, by subsidies I am not referring to subsidies to protect open space or to undertake environmental or conservation work in rural areas.¹³⁰ Rather, I mean production subsidies that are primarily targeted for agricultural export markets.

The WTO Agreement on Subsidies and Countervailing Measures makes export subsidies illegal.¹³¹ The essence of what is prohibited is financing an export product or commodity by governmental action through a financial payment or the transfer of a good or service to the producer from the government at less than full value.¹³² Just in the two years or so, the WTO has ruled in favor of the United States and against Canada for subsidies given to Canadian dairy farmers¹³³ and held that sale of timber by Canadian provinces from public lands constitutes WTO-illegal subsidies.¹³⁴ Even better for the United States, the WTO has twice in that same period upheld U.S. laws that govern review of remedies that arise from subsidies, otherwise known as countervailing duty laws, as being consistent with the obligations the United States has under WTO law.¹³⁵ In the Canadian Dairy subsidy and lumber cases, the U.S. Trade Representative ("USTR") noted that the United States victory was indicative of "how the WTO trade dispute resolution system works" to end unfair subsidies¹³⁶ and,

130. Although such otherwise legitimate objectives may be used to disguise subsidies.

131. Agreement on Subsidies and Countervailing Measures, WTO Agreement, Annex 1A, art. 3, para. 3.1 (1994), http://www.wto.org/english/docs_e/legal_e/24-scm.pdf (last visited Nov. 3, 2004). Similarly, the Agreement on Agriculture forbids certain export subsidies. Agreement on Agriculture, *supra* note 129, art. 3, para.3, art.8.

132. Report of the Appellate Body, Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products: Second Recourse to Article 21.5 of the DSU by New Zealand and the U.S., WT/DS103/AB/RW2, paras. 85, 101 (Dec. 2002).

133. *Id.*; see also, Press Release, Office of the U.S. Trade Representative, *U.S. Wins in WTO Challenge to Canadian Dairy Subsidies*, (Dec. 20, 2002), available at http://www.ustr.gov/Document_Library/Press_Releases/2002/December [hereinafter Dairy Subsidies].

134. Press Release, Office of the U.S. Trade Representative, *WTO Adopts Report Upholding U.S. Position on Canadian Lumber Subsidies*, (Nov. 1, 2002), available at http://www.ustr.gov/Document_Library/Press_Releases/2002/November [hereinafter Lumber Subsidies].

135. *Id.*; see also Press Release, Office of the U.S. Trade Representative, *WTO Appellate Body Upholds Key Provisions of U.S. Anti-Subsidy Law Involving Steel Case*, (Nov. 28, 2002), available at http://www.ustr.gov/Document_Library/Press_Releases/2002/November.

136. Dairy Subsidies, *supra* note 133.

as such, unfair trading practices.¹³⁷ As the comments by the USTR suggest, the United States, like many members of the WTO, vigorously and aggressively seeks to enforce their rights to ensure that their producers are not short-changed by producers abroad who are enjoying subsidies.

Yet, while the rule against subsidies has been operational for the last fifty-five years, it has not been fully extended to cover commodities like cotton, textiles, and sugar that developing countries produce perhaps at the lowest cost.¹³⁸ Even the 1994 Agreement on Agriculture, that was enacted with a view to leveling the playing field in global agriculture following an almost fifty-year history of excluding agriculture from the liberalizing mandates of the GATT regime, does not fully liberalize global agricultural trade within its mandates. In essence, countries in the E.U. as well the United States that are not the lowest cost producers of such produce have continued to be effectively insulated from having a legal obligation not to subsidize producers of high-cost produce to the disadvantage of low-cost developing country producers. For example, cotton farmers receive handsome subsidies in the United States and in the E.U., at the expense of low cost producers in developing countries. A WTO panel has already ruled U.S. cotton subsidies contravene the United States' WTO obligations in a case brought by Brazil.¹³⁹

Another factor giving credence to the argument against cotton subsidies is the fact that only three percent or less of the U.S. population is engaged in agriculture, while in many developing countries, particularly in Africa, over seventy percent of the population is engaged in agriculture.¹⁴⁰ Because of the large segments of their populations involved in agriculture, developing

137. Lumber Subsidies, *supra* note 134.

138. See *WTO to Rule on Sugar Subsidies*, Aug. 4, 2004, available at <http://www.sidsnet.org/latestarc/trade-newswire/msg00289.html> (last visited Oct. 8, 2004) (discussing an upcoming ruling on sugar subsidies).

139. United States – Subsidies on Upland Cotton, Closing Statement of the United States of America at the Second Session of the First Meeting of the Panel with the Parties, WT/DS267/R, (Oct. 9, 2003), available at http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file427_5598.pdf (last visited Oct. 13, 2004). This ruling got positive editorials from the Economist Magazine although the editorial expressed skepticism that the United States would comply with the ruling, see *Unpicking Cotton Subsidies*, Economist, April 30, 2004, http://www.economist.com/agenda/PrinterFriendly.cfm?Story_ID=2626900 (last visited Oct. 13, 2004). See also Editorial, *Those Illegal Farm Subsidies*, N.Y. Times, Apr. 28, 2004, available at http://www.wcit.org/topics/agriculture/WTOcotton-nyteditl_4-04.htm

140. International Labour Office, *Agricultural Population in Selected Countries in 1996*, http://turva.me.tut.fi/iloagri/kuvat/at_25.htm (last visited Oct. 11, 2004).

countries want issues of development, food security and rural livelihoods at the heart of the WTO negotiations. The basic claims of developing countries is that the 1994 Agreement on Agriculture sets a highly uneven and distorted playing field between developing and developed countries in at least three respects.

First, it continues to legalize protectionist measures through a special safeguard provision in the agreement over and above the already high tariffs that are already protected from liberalization.¹⁴¹ In addition, domestic support measures allow subsidies impermissible in the industrial context.¹⁴²

Second, the Agreement on Agriculture erodes the only defenses against subsidization for agriculture products through measures, such as the peace clause, which calls for due restraint in initiating countervailing duty investigations and exempts subsidies with more than minimally trade distorting effects¹⁴³ from other WTO challenges as long as product specific support does not exceed the level decided in 1992.

Third, it ignores the chilling effect of its complex structure of rules in promoting market-oriented international agricultural trade by encouraging over-production and excess capacity, which results in artificially depressing farm prices below market levels to the disadvantage of low-cost producers in developing countries.

In my view, developing countries are effectively subsidizing the

141. In addition, the dispute settlement process of the WTO places too high a premium on developing countries to effectively participate as repeat players even where the challenged action is impermissible under these rather complex rules. Because of that, developed countries are able to influence the interpretation of the rules more favorably towards them at the expense of countries that are not repeat players in the dispute settlement process because of resource and other constraints. See Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, in *Towards a Development Supportive Dispute Settlement System in the WTO*, at 5 (ICTSD Resource Paper No. 5, Mar. 2003); see also Victor Mosoti, *Does Africa Need the WTO Dispute Settlement System?* 67-88, Asif Qureshi, *Interpreting WTO Agreements for the Development Objective*, in *Towards a Development Supportive Dispute Settlement System in the WTO* (ICTSD Resource Paper No. 5, Mar. 2003) (discussing the concern developing countries have in the interpretation of WTO Agreements).

142. Domestic support measures are also known as green boxes in the Agreement on Agriculture. See Agreement on Agriculture, *supra* note 129. They would be impermissible in the industrial context because subsidies to a specific industry under the Subsidies and Countervailing Agreement would be impermissible. Agreement on Subsidies and Countervailing Measures, *supra* note 131, art. 3, para 3.1.

143. Subsidies that have more than minimal trade distorting effect are also known as amber subsidies under the Agreement on Agriculture. See Agreement on Agriculture, *supra* note 129; Dale E. McNeil, *Furthering the Reforms of Agricultural Policies in the Millennium Round*, 9 MINN. J. GLOBAL TRADE 41, 54-56 (2000) (explaining the origin of amber subsidies in the Agreement on Agriculture).

U.S. economy when they consume agricultural exports that are produced with support from the appropriations under the Farm Act. Indeed, far from helping developing countries such agricultural exports undermine their ability to assure good care for their citizens. In addition, farm subsidies in the United States benefit agribusiness at the expense of tax-payers and the rural middle-class in the farm states.¹⁴⁴As a reflection of this imbalance, several farm states have passed anti-corporate farming measures that prevent out-of-state corporations from doing business in their states.¹⁴⁵ As a result, subsidies are perhaps bad all around: for developing country farmers as well as for rural farming communities in developing countries and the American economy as well. A recent editorial in the very impressive *Harvesting Poverty* series of the *New York Times* put it best:

Any hope that the United States would take the moral high ground at Cancun, and reclaim its historic leadership in pressing for freer trade, was further dashed by the disgraceful manner in which the American negotiators rebuffed the rightful demands of West African nations that the United States commit itself to a clear phasing out of its harmful cotton subsidies. *American business and labor groups, not to mention taxpayers, should be enraged that the administration seems more solicitous of protecting the most indefensible segment of United States protectionism rather than of protecting the national interest by promoting economic growth through trade.*¹⁴⁶

Needless to say, without production subsidies for things that are produced elsewhere at lower cost would result in allocating resources much more efficiently. In addition, reducing or eliminating subsidies undermines confidence in the global structure of trade rules at a time when such confidence is essential for international commerce.

For these and other reasons, I argue in favor of giving equal priority to leveling the playing field of international trade and commerce between developing and developed countries as an important pre-condition for establishing the trust and confidence in the system of global commerce among countries with different sources of competitive advantage. In addition, the fair competition

144. *The Cancun Failure*, *supra* note 86; Center for Responsive Politics, *Agribusiness: Long-Term Contribution Trends*, available at <http://www.opensecrets.org/industries/indus.asp?Ind=A&Format=Print> (last visited Nov. 2, 2004).

145. Courts have not been very sympathetic of these laws so far, see Molly McDonough, *Down on the Farm: Laws Aimed at Boosting Family Farmers May Violate Commerce Clause*, 89 *A.B.A.J.* 18, 20 (2003) (stating that courts have not been sympathetic to anti-corporate farming law so far).

146. *The Cancun Failure*, *supra* note 86 (emphasis added).

resulting from leveling the playing field would give developing countries, including countries in the Middle East, a chance not only to feed their people, but perhaps even lay the basis for a middle-class that would in turn help build on the emerging democracies in the South. As a surplus or spin-off,¹⁴⁷ elimination of subsidies in rich Western countries would most likely reduce the conditions of frustration and hopelessness among young people likely to be attracted by those interested in recruiting terrorists.¹⁴⁸

It is important to note that the modest proposals here would not solve world hunger and poverty, but they would go a long way towards addressing those goals. Yielding to lower cost producers in developing countries still leaves many products of the farmlands of the rich industrialized world that are competitively produced without distorting subsidies.¹⁴⁹ Corn in the United States might be one such example.¹⁵⁰

However, that is not the case for American grown sugar and that is why the American lobby has been campaigning very hard to ward off a WTO Agreement that would introduce cheaper sugar from countries like Guatemala.¹⁵¹ Indeed, it must be recognized that more than fifty developing countries, which is a majority of them, depend on export earnings of one or two commodities to earn much needed foreign aid.¹⁵² It follows that it is really in exporting food products and textiles in which developing countries have a comparative advantage, like sugar and cotton, that these countries will grow. The facts here are straightforward and simple.

Elimination or reduction of farm subsidies in rich industrial

147. Michael Santoro, *Profits and Principles: Global Capitalism and Human Rights in China* 43 (2000) (explaining the spin-off theory for human rights from trade).

148. The United States Trade Representative's Office has made this link between national security and free trade, although it has not been made with reference to cutting subsidies but rather with regard to removing protectionism preventing access to U.S. products and produce in developing countries. See Robert B. Zoellick, *Globalization, Trade and Economic Security*, Remarks at the National Press Club (Oct. 1, 2002), available at <http://www.state.gov/e/eb/rls/rm/2002/14014.htm> (last visited Nov. 2, 2004); see also Mark S. Nadel, Letter to the Editor, *Fairness to Farmers*, N.Y. Times, Sept. 27, 2003, at A14.

149. Hence, it is true that there are at least two wings in the U.S. farm lobby, a wing that seeks to open up protected developing country markets for U.S. products and produce, and a wing that seeks subsidies to protect less efficient sectors of U.S. farming. See *The Cancun Failure*, *supra* note 86 (describing the split in the American Favor lobby).

150. Editorial, *From the Highland to Your Grocer*, N.Y. Times, Sept. 28, 2003, §4, at 10. (Based on this argument, no matter how little a farmer in a developing country is paid for her labor, the "efficiencies of scale, soil differences, the gap in technology and transport systems" make it much cheaper to produce corn in the United States).

151. *Id.*

152. Chimni, *supra* note 118, at 69; Ur-Rahman, *supra* note 118, at 89.

nations will reduce dependency on foreign aid from these countries since developing countries will have a chance to fairly earn a return for their sweat and labor on their farms. There is another critical benefit that would come with the reduction of foreign assistance, that is the pride and sense of self-worth and autonomy from not having to beg and receive handouts from the West. This, in my view, would go a long way in putting in place solutions from developing countries to their problems. To further explore the advantages of removing subsidies, let us examine the case of cotton.

B. The Example of Cotton Reform in WTO Agricultural Rules

United States and E.U. subsidies to cotton production have so weakened the commodity prices for cotton that it is no longer profitable for West African farmers to grow it.¹⁵³ For example, in late 2002, a pound of cotton was fetching thirty-five cents in the international market, a Western or Central African farmer was producing cotton at forty-seven cents a pound.¹⁵⁴ You might, therefore, think that the West African farmers were producing at above market prices. But not before you know that production costs in the United States were seventy-three cents a pound and they were even higher in Western Europe, yet these African producers could not enjoy their comparative advantage because of the three billion dollars of U.S. subsidies to 25,000 cotton farmers (including over two billion in cash payments to the farmers and another \$270 million to cotton exporters), and one billion dollars in subsidies to E.U. cotton farmers primarily in Greece and Spain.¹⁵⁵ In other words, the United States, the E.U. and China, who are all net-cost producers of cotton, have flooded the world cotton market thereby depressing cotton prices for the lowest cost producers who happen to be in Africa.¹⁵⁶ The International Cotton Advisory Committee estimates that the depression in world cotton prices will remain unless the subsidies are removed.¹⁵⁷ As a result more than ten million people who depend on

153. See Oxfam, *Cultivating Poverty: The Impact of US Cotton Subsidies on Africa* (Briefing Paper No. 30 2002), available at http://www.oxfam.org/eng/pdfs/pp020925_cotton.pdf (last visited Nov. 2, 2004) (discussing the crisis in the world cotton market).

154. Statement of President Toumani Toure, *supra* note 121.

155. See generally Ousmane Badiane et. al., *Cotton Sector Strategies in West and Central Africa* (World Bank Policy Research, Working Paper No. 2867, July 2002), OXFAM, *supra* note 153, at 21, 31.

156. See International Cotton Advisory Committee, *Production and Trade Policies Affecting the Cotton Industry* 4, 6 (2002) (reporting "government measures affecting cotton production, ginning and trade").

157. See *id.* at 8.

cotton production in West and Central Africa have their livelihood threatened¹⁵⁸ in a continent where already more than fifty percent of the population lives on less than one U.S. dollar a day.¹⁵⁹ In addition, the World Bank has argued that unless these subsidies are removed, any attempts to undertake policy reforms to grow the economies of the countries involved or to fight poverty will come to nought.¹⁶⁰ Indeed, the entirety of the subsidies given to America's 25,000 cotton farmers is three times more than the entire U.S. Agency for International Development ("USAID") assistance budget for Africa's 500 million people.¹⁶¹ The removal of these subsidies would result in a twenty-six percent rise in world cotton prices and would earn Africa more than \$300 million in foreign exchange.¹⁶² As already noted Brazil has prevailed against the United States in its cotton subsidies case at the WTO.¹⁶³ This victory certainly encourages countries like Mali, which for a long time has depended on cotton as a major source of foreign exchange, to follow the Brazilian example.¹⁶⁴

There is another reason, besides the fact that African countries have lower production, land and labor costs than anywhere else in the world, why cotton production is best left to Africa. This is because the amount of cotton subsidies given by the United States amounts to "more than three times" the amount of U.S. assistance to Africa.¹⁶⁵ In effect, removal of these subsidies would benefit Africa so much more than the total amount of assistance the United States gives Africa.¹⁶⁶ This has remained historically true in agriculture. For example, going by 1980 figures, developing country exports were \$512 billion

158. See Oxfam, *supra* note 153, at 1 (finding that more than ten million people, who depend directly on cotton production are devastated by falling cotton prices).

159. See Population under \$1 a day (Top 100 countries), available at http://www.nationmaster.com/graph-T/econo_pop_und_1_a_day/AFR (last visited Oct. 11, 2004); see also Oxfam, *supra* note 153, at 1.

160. Cf. Badiane et. al., *supra* note 155, at 20-21 (arguing that the fight against poverty will be much more effective if subsidies to cotton farmers in the United States and other countries were eliminated).

161. Oxfam, *supra* note 153, at 2.

162. *Id.*

163. For other forthcoming challenges, see Robert Steinberg & Timothy Josling, *When the Peace Ends: The Vulnerability of EC and US Agricultural Subsidies to WTO Legal Challenge*, 6 J. Int'l Econ. L. 369, 369 (2003) (discussing potential challenges to U.S. subsidies when the "Peace Clause" expires); ICSTD, *Dispute Settlement I: Brazil - Sugar and Cotton*, 6 Bridges Wkly. Trade News Dig. 33 (Oct. 2, 2002), at <http://www.ictsd.org/weekly/02-10-02/story1.htm> (last visited Aug. 18, 2003).

164. Statement of President Toumani Toure, *supra* note 121.

165. *US Cotton Subsidies Ruining Poor Farmers*, <http://www.southcentre.org/info/southbulletin/bulletin47/bulletin47-04.htm> (last visited Nov. 4, 2004).

166. See *id.* (noting that these U.S. cotton subsidies contribute to "mass poverty in some of the world's poorest countries).

while aid was only \$38 billion.¹⁶⁷In essence, a relatively minor reduction in first-world protectionism would almost invariably give more to developing countries than the total value of U.S. aid to Africa.¹⁶⁸ In addition, removal of agricultural subsidies and tariffs in the E.U. and the United States would earn developing countries eight times the total amount of total debt relief they have received from these countries so far.¹⁶⁹

Re-balancing the global agricultural trade would therefore have the effect of ensuring that hundreds of thousands of developing country farmers have the power to become consumers, the power to exercise their rights of citizenship to the hilt and the power to be producers. These benefits would go further than any amount of foreign aid that might be given to the countries from where these farmers come from. Besides the fact that foreign aid is ineffective, it is equally true that foreign aid does little for the dignity of poor farmers – if it ever reaches them anyway.

It is important to note that most of the farm subsidies in the United States are given to support family farms, but an overwhelming amount goes to agribusiness.¹⁷⁰ According to the Environmental Working Group, in 2002 agribusiness concerns received sixty-five percent of all federal farm payments up from fifty-five percent in 1995.¹⁷¹ I think, though, that we should not lose sight of the problem here. The problem is not so much agribusiness, although this is not to suggest it is not part of the problem, but as the Wall Street Journal recently argued, the essence of the problem is

167. James Morton, *The Poverty of Nations: The Aid Dilemma at the Heart of Africa* 22 (1994).

168. *Id.*

169. Carl Bildt, *Want to Help Africa? Stop Farm Subsidies*, Wall St. J., June 18, 2002, at A12.

170. These industrial scale farming interests, according to the Center for Responsive Politics, gave over fifty-four million dollars in political contributions in 2002, up from over thirty-seven million dollars in 1992. The share of contributions to Republicans in 2002 was seventy-two percent compared with sixty percent in 1992. Center for Responsive Politics, *Agribusiness: Long-Term Contribution Trends*, available at <http://www.opensecrets.org/industries/indus.asp?Ind=A&Format=Print> (last visited Nov. 2, 2004).

171. See Elizabeth Becker, *Few Ways to Limit Farm Aid*, N.Y. Times, Sept. 4, 2003, at W7 (also noting that the Republicans opposed and defeated a payment limit on farm payments in the 2002 Farm Bill). It is also the case in Europe that large corporate agricultural interests get a bigger share of subsidies than do family farmers, see Editorial, *A French Roadblock to Free Trade*, N.Y. Times, Aug. 31, 2003, §4, at 8 (also noting that Europe has a 'right' to promote environmental and conservation goals as well as developing rural areas and protecting agricultural space, but promoting agricultural overproduction through subsidies would be inconsistent with reforming global agricultural trade).

that subsidies keep U.S. farm prices artificially low.¹⁷²

Removing subsidies would also make good sense for Western countries. For example, in the United States removal of subsidies would be beneficial because:

(i) Export subsidies result in higher food prices for consumers in the United States since the subsidies mostly target exported food rather than food sold in the United States;

Export subsidies encourage overproduction and therefore less environmentally friendly farm practices, such as less idling of the land and the use of marginal lands farmed with a view to capture the subsidies, which all combine to make land more susceptible to erosion.¹⁷³ Subsidies also encourage use of chemicals that are often regarded as environmentally harmful;¹⁷⁴

Export subsidies do little to protect farmers from swinging commodity prices since their goal is not to manage the inventory or supply of food in the national granary. Rather, it is to ensure that farmers earn a statutorily designated price on their crop through export subsidies. Export subsidies are ineffective to safeguard against swinging commodity prices because they do not seek to smooth out differences between big and small harvests as a result of weather changes. Hence, in a good weather year, there is glut since the Mid-west farmers and corporations "grow subsidized crops on every acre of available land"¹⁷⁵ (of course protected from the vagaries of the market), but in a year where there is drought (like there was in Kansas and Nebraska in the fall of 2002) means only farmers in states without drought (like Iowa and Minnesota at the same time)

172. Editorial, *Liberals and Subsidies*, Wall St. J., Sept. 12, 2003, at A10. According to the editorial:

We've been writing about the damage that farm subsidies do to Third World farmers for, oh, 100 years. So we're delighted to see that liberals, including our sometime foils at Oxfam, are suddenly picking up the cause. . . . But it's important to keep in mind what Oxfam forgets. . . . Oxfam and its allies complain that corn imports are driving thousands of small Mexican farmers out of business. In an open market, that is not necessarily a bad thing: If America kept the same number of farmers it had 50 or 100 years ago, we'd be far less wealthy. *The legitimate Mexican complaint is that subsidies keep U.S. corn prices artificially low.*

Id. (emphasis added).

173. It has also been argued that idling land would encourage foreign competitors to expand their low-cost production and that in the past, there was a policy of idling land as a precondition of receiving subsidies. See Scott Kilman, *The Outlook: Some Economists Say Farm Policy Has Got It All Wrong*, Wall St. J., Aug. 19, 2002, at A2.

174. See generally David Malin Roodman, *Paying the Piper: Politics, Subsidies and the Environment* (World Watch Institute, WorldWatch Paper 133, 1996).

175. Kilman, *supra* note 173.

would be able to have any produce.¹⁷⁶ Such swings in the inventory of agricultural produce result in higher prices for U.S. consumers;¹⁷⁷

Further, swings in commodity prices would best be accommodated through risk management contracts, such as futures contracts, rather than subsidies which cost U.S. consumers more on their grocery bills besides the tax dollars spent on the subsidies;

Finally, it would be a far better allocation of resources to ease farmers into other activities under trade adjustment assistance than to continue misallocating resources endlessly, however, politically rational continuing the huge subsidies is.

For all these and many other reasons, improving the terms of trade in agriculture is crucial for developing economies. However, since the protectionism of the developed world in agriculture is coupled with protectionism in some developing countries,¹⁷⁸ any solution requires reform both in the developed and developing world.¹⁷⁹ Under one reform scenario, the World Bank has shown that if developed countries cut agricultural tariffs by ten percent and five percent in manufacturing, and developing countries reciprocate by fifteen percent and ten percent in agriculture and manufacturing respectively, while all countries took steps to eliminate agricultural export subsidies, "decouple" domestic subsidies to minimize trade distortions, and eliminate specific tariffs, quotas, and anti-dumping duties progressively over the next five years to 2010, developing countries would gain nearly \$350 billion in additional income by 2015.¹⁸⁰ "Rich countries would benefit, too, with gains [in] the order of []\$170 billion."¹⁸¹

Besides cuts in agricultural tariffs and removal of subsidies, other things that could be done to balance out the playing field in agriculture include introduction of a "strategic product category" for developing countries in the Agreement on Agriculture as well as

176. *Id.*

177. *Id.*

178. India, for example, is subsidizing farmers to grow rice and wheat when India has a surplus of both. Bi-weekly Bulletin, *India, Agric. & Agri-Food Canada*, Aug. 13, 2004, http://www.agr.gc.ca/mad-dam/e/bulletine/v17e/v17n12_e.pdf (last visited Nov. 4, 2004).

179. See Robert H. Bates, *Essays in the Political Economy of Rural Africa* 1 (1983) (showing how African governments have over time shifted the terms of trade against agriculture by investing in industrial programs that favor connected political elites in urban areas at the expense of investing in rural areas and as such in agriculture). Robert Bates has also argued that African governments maintained below market prices for farm products in cities where the political base of most of these governments is based and can easily be mobilized. *Id.* at 109, 117, 125-26, 128-29.

180. World Bank, *supra* note 119, at xxviii-xxix.

181. *Id.* at xxix.

extending special and differential treatment to developing countries under that agreement. These proposals for reform, however, presume that farmers and agribusiness in rich industrialized countries will be persuaded by the economic justifications we have laid out so far to persuade them to transcend the immediacy of their local priorities and needs so that they can embrace free market reform in agriculture as a way of promoting an ethic of fairness tied to humanity beyond their immediate and even their national borders.¹⁸² In fact, by merely focusing on reform of reforms to WTO law:

consecrates the mistaken idea that wrongdoing is the behavior of a general category known as "states" and is not the behavior of morally responsible human beings. It therefore obscures the fact that breaches of international trade law are attributable formally to the legal persons known as states but morally to the human beings who determine the behavior of states.¹⁸³

C. Introducing Basic Reforms in the WTO's Agricultural Framework

In sum, I argue in favor of introducing conditions of competition in agricultural commodity markets like cotton by eliminating trade-distorting subsidies in developed economies that have the effect of counteracting the competitive advantage of developing country commodities on the international market. One of the most important justifications for this recommendation is that the trade-distorting subsidies are illegal under the Agreement on Agriculture and they are contrary to the shared assumptions as to their fairness and economic effect on developing country economies dependent on commodity exports.

Further, the benefits that ought to accrue to developing country producers of cotton under Article II of the GATT have been impaired by the subsidy payments made to cotton farmers in developed countries which operate to protect developed country cotton producers completely from the movement of prices of imports and thereby prevent the tariff concessions of the Uruguay Round from having any impact on the competitive relationship between domestic and imported oilseeds.

As such, the Cancun Ministerial solution urged by the United States seeking more efficient cotton-producing countries in Africa to diversity out of cotton while the United States maintained its subsidies is both contrary to the spirit of liberalizing agricultural

182. For my influences here, see Martha Naussbaum, *Compassion and Terror, Daedalus*, (Winter 2003), at 16.

183. Philip Allot, *State Responsibility and the Unmaking of International Law*, 29 *Harv. Int'l L.J.* 1, 13-14 (1988).

trade as well as the development objectives that ought to be central in the Doha Round.

D. However, Agricultural Trade Liberalization Is No Panacea

There are a variety of reasons that undermine the assumption that agricultural trade liberalization would help farmers in commodity-dependent developing and least developed countries. First, middle-income countries like China, India and Brazil are much more likely to capture the gains from increased access to industrialized country markets if trade-distorting subsidies were reduced. Second, negotiation on agricultural trade liberalization is not a stand-alone issue in the WTO. Thus, liberalization in agriculture is often made impossible because concessions in agriculture from developed countries involve horse trading on other issues of value to developing and least developed commodity-dependent countries.¹⁸⁴ For example, the question of access to essential medicines under the TRIPS Agreement is one such issue. Although there is already an agreement largely favorable to developing countries, its implementation may be the subject of horse trading with developed countries. Third, we should not forget that reforming the global agricultural regime presupposes a willingness on the part of the United States and the E.U. in particular and unless they are willing to fully liberalize agriculture like they have done for industrial products, piece-meal and ad-hoc reforms spurred by litigation will hardly reap the comparative advantage that developing countries have in commodities like cotton.

IV. CONCLUSION

In this article, I have argued that there are at least two related and significant reasons accounting for the legitimacy crisis at the WTO. First, I have argued that there are organizational and procedural barriers to the full participation of developing countries in negotiating new trade agreements, reforming old ones inimical to their interests or being fully involved in the governance of the WTO. These problems are characterized by the inadequacies of WTO's

184. The U.S.-Australian Free Trade Agreement of 2004 is another example of such horse-trading. In return for giving Australia access to U.S. agricultural market, Australia agreed to give U.S. pharmaceutical companies access to its market thereby raising the cost of prescription drugs in Australia and upsetting perhaps the best 'pay for value' health care systems worldwide. See Kevin Outterson, *The U.S.-Australia Free Trade Agreement's Unfortunate Attack on Good Healthcare Policy*, Jun. 22, 2004, available at <http://www.ita.doc.gov/td/chemicals/phRMA/Outterson%20Response1.pdf> (last visited Nov. 19, 2004) (comments submitted to the House Comm. on Ways and Means).

negotiating and governance framework and they invariably result in a failure to accommodate the concerns of developing and least developed commodity-dependent countries within the WTO. Examples of these inadequacies include exclusionary green room meetings and the pressure-cooker negotiating process of successive negotiating rounds for countries without trade governance capacity to effectively participate in negotiating new trade rules. In addition to the reforms proposed in this article, some have proposed a WTO parliamentary assembly as part of the remedy.¹⁸⁵ The World Bank and IMF have been moving forward with reforms to give more voice for developing countries for some time now.¹⁸⁶ Second, I have argued that the legitimacy crisis must also be understood from the perspective of pre-existing WTO rules that are heavily biased in favor of developed countries and against developing countries. I used the example of agriculture and, in particular, the extensive export subsidies in developed country markets for commodities supported by the power of farming constituencies in these countries. These subsidies are not only trade distorting, but work against the comparative advantage that developing countries have in agriculture.

In light of these two problems, it is my view that the WTO's legitimacy crisis cannot be resolved by exclusively focusing on reforms of the organizational and procedural problems to the exclusion of the substantive questions, particularly with regard to preexisting rules. While process-oriented reforms could certainly include open citizen participatory processes at the WTO, substantive issues, such as the bias against agriculture, may not be readily addressable by merely having citizen participation at the WTO. Far-reaching changes spreading the market criterion of comparative advantage to agriculture as in trade in industrial products and services must be made possible in agriculture as well. Without such reforms, the WTO will remain a club of the rich and powerful countries while developing countries remain at the margins subsidizing their wealthy counterparts.

Reversing a more than fifty-year history of heavy subsidies for industrialized country agriculture while not easy is critical to ensure

185. See Nicole Vallinoto, Discussion Paper, *International Democracy, United Nations Reforms and the Role of Global Civil Society*, presented at the World Social Forum Workshop, Feb. 4, 2004, available at http://inscricoes.forumsocialmundial.org.br/content/index.php?page=_detalhe_oficina_R05&id=757 (last visited Aug. 2, 2004); Howse, *supra* note 49, at 20; Dahrendorf, *supra* note 49, at 17.

186. See The Board of the World Bank and the International Monetary Fund, *Enhancing the Voice and Participation of Developing and Transition Countries: Progress Report by the Boards of the World Bank and IMF* (Sept. 12, 2003), available at [http://siteresources.worldbank.org/DEVCOMMINT/Documentation/20127822/DC2003-0012\(E\)-Voice.pdf](http://siteresources.worldbank.org/DEVCOMMINT/Documentation/20127822/DC2003-0012(E)-Voice.pdf).

that developing country farmers can compete on an even level with the currently heavily subsidized western counterparts. A lot of political will is required to make these changes in the developed world. Take the example of Japan's 400 percent tariff on rice, which it supports and is campaigning to retain on the premise that rice paddies and farming fields are an integral part of its environmental protection and economic security program.¹⁸⁷ The importance of rice as a staple food in Japan introduces complex cultural considerations that Japan might consider more important than pursuing a pure theory of free trade that might justify ending such trade-distorting subsidies. This example highlights the difficulty of the choices that members of the WTO must make and the temptation to make reforms that only touch on procedural and organizational matters while leaving substantive issues such as those involving subsidies unresolved. Should the WTO therefore choose to introduce transparency measures, such as citizen participation, its legitimacy crisis would only be partially resolved.

187. Toshio Aritake & Andrew Yeh, *Japan Proposes Farm Tariffs, Ceilings During Zoellick's Trip to Revive WTO Talks*, 21 Int'l Trade Rep. 304-305 (2004). Japan and a group of ten other countries argued in favor of maintaining high tariffs on rice, wheat, barley and dairy products in exchange for accepting tariff reductions/ceilings on other products. *Id.*