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A QUESTION OF JUSTICE: THE WTO, AFRICA, AND COUNTERMEASURES FOR BREACHES OF INTERNATIONAL TRADE OBLIGATIONS

NSONGURUA J. UDOMBANA*

“Anarchy — the threat (real or supposed) used to justify the WTO — may be bad for the weak, but the tyranny of the strong may be worse.”¹

INTRODUCTION

Contemporary international trade regimes are outcomes of the international community's desire to promote stability and cooperation through international economic relations. One of the purposes of the United Nations (UN), itself a member of the international community, is to achieve “international cooperation in solving international problems of an economic, social, cultural, or humanitarian character.”² The UN has reiterated this sentiment in a number of instruments, including the Declaration on the Right to Development of 1986,³ which noted, *inter alia*, that sustained action is required to promote development in developing countries and called on states to cooperate for this purpose.⁴ Regional institutions also have, as one of their basic objectives, the promotion of international economic relations. Indeed, some states organize themselves solely for such purposes — like the

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1. FATOUMA JAWARA & AILEEN KWA, BEHIND THE SCENES AT THE WTO: THE REAL WORLD OF INTERNATIONAL TRADE NEGOTIATIONS—LESSONS OF CANCUN 303-04 (2004) (countering the myth that developing countries are well-served by the WTO and exposing the often brutish methods employed by the world's powerful states to impose their agenda on the poorest).

2. U.N. Charter art. 1(3), para. 4 [hereinafter UN Charter]. See also *id.* art. 55 (providing for international cooperation in various fields, “[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations”).

3. See Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc A/Res/41/128 (Dec. 4, 1986) [hereinafter DRD].

4. *Id.* art. 4(2). See generally Robert W. Gregg, *The Politics of International Economic Cooperation and Development*, in *POLITICS IN THE UNITED NATIONS SYSTEM* 106 (Lawrence S. Finkelstein ed. 1988).

Economic Cooperation and Development (OECD), which is an intergovernmental organization designed to encourage multilateral dialogue and cooperation on economic and social policies that have transnational effects.⁵

The African Union (AU) lists the promotion of international cooperation as one of its objectives, taking due account of the UN Charter.⁶ Some human rights instruments have expressed similar sentiments. States Parties to the African Charter on Human and Peoples' Rights⁷ pledge, *inter alia*, "to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the [UN] Charter."⁸ The Committee on Economic, Social and Cultural Rights has indicated that international cooperation for development and, hence, for the realization of ECOSOC rights is an obligation of all states.⁹ This entails, presumably, obligations to develop treaties promoting development and economic well-being and to establish institutions and procedures to realize these goals.

There has been "an increasingly complex interdependence"¹⁰ in contemporary times in a scale never known in history, an interdependence that permeates all areas of international relations—political, economic, and social. There has also been a growing concern with economic and developmental issues, reflecting the adverse economic conditions in various parts of the world.¹¹ Africa, which the erstwhile Organization of African

5. The OECD replaced the Organization for European Economic Cooperation (OEEC) in 1960, which was set up to administer the Marshall Plan aid provided by the United States to Europe in the aftermath of World War II. Current members of the OECD are Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Japan, Korean Republic, Luxemburg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States. OECD, OECD Member Countries, http://www.oecd.org/document/58/0,2340,en_2649_201185_1889402_1_1_1_1,00.html (last visited July 27, 2005).

6. See Constitutive Act of the African Union art. 3(e), July 11, 2000, CAB/LEG/23.15, 479 (as amended by the Protocol on Amendments to the Constitutive Act of the AU, July 11, 2003) [hereinafter AU Act].

7. African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/rev.5, 21 I.L.M. 58 (1982) [hereinafter African Charter] (entered into force Oct. 21, 1986).

8. *Id.* pmb1.

9. CESCR General Comment 3: The Nature of State Parties Obligations, art. 2 para. 1, Committee on Economic, Social and Cultural Rights, 5th Sess. (1990), reprinted in *Compilation of General Comments and General Recommendations Adopted By Human Rights Treaty Bodies* 18, U.N. Doc. HRI/GEN/1/Rev.5 (2001) (citing the DRD). See also Sigrun Skogly, *The Obligation of International Assistance and Co-operation in the International Covenant on Economic, Social and Cultural Rights*, in *HUMAN RIGHTS AND CRIMINAL JUSTICE FOR THE DOWNTRODDEN: ESSAYS IN HONOUR OF ASBJORN EIDE* 403 (Morten Bergsmo ed., 2003).

10. Charles Beitz, *Social and Cosmopolitan Liberalism*, 75(3) INT'L AFF. 516 (1999).

11. MALCOLM SHAW, *INTERNATIONAL LAW* 825 (1997).

Unity (OAU)¹² regards as “the most backward in terms of development from whatever angle it is viewed,”¹³ is in dire need of sustained international cooperation for sustainable economic development, as enjoined by such instruments as the UN Charter and the DRD.¹⁴

Several international institutions have sprung up in the last few decades to provide systems of global governance and settings for webs of relationships that shape and channel the operation of international economic cooperation and other social intercourse, including the management of conflicts. Most of these institutions sprung up in response to demands by the international society, including national governments.¹⁵ As “physical entities possessing offices, personnel, equipment, budgets, and so forth,”¹⁶ they now take on functions that, hitherto, were monopolistically regulated by states, including control over currencies,¹⁷ passports, and borders.¹⁸ They also play a significant role in recognizing, legitimating, and empowering governments as significant actors in global governance.¹⁹

This Article, both a descriptive and prescriptive piece, explores some of the legal and developmental issues arising from contemporary international trade — as anchored by the World Trade Organization (WTO)— particularly as they affect Africa. It argues that, contrary to the claims of the WTO apologists, trade liberalization has little positive impact on Africa. The distribution of benefits deriving from trade seldom takes account of Africa’s peculiar position and needs. Consequently, the continent’s share and participation in international economic exchanges and trade has continued to fall. Developing countries are promised the tantalizing fruits of economic liberalization — by keeping their markets open — but these fruits have failed to materialize because of the North’s repeated failure or neglect to make reciprocal concessions demanded by the South.

12. Until July 2002, the OAU was Africa’s continental political organization. The AU succeeded the OAU. See AU Act, *supra* note 6, art. 33(1) (providing that the AU “Act shall replace the Charter of the Organization of African Unity”).

13. Yaoundé Declaration, Africa: Preparing for the 21st Century, OAU Assembly, 32d Ord. Sess., para. 2, OAU Doc. AHG/Decl.3 (XXXII) (July 1996) [hereinafter Yaounde Declaration].

14. See, e.g., DRD, *supra* note 3, art. 3(3) (providing: “States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development”).

15. See Tom Keating, *Testing the Limits of Global Governance*, 2 MCGILL INT’L REV. 40 (2005).

16. Oran R. Young, *International Regimes: Toward a New Theory of Institutions*, 39 WORLD POLITICS 108 (1986).

17. Cf. GREGORY MILLMAN, AROUND THE WORLD ON A TRILLION DOLLARS A DAY: HOW REBEL CURRENCY TRADERS DESTROY BANKS AND DEFY GOVERNMENTS 101 (1995) (asserting that “[a] currency and an army had historically been the twin pillars of national sovereignty”).

18. See THEODORE H. COHN, GOVERNING GLOBAL TRADE: INTERNATIONAL INSTITUTIONS IN CONFLICT AND CONVERGENCE 1 (2002); JACK DONNELLY, REALISM AND INTERNATIONAL RELATIONS 131, 141 (2000).

19. See Keating, *supra* note 15, at 40. See generally CRAIG MURPHY, INTERNATIONAL ORGANIZATION AND INDUSTRIAL CHANGE (1994).

Contemporary international trade regimes also leave unanswered many questions of importance to developing states. For example, what is the nature of economic interests or entitlement that defines a state? Do the same interests define all states; that is, are the interests of the economically termed North coterminous with those of the South? What is the legal standing of each interest *vis-à-vis* others? What options, from the point of view of international economic law, are available to a state when its economic interests are violated? Does that option include unilateral retaliation by the aggrieved state or groups of states in order to redress the inequality and restore equilibrium? How should Africa, in particular, go about redressing inequalities arising from international economic law?

This Article will argue that the current WTO trade rules, “written surreptitiously, and under the influence of the world’s largest multilateral corporations,”²⁰ are far from equitable, ethical, sympathetic, or development friendly. Although the WTO might have a noble vision of bringing about an ordered global trade regime, the Northern Hemisphere has hijacked the WTO as an instrument of imperialism against the Southern Hemisphere. Today, the WTO rules and practices threaten the sovereignty and sustainable development of developing countries, a real, immense, and unceasing threat.

The Article begins by assessing the impact of the WTO regime on developing economies in the context of its set vision and mission. It illustrates how selective implementations and breaches of trade rules undermine the international trade regime and, in particular, the economies of Africa (Part I). The Article proceeds to examine the WTO remedies and concludes that they have failed to checkmate flagrant breaches of trade rules by the industrial countries, especially as the assumed remedies are inaccessible to developing countries (Part II). The Article proceeds to examine countermeasures under general international law and urges Africa to adopt unilateral measures to counterpoise breaches of international trade obligations and to strengthen its domestic economy and bargaining power in global trade negotiations (Part III). This Article, however, sees potential in a reformed WTO and, thus, outlines reform areas so that “this vitally important institution for the future”²¹ can maximize its potentials (Part IV).

This Article adopts a nuanced interpretative methodology, integrating the traditional legal exegesis with other approaches — including economic theories — to deepen insights into the nature of the problem. Examining the WTO trade regime demands an interdisciplinary analysis. Besides, a pragmatic methodology is needed to respond to the legal, economic, and political imperatives of globalization.²²

20. Lori Wallach, *It's Not About Trade, in WHOSE TRADE ORGANIZATION? A COMPREHENSIVE GUIDE TO THE WTO* 1, 4 (Lori Wallach & Patrick Woodall eds., 2004).

21. Supachai Panitchpakdi, *Forward* to PETER SUTHERLAND ET AL., *THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM* 3 (2004) [hereinafter *THE FUTURE OF THE WTO*].

22. Cf. Jeffery M. Brown, *Black Internationalism: Embracing an Economic Paradigm*, 23 MICH. J. INT'L L. 807, 810 (2002).

I. THE WTO, TRADE, AND DEVELOPMENT

The UN provides the bedrock of modern international institutions, focusing on global political security. The WTO and the Bretton Woods sisters — the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development, popularly called the World Bank — form the backbone of a contemporary international economic legal system that focuses on global economic security. International non-governmental organizations (INGOs) have joined the fray and are influencing, in diverse ways, the norm creation and decision-making process within international institutions. Notable examples of the INGOs are the International Chamber of Commerce (ICC) and the World Economic Forum (WEF). All of this has considerably limited the autonomy of states, with serious implications for developing countries.

This Part examines how the constraints of *real politick* have derailed the vision of the WTO, causing some members of the club to benefit from the substance of free trade while others, largely African countries, walk in its shadows.

A. Towards a Vision of Better Trade Governance

Free trade is the modern day religion²³ and the WTO is its prophet. The WTO was established in 1995²⁴ to provide a much-needed institutional solidity to the world trading system. Its vision is the rules-based liberalization of international trade through the removal of special preferences and the imposition of uniform trade rules. Its mission is to “provide the common institutional framework for the conduct of trade relations among its Members”²⁵ in order to achieve better trade governance.²⁶ Both its vision and mission are founded upon the philosophy that international trade benefits all parties, all things being equal (though all things are rarely equal) and that free trade is key to sustained economic growth.

23. See, e.g., John Kenneth Galbraith, *Agricultural Policy: Ideology, Theology and Reality Over the Years*, Speech to National Governor’s Conference at Harvard University (July 27, 1987) (“No one can be without sin who does not at least daily affirm his belief in the profound beneficence of free market forces.”), quoted in Kevin Watkins, *Free Trade and Farm Fallacies: From the Uruguay Round to the World Food Summit*, 26 THE ECOLOGIST 244 (1996).

24. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994 [hereinafter Marrakesh Agreement]. For the Marrakesh Agreement and its annexes, see WTO, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999) [hereinafter LEGAL TEXTS], available at http://www.wto.org/english/docs_e/legal_e/legal_texts_e.htm (last visited Sept. 28, 2005) [hereinafter referred to, without any cross reference, as WTO web site].

25. *Id.* art. II.1.

26. See generally Sylvia Ostry, *WTO: Institutional Design for Better Governance, in EFFICIENCY, EQUITY AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM* 361 (Roger Porter *et al.* eds., 2001) (proposing improvements to WTO governance through incremental initiatives).

The preamble to the Marrakesh Agreement sets out a list of noble goals. One goal is to conduct international trade with a view to "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services."²⁷ Another goal is to allow "for the optimal use of the world's resources in accordance with the objective of sustainable development."²⁸ The Agreement even recognizes the "need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development."²⁹

The development-oriented goals of the Marrakesh Agreement correspond fairly with those in some human rights instruments. Examples include the Universal Declaration of Human Rights,³⁰ rights to life,³¹ to work,³² and to an adequate standard of living;³³ the International Covenant on Economic, Social and Cultural Rights,³⁴ right to "an adequate standard of living . . . including adequate food, clothing and housing, and to the continuous improvement of living conditions,"³⁵ and "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,"³⁶ and, back home, the African Charter's rights to health,³⁷ to education,³⁸ and to development.³⁹ Obviously, symmetries exist between trade, development, and human rights; and Han Park has revealed that economic development serves as the strongest predictor of improved basic needs achievement.⁴⁰

The establishment of the WTO has been hailed as "the most dramatic advance in multilateralism since the inspired period of institution building of

27. Marrakesh Agreement, *supra* note 24, pmb1. Cf. John H. Jackson, *Interdisciplinary Approaches to International Economic Law: Reflections on the "Boilerroom" of International Relations*, 10 AM. U. J. INT'L L. & POL'Y 595, 603 (1995) (observing that current trade liberalization policies are designed to promote enhancement of world welfare).

28. Marrakesh Agreement, *supra* note 24, pmb1.

29. *Id.*

30. Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

31. *Id.* art. 3.

32. *Id.* art. 23.

33. *Id.* art. 25.

34. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

35. *Id.* art. 11(1).

36. *Id.* art. 12(1).

37. African Charter, *supra* note 7, art. 16.

38. *Id.* art. 17.

39. *Id.* art. 22.

40. See Han S. Park, *Correlates of Human Rights: Global Tendencies*, 9 HUM RTS. Q. 405, 410-13 (1987). See also Bruce E. Moon & William J. Dixon, *Politics, the State, and Basic Human Needs: A Cross National Study*, 29 AM. J. POL. SCI. 661, 689-90 (1985).

the late 1940s.”⁴¹ The institution has grown to become nearly an empire and has measurably pulled the major players towards multilateral solutions to trade issues. The global economy has undoubtedly experienced some positive growth since its establishment. The 2001 WTO Ministerial Declaration, adopted in Doha, Qatar, applauded the contribution of free trade to growth, development and employment, and emphasized the importance of continued trade liberalization to the promotion of recovery, growth, and development.⁴²

Andrew Guzman is among scholars that celebrate “the remarkable success of the GATT/WTO system.”⁴³ He maintains that the WTO is “one of the world’s most dominant international institutions, establish[ing] a reasonably effective system of dispute resolution, and develop[ing] a nearly universal membership.”⁴⁴ For Sylvia Ostry, the “power” and “effectiveness” of the WTO have become magnets for expansionist ideas.⁴⁵ For Judith Bello, “[t]he genius of the GATT/WTO system is the flexibility with which it accommodates the national exercise of sovereignty, yet promotes compliance with its trade rules through incentives.”⁴⁶ The same viewpoint has been put forward in the United States to make membership in the WTO more palatable to constituencies concerned about the supranational powers of the organization.⁴⁷

When one peels back the outer layers of the WTO, one finds, in the expressive words of Deborah Cass, a “[l]ack of representation of citizens in the international trade law decision-making, an absence of local political participation, the existence of only rudimentary structures of constitutionalism, the difficulty of defining a community to authorize any constitutional structure, and the inability of individuals to rely directly upon WTO law.”⁴⁸ Other fears about free trade are that it “will promote a materialistic style of development, enable [transnational corporations] to

41. See THE FUTURE OF THE WTO, *supra* note 21, at 9 (offering a rousing defense of multilateral trade liberalization and making practical suggestions on how the WTO could work better).

42. See Doha WTO Ministerial 2001: Ministerial Declaration, at 1 (Nov. 14, 2001), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm [hereinafter Doha Ministerial Declaration] (last visited Oct. 2, 2005).

43. Andrew Guzman, *Global Governance and the WTO*, 45 HARV. INT’L L.J. 303 (2004).

44. *Id.*

45. Sylvia Ostry, *The WTO and International Governance*, in THE WORLD TRADE ORGANIZATION MILLENNIUM ROUND 285, 290, 293 (Klaus Günter Deutsch & Bernhard Speyer eds., 2001) (stating that the WTO has become a magnet for policy overload).

46. Judith H. Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AM. J. INT’L L. 416, 417 (1996).

47. See Deborah E. Siegel, *Legal Aspects of the IMF/WTO Relationship: The Fund’s Articles of Agreement and the WTO Agreements*, 96 AM. J. INT’L L. 561, 564 (2002) (comparing Judith Bello’s view with those held by other scholars “attribut[ing] a more supranational character to the WTO”).

48. Deborah Cass, *The ‘Constitutionalization’ of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EUR. J. INT’L L. 39, 44-45 (2001).

dominate the world, accelerate privatization and 'marketisation,' emaciate national governments, destroy communities, preclude alternative development options, facilitate the monopoly of a particular world view and inundate traditional societies with the hedonistic culture of the West."⁴⁹ The next segment examines some of these problems in detail.

B. *Between Vision and Reality*

The central thesis of this Article is that the WTO trade regime has not benefited, and cannot benefit, all parties because it operates like the *Animal Farm*.⁵⁰ In Orwell's classic, animals take over the running of a farm, and everything is wonderful for a while — until the pigs get out of hand and take most of the power for themselves, thinking that they are the best administrators of government. Power ultimately corrupts them, as it does humans, and they turn on their fellow animals, eliminating competitors through propaganda and bloodshed. Though written to reveal the hypocrisy of communism, as practiced in the then Soviet Union,⁵¹ *Animal Farm* is surprisingly relevant to an understanding of contemporary international trade relations. Although all animals are equal under the WTO regime, based on the concept of sovereignty and equality of states,⁵² the practice of trade reveals that some animals — the industrial countries — are more equal than others. This segment examines reasons for this glitch.

1. *The WTO Has a 'Secret Relationship to Mystery'*

Lori Wallach writes: "The WTO is a mechanism to bring every country in the world — ready or not — into an existing global market designed by corporations, and to take the practices those corporations invented willy-nilly — which, of course, suit their needs — and set them in stone as 'WTO rules.'"⁵³ Apologists of free trade will dismiss such assertions as baseless or even as rantings of a disgruntled scholar. The WTO itself believes that criticisms of its activities often stem from fundamental misunderstandings of its works. It asserts that it is a "member-driven" organization where decisions are negotiated, accountable and democratic, and that, in the absence of a multilateral regime like the WTO, "the more powerful countries

49. GRAHAM DUNKLEY, THE FREE TRADE ADVENTURE: THE WTO, THE URUGUAY ROUND AND GLOBALISM – A CRITIQUE 102-03 (2000).

50. See GEORGE ORWELL, *ANIMAL FARM passim* (Penguin Books, 1951).

51. The aim of communism was to make workers of the world masters of their own fate, enabling them to enjoy in freedom and peace the wealth their labor created. This entailed sweeping away the capitalists, who, the communists alleged, appropriated the lion's share of what the workers produced — due to their ownership of the means of production. The 1917 revolution in the Union of Socialist Soviet Republics liquidated the Czar, the aristocracy and the capitalists but replaced it with communist czars and petty rulers as despotic as their predecessors.

52. Cf. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 289 (1998) ("The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations.").

53. Wallach, *supra* note 20, at 2 (asserting further that "the WTO and its agreements are a powerful mechanism for spreading and locking in corporate-led globalization").

would be freer to impose their will unilaterally on their smaller trading partners.”⁵⁴ *The Economist*, unashamedly the mouthpiece of Western capitalism, echoes this sentiment. In 2001, it wrote that the WTO is a no would-be tyrant; that it is democratic to a fault; that it has few powers of its own; and that its rules are devised and altered solely by its members through consensus, through the requirement of unanimity.⁵⁵ Really? How democratic is an organization that is dominated by a few major industrial countries? How effective is the participation of developing countries in negotiations leading to decision-making in the WTO?

Certainly, there is much motion in the WTO by developing-country members, though the degree of a corresponding movement is uncertain. Different sources point to the absence of freedom of speech or association in the WTO;⁵⁶ to the “lack of transparency and inclusiveness” in trade negotiations and decision-making processes;⁵⁷ and to the fact that only a few developing-country members are able to participate effectively in these processes.⁵⁸ At times, if not at all times, developing country members are forced to swallow the bitter pills of trade liberalization through arm-twisting, intimidation, and deception by the industrial countries. The curious and patronizing assumption is that the developed countries know what is best for their developing counterparts!

The WTO, says Anne Orford, has a “secret relationship to mystery”⁵⁹ and remains a dictatorial tool of the rich and powerful, despite its democratic pretensions. Even *The Economist* now admits that “[m]ore than any other country, America still sets the tone of the global trading system . . . and its leadership has been essential to completing every global trade round since the modern multilateral system was set up after the second world war.”⁶⁰ Joseph Stiglitz, the 2001 Nobel laureate in economics and former chief economist at the World Bank, stated:

54. WTO, 10 BENEFITS OF THE WTO TRADING SYSTEM 4 (2003), available at http://www.wto.org/english/thewto_e/whatis_e/tif0b00_e.htm (last visited Sept. 28, 2005) [hereinafter 10 BENEFITS OF THE WTO TRADING SYSTEM].

55. *Who Elected the WTO?* THE ECONOMIST, Sept. 27, 2001.

56. Federico Cuello, press conference launching *Behind the Scenes at the WTO* (Sept. 2, 2003), cited in JAWARA & KWA, *supra* note 1, at lxvi, lxxix (remarking on U.S. bullying of developing countries in the WTO).

57. See, e.g., Declaration on the Fifth WTO Ministerial Conference, AU Assembly, 2d Ord. Sess. para. 9, AU Doc. Assembly/AU/Decl.4 (II) (July 2003) [hereinafter Declaration on the Fifth Ministerial Conference].

58. See UNDP, HUMAN DEVELOPMENT REPORT 2002: DEEPENING DEMOCRACY IN A FRAGMENTED WORLD 121 (2002) [hereinafter UNDP REPORT 2002] (noting that low and medium human development countries have poor representation in negotiations on international conventions).

59. Anne Orford, *Trade, Human Rights and the Economy of Sacrifice*, 03/04 JEAN MONNET WORKING PAPER 1, 2 (2004), available at www.jeanmonnetprogram.org/papers/04/040301.pdf (last visited July 10, 2005).

60. *Time to Deliver the Goods*, THE ECONOMIST, Jan. 8, 2005, at 61.

[W]e have a system that might be called *global governance without global government*, one in which a few institutions—the World Bank, the IMF, the WTO—and a few players—the finance, commerce, and trade ministries, closely linked to certain financial and commercial interests—dominate the scene, but in which many of those affected by their decisions are left almost voiceless.⁶¹

The November 1999 Seattle ministerial meeting exposed the “secret relationship” in the WTO; it was the first round of trade negotiations after the conclusion of Uruguay Round. Chris Milner and Robert Read reported that, during that meeting, “many developing-country members were effectively disenfranchised in that they were virtually excluded from the crucial ‘Green Room process’ in negotiating the agenda and were neither canvassed on their views concerning many issues of critical importance to them nor informed about the decisions taken on their behalf.”⁶² Gilbert Winham also described the GATT Tokyo Round negotiations — one of the pre-negotiation rounds of the Uruguay Round — as a pyramid process, where “issues tended to be first negotiated between the United States and the EC [European Community]; and once a tentative trade-off was established the negotiation process was progressively expanded to include other countries. In this way co-operation between the United States and the EC served to direct the negotiation.”⁶³ The latest ‘Round’ — the Doha Development Round — is not any different. As Bhagirath Das writes, the Doha Work Program is “not the result of any serious negotiation among the members of the WTO. The major developed countries have not engaged in any negotiation of give-and-take type; they just put up their proposals and asked the developing countries to accept them.”⁶⁴

The international economic system, according to Jarrod Wiener, is “an outgrowth of the internal systems of economy of the largest and most influential states, in the sense that international policies have reflected their domestic priorities.”⁶⁵ The liberalization of the mid-1800s prompted the domestic pressures that the Industrial Revolution wrought in Britain and the form in which international finance evolved from Britain’s policy of maintaining a gold standard. Similarly, pressures in the United States during the Great Depression and the transfer of hegemony from Britain prompted the mechanisms of the Bretton Woods system.⁶⁶ Today, it is the rich

61. JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 22 (2002) (describing the many ways in which the major institutions of globalization, including the WTO, have failed the struggling countries they were meant to serve).

62. Chris Milner & Robert Read, *Introduction: The GATT Uruguay Round, Trade Liberalization and the WTO*, in *TRADE LIBERALIZATION, COMPETITION AND THE WTO* 1 (Chris Milner & Robert Read eds., 2002).

63. Gilbert Winham, *The Prenegotiation Phase of the Uruguay Round*, 44(2) INT’L J. 289-90 (1989).

64. Bhagirath Lal Das, *The New Work Programme of the WTO*, THIRD WORLD NETWORK, April 8, 2002, available at www.twinside.org.sg/title/das.doc (last visited July 10, 2005).

65. JARROD WIENER, *GLOBALIZATION AND THE HARMONIZATION OF LAW* 54 (1999).

66. *Id.*

industrial countries that dominate the international economic systems, shaping their rules and regulations, their institutions and policies for trade, money, and finance. According to Leroy Trotman, the major players in the contemporary international economic order (IEO) “were the vision and developers of the new order; it was the smaller less powerful who sought association, in response to the offer of a better opportunity to participate for the benefit of their communities, and who entered an association where the rules, good or bad, were already prepared for others.”⁶⁷

The Quadrilaterals or Quads — Canada, EU, Japan, and the United States — and the ‘unseen hands’ of other trade-related institutions, including the OECD and the Group of Eight Most Industrialized Countries (G8), control the decision-making processes in the WTO.⁶⁸ Some of the most difficult negotiations in trade talks have required initial breakthroughs among the Quads. Further, the WTO and the Bretton Woods institutions are integrated institutions, and deliberately so, because their architects designed them to project the Washington Consensus policies globally.⁶⁹ Several provisions in the Marrakesh Agreement and other soft laws provide the normative basis for institutional cooperation and specifically address the WTO’s relationship with the IMF. The reverse, however, is not the case — understandably because the articles of the IMF were elaborated long before the establishment of the WTO — though some IMF articles authorize relationships with other international organizations and set forth the basis for cooperation between the two organizations.⁷⁰

The Marrakesh Agreement mandates the WTO to cooperate with the Bretton Woods institutions “with a view to achieving greater coherence in global economic policy-making.”⁷¹ The Declaration on the Contribution of

67. Leroy Trotman, *The WTO: The Institutional Contradictions*, in DOHA AND BEYOND: THE FUTURE OF THE MULTILATERAL TRADING SYSTEM 19, 21 (Mike Moore, ed., 2004).

68. For an analysis of these institutions’ role in global trade, see COHN, *supra* note 18, at 3-8, 132-41.

69. See Anne-Marie Burley, *Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State*, in THE WORLD TRADING SYSTEM: CRITICAL PERSPECTIVES ON THE WORLD ECONOMY 50 (Robert Howse ed., 1988), reprinted in MULTILATERALISM MATTERS 125 (John Gerard Ruggie ed., 1993).

70. See, e.g., Articles of Agreement of the International Monetary Fund art. X, July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39 (as amended through June 28, 1990) (stating: “The Fund shall cooperate within the terms of this Agreement with any general international organization and with public international organizations having specialized responsibilities in related fields”).

71. Marrakesh Agreement, *supra* note 24, art. III.5. See also *id.* art. XV (setting out both the principle of WTO consultations with the IMF and the scope and effect of such consultations). For a history of GATT and the Bretton Woods system, see Dukgeun Ahn, *Linkages Between International Financial and Trade Institutions: IMF, World Bank and WTO*, J. WORLD TRADE, Aug. 2000, at 1, 3-5. See generally, ROBERT HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (2d ed., 1990); OLIVER LONG, *LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM* (1985); ARMAND VAN DORMAEL, *BRETTON WOODS: BIRTH OF A MONETARY SYSTEM* (1978); Gerald A. Bunting, *GATT and the Evolution of the Global Trade System: A Historical Perspective*, 11 ST. JOHN’S J. LEGAL COMMENT. 505 (1996).

the [WTO] to Achieving Greater Coherence in Global Economic Policymaking⁷² states:

The interlinkages between the different aspects of economic policy require that the international institutions with responsibilities in each of these areas follow consistent and mutually supportive policies. The [WTO] should therefore pursue and develop cooperation with the international organizations responsible for monetary and financial matters, while respecting the mandate, the confidentiality requirements and the necessary autonomy in decision-making procedures of each institution, and avoiding the imposition on governments of cross-conditionality or additional conditions.⁷³

Consequent upon these normative provisions, the IMF and similar bodies participate regularly in the Integrated Framework for Trade-Related Technical Assistance with the WTO. Like the WTO, forty-eight percent of the IMF's voting rights are concentrated in the hands of seven states: United States, Japan, France, UK, Saudi Arabia, China, and Russia. These states also control forty-six percent of voting rights at the World Bank.⁷⁴ The existing bond between the WTO and the Bretton Woods institutions illustrates the "mosaic" nature of modern international institutions. As John Jackson writes:

International regulation of international trade is . . . an extraordinarily complex and muddled affair, involving a wide variety of organizations and institutions . . . when one considers GATT, it is necessary to relate it to the mosaic and ever-changing picture of other international institutions. In some cases the institutions complement each other in important ways . . . In other cases the subject-matter attention of these institutions overlaps.⁷⁵

The point here is that trade, investment, and finance institutions all serve transatlantic political and economic interests. They constitute, in B. Chimni's words, "a nascent global state whose function is to realise the interests of transnational capital and powerful states in the international system to the disadvantage of third world states and peoples [and that] [t]he evolving global state formation may therefore be described as having an imperial character."⁷⁶

72. Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking, in *LEGAL TEXTS*, *supra* note 24.

73. *Id.* para. 5. *Cf.* Agreement Between the International Monetary Fund and the World Trade Organization, Dec. 9, 1996 [hereinafter Cooperation Agreement], reprinted in 25 *SELECTED DECISIONS AND SELECTED DOCUMENTS OF THE INTERNATIONAL MONETARY FUND* 705 (2000) [hereinafter *SELECTED DECISIONS*] (implementing the legal relationship between the organizations and including several provisions on document exchange, reciprocal attendance at meetings, and other matters that facilitate cooperation).

74. UNDP REPORT 2002, *supra* note 58, at 113.

75. JOHN JACKSON, *WORLD TRADE AND THE LAW OF GATT* 11 (1969).

76. B. S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15(1) *EUR. J. INT'L L.* 1, 1-2 (2004).

2. *The More Africa Liberalizes, the Less It Trades*

International trade is based on the economic theories of comparative advantage and economies of scale. The theory of comparative advantage, pioneered by the 19th century economist David Ricardo—in his time called “comparative costs” — is based on the idea that all countries can raise their living standards through specialization and trade. It posits that countries should produce goods where they have an advantage over other states. Even if one country can make everything at a lesser cost than every other, it still gains from focusing on the goods in which its relative advantage is greatest, that is, in which it has a comparative advantage.⁷⁷ The theory of economies of scale is built on the idea that specialization in the production of goods and services leads to lower (average) production costs. It assumes that the cost of tariff reductions in favor of one state is warranted only when a trading partner obtains an offsetting benefit from a reciprocal tariff concession.⁷⁸ These theories, however, have their flip sides, including the possibility that a country’s export prices could fall so much that it becomes worse off.

The WTO believes that “[a]mbitious liberalization of tariffs and non-tariff barriers carries with it the potential to underpin faster economic growth, which, in turn, could significantly increase the living standards of people around the world.”⁷⁹ Admittedly, a few developing countries, mostly the upper-middle income countries, have made appreciable gains by integrating their economies into the international trading system. They have also broken into new markets in the last couple of years, with their share in world trade rising strongly.⁸⁰ Developing countries’ share in manufacturing, for example, has risen from seventeen percent in 1990 to twenty-seven percent in 2000.⁸¹ Evidence, however, shows that the blessings of world trade have not spread evenly; while some societies have been able to share some of the benefits of economic growth and welfare resulting from free trade, others have remained excluded and increasingly marginalized.⁸² A few powerful nations particularly benefit from the blessings of free trade, “under the guise of ‘democracy,’ ‘openness’ and a ‘neutral’ Secretariat.”⁸³

77. See Gerhard Loibl, *International Economic Law*, in INTERNATIONAL LAW 689, 690 n. 1 (Malcolm D. Evans ed., 2003).

78. See Kyle Bagwell *et al.*, *It’s a Question of Market Access*, 96 AM J. INT’L L. 56, 59 (2002).

79. Cf. WTO, ANNUAL REPORT 2003, 3 (2003) [hereinafter WTO ANNUAL REPORT 2003].

80. See CONSTANTINE MICHALOPOULOS, DEVELOPING COUNTRIES IN THE WTO 1 (2001) (noting that trade in some developing countries has grown proportionately since the early 1990s).

81. See WORLD BANK, GLOBAL ECONOMIC PROSPECTS 2005: TRADE, REGIONALISM AND DEVELOPMENT (2004).

82. See generally Friedl Weiss & Paul De Waart, *International Economic Law with a Human Face: An Introductory View*, in INTERNATIONAL ECONOMIC LAW WITH A HUMAN FACE 2 (Friedl Weiss *et al.* eds., 1998).

83. See JAWARA & KWA, *supra* note 1, at 269.

For many developing countries, the new dawn promised by Uruguay Round has turned into darkness due to the asymmetries in the implementation of free trade.⁸⁴

Available evidence shows that Africa's economy is experiencing increasing and serious deterioration in terms of trade, despite tremendous efforts deployed by its governments to reorganize and restructure their economies, often at a very high social cost.⁸⁵ Trade liberalization has worked to undermine the comparative advantages that Africa might have had, aggravating their development problems and leading to the abuse of labor standards and human rights. The challenges and problems that prompted many African countries to join the WTO — the regeneration and reviving of their economies in order to achieve a better life for their citizens — have remained, years after their accession to the WTO agreements. Even Joseph Stiglitz claims a direct cause and effect relationship between Africa and the Uruguay Round and insists that the Round has worsened the Continent's situation.⁸⁶

Of course, the WTO is quick to roll out figures showing benefits of trade liberalization for Africa. Its 2003 Annual Report indicates that trade growth in Africa in 2002-2003 "was at about the same pace as the global average, which under current circumstances, was an important and welcome achievement."⁸⁷ Its 2004 Report estimates that Africa's Gross Domestic Product (GDP) growth reached 3.6 percent in 2003, "the highest expansion rate since 2000."⁸⁸ It also indicates that the number of African countries reporting a decline in their export value in 2003 dropped to four — "the lowest level for the entire 1990-2003 period" — but it admits that "eight African countries exported less in 2003 than in 1990."⁸⁹ Comparatively, China's export growth for the corresponding period "was two times faster than that of world exports."⁹⁰

84. See Jeffrey Dunoff, *The WTO in Transition: Of Constituents, Competence and Coherence*, 33 GEO. WASH. INT'L L. REV. 979, 981 (2001). See also JOE OLOKA-ONYANGO & DEEPIKA UDAGAMA, *THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: GLOBALIZATION AND ITS IMPACT ON THE FULL ENJOYMENT OF HUMAN RIGHTS* [hereinafter *REPORT ON GLOBALIZATION*] (noting that liberalization has become "a veritable nightmare" for certain sectors of humanity, citing, *inter alia*, patents and their adverse effects on pharmaceutical prices). The preliminary report submitted by J. Oloka-Onyango and Deepika Udagama was in accordance with Sub-Commission Resolution 1999/8, para. 15, U.N. Doc. E/CN.4/Sub.2/2000/13 (2000).

85. Algiers Declaration, OAU 35th Assembly of Heads of State and Government, OAU Doc. AHG/Decl.1 (XXXV) (July 1999) [hereinafter *Algiers Declaration*].

86. See STIGLITZ, *supra* note 61, at 245.

87. WTO ANNUAL REPORT 2003, *supra* note 79, at 2.

88. WTO, *WORLD TRADE DEVELOPMENTS IN 2003 AND PROSPECTS FOR 2004*, 11 (2004) [hereinafter *WORLD TRADE DEVELOPMENTS IN 2003*], available at http://www.wto.org/english/res_e/statis_e/its2004_e/its04_general_overview_e.htm (last visited Sept. 20, 2005) (reporting how real merchandise trade growth in Africa was boosted by a higher export volume of mining products, which is Africa's principal export sector).

89. *Id.* at 12.

90. *Id.* at 1.

International economic institutions should put faces on events, rather than just reel out statistics. Development is not about statistics, but about lives and jobs. The reality is that output and trade in Africa have continued to shrink over the decades, with its share of world trade collapsing from around six percent in 1980 to two percent in 2002.⁹¹ A sectoral analysis of world trade for 2003 shows that very few goods entered the North from Africa through “market access,” even in traditional areas as textiles and agriculture. Africa’s share of world trade in textiles and clothing was less than four percent in 2003, compared to forty-five percent for Asia.⁹² Further, Africa’s share of agricultural products over the 1990-2003 periods has decreased by fourteen percent, with Western Europe and transitional economies now accounting for one half of world agricultural exports.⁹³

A contrario, Africa is offering the North unlimited market access and is taking on obligations in services and intellectual property that involve restructuring domestic economies. The General Agreement on Trade and Services (GATS)⁹⁴ provides the developed countries with new tools to pry open developing country markets. International sales of services of United States affiliates abroad was \$432 billion in 2001 alone, exceeding the value of its exports from home in the second half of the 1990s.⁹⁵ The Agreement on Trade-Related Aspects of Intellectual Property (TRIPS)⁹⁶ has tripped the balance against the South by forcing them to adopt patent and copyright legislation for the benefit of the North and, of course, their multinational corporations.⁹⁷ Often, these domestic changes have negative implications on welfare and human rights. Notwithstanding that TRIPS favors foreign corporate interests, the WTO has failed to elaborate similar agreements on trade-related labor rights — except prison labor — or on trade-related environmental measures to cater for developing country interests. The Washington Consensus links protection of property rights to growth and

91. See WORLD BANK, *GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES 2002: MAKING TRADE WORK FOR THE WORLD’S POOR* (2002), cited in COMMISSION FOR AFRICA, *OUR COMMON INTEREST: REPORT OF THE COMMISSION FOR AFRICA* 246 (2005) [hereinafter *OUR COMMON INTEREST*].

92. WORLD TRADE DEVELOPMENTS IN 2003, *supra* note 88, at 7.

93. See *id.* at 5 (noting that world exports of agricultural products in 2003 expanded by fifteen percent to \$674 billion, “exceeding the previous peak level of 1996”).

94. General Agreement on Trade in Services, Apr. 15, 1994, 33 I.L.M. 1168 (1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1B [hereinafter GATS], in *LEGAL TEXTS*, *supra* note 24. The GATS is a framework agreement imposing a common set of standards to be applied to service industries with respect to which states undertake obligations.

95. See WORLD TRADE DEVELOPMENTS IN 2003, *supra* note 88, at 4.

96. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C [hereinafter TRIPS Agreement], in *LEGAL TEXTS*, *supra* note 24.

97. Jeffrey Dunoff, *Is the World Trade Organization Fair to Developing States?* 97 A.S.I.L. PROC. 153, 154 (2003).

innovation and treats environmental and human rights as “luxury goods, a kind of gratification to be postponed until unrestrained industrial or postindustrial capitalism produces high real incomes.”⁹⁸

Africa has witnessed a near stagnation in the last three decades and continues to be vulnerable to globalization and trade liberalization for several reasons. Part of the reasons include key problems in the “supply side” issues of market access, such as Africa’s low capacity to produce and trade competitively in commodities, manufactured goods, and services. The composition of Africa’s exports has essentially remained unchanged, with over-dependence on primary production and resource-based sectors,⁹⁹ which is “a product of the colonial and post-colonial division of labor between the core regions of the industrialized world and the non-industrialized periphery.”¹⁰⁰ A recent UNDP survey reveals that “primary commodities account for more than two-thirds of exports in 16 of the 23 top or high priority Sub-Saharan countries with data.”¹⁰¹

Some developing countries have benefited from the vast growth that the manufacturing sector has experienced in the last two decades and where global levels of protection have reduced significantly; yet Africa has benefited little because of its focus on agriculture, where growth has been slower and where significant protection still remains.¹⁰² Often, Sub-Saharan Africa (SSA) is not mentioned in certain merchandise and commercial services sectors of world trade, such as Information and Communications Technologies (ICTs), iron and steel, chemicals and automotive products.¹⁰³

A direct correlation exists between commodity dependence and poverty levels, especially in circumstances of perennially declining prices.¹⁰⁴ Prices of primary products hardly move up due to a variety of factors, including the

98. Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT’L L. 94, 104 (2002). For a critique of this position, see AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).

99. OAU, *The New Partnership for Africa’s Development (NEPAD)*, para. 156 (Oct. 2001) [hereinafter NEPAD]. “African economies are vulnerable because of their dependence on primary production and resource-based sectors, and their narrow export bases. There is an urgent need to diversify production and the logical starting point is to harness Africa’s natural resource base”. *Id.*

100. Carmen G. Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries*, 27 COLUM. J. ENVTL. L. 433, 436 n. 11 (2002) (citing E.M. YOUNG, *WORLD HUNGER* 41 (1997)).

101. UNITED NATIONS DEVELOPMENT PROGRAM (UNDP), *HUMAN DEVELOPMENT REPORT 2004*, 134 (2004) [hereinafter UNDP, *HUMAN DEVELOPMENT REPORT 2004*].

102. M. Ataman Aksoy, *The Evolution of Agricultural Trade Flows*, in *GLOBAL AGRICULTURAL TRADE AND DEVELOPING COUNTRIES* 17, 22 (M. Ataman Aksoy & John Beghin eds., 2005) [hereinafter *GLOBAL AGRICULTURAL TRADE AND DEVELOPING COUNTRIES*].

103. See *WORLD TRADE DEVELOPMENTS IN 2003*, *supra* note 88, at 6 (reporting that the major exporters of chemicals include the United States, Canada, Mexico, the EU, Japan, China, Republic of Korea, Singapore, India and Malaysia).

104. See *Declaration on the Ongoing Review of the EU Common Agricultural Policy (CAP) and Its Impact on Trade in Commodities With ACP Countries*, AU Assembly, 3d Ord. Sess., pmb., Assembly/AU/Decl.13 (III) (July 2004) [hereinafter *Declaration on Review of CAP*].

fact that demands for such products do not usually correlate with increase in income. There is also, on the one hand, a general decline in the share of agricultural products in global trade¹⁰⁵ and, on the other hand, a permanent world oversupply of virtually everything that Africa could offer. There is very little extra room for absorption of African exports.

Africa also has been a major player in its own marginalization, largely through wrong-footed economic and regulatory policies and strategies. Many governments have failed to address themselves to the imperatives of globalization, which require utilizing imaginative policies and strategies necessary to compete favorably in a growing competitive international environment. There are also numerous obstacles that many governments place in the way of private investments. Bad and pointless regulations continue to foster graft and corruption. To register a business in Ethiopia — a Least Developed Country (LDC) — “a would-be entrepreneur must deposit the equivalent of 18 years’ average income in a bank account, which is then frozen,”¹⁰⁶ yet experiences in several rich countries show that such capital requirements are unnecessary.¹⁰⁷ Similarly, it takes multiple procedures to record or register a property transaction in Nigeria.¹⁰⁸

The Economist concludes that “businesses in poor countries shoulder three times the administrative costs and have to struggle through twice as many bureaucratic procedures as their counterparts in rich countries.”¹⁰⁹ This is hardly a testimony to a Continent that has more reason to speed up development than the advanced economies.

3. *Equal Treatment of Unequals in International Trade Breeds Inequality*

The sense of injustice is sometimes seen as a capricious sentiment. The reason is because justice is “a complex and shifting balance between many factors, including equality.”¹¹⁰ It is not equality *simpliciter*; it is proportional equality. Nevertheless, the demand for equality has as its source the desire for fair play. Thus, certain objective criteria may be used to determine if an IEO is just. One criterion is that the rules of such an order should be applied uniformly to ensure an equal playing field among all participants,¹¹¹ though

105. See WORLD TRADE DEVELOPMENTS IN 2003, *supra* note 88, at 5 (“While the share of agricultural products was about the same as in the preceding two years, at 9 percent, it remained 2 percent below the average level recorded in the 1990s.”).

106. *Measure First, Then Cut*, THE ECONOMIST, Sept. 11, 2004, at 77 (reviewing a World Bank study showing that bad regulations are a huge brake on global growth).

107. *Id.*

108. See *id.* (noting, rather sweepingly, that land is useless as a collateral in Nigeria because “[i]ts owners typically cannot prove, legally, that they own it”).

109. *Id.*

110. RWM DIAS, JURISPRUDENCE 66 (1985).

111. Aristotle pioneered the analysis of justice and put forward the idea that goods should be distributed to individuals on the basis of their relative claims. See ARISTOTLE, NICOMACHEAN ETHICS V 3 (J.A.K. Thompson trans. 1955). His ideas still serve as a crucible into which modern craftsmen continue to pour problems of a contemporary era and provide the framework for examining different conceptions of justice. John Rawls, for example, asserts equality for all, both in the basic liberties of social life and in the distribution of all forms of social goods, subject only to the exception that inequalities may

such a uniform application of rules makes meaning only where the participants stand on an equal footing. The other criterion is that the IEO should allow for change at a more measured pace while preserving national sovereignties.¹¹²

The WTO's principles of fair competition and non-discrimination translate into the abolition of trade preferences and the erosion the General System of Preferences (GSP). Africa must now trade with others on an equal footing; yet, an equal treatment of unequal economies perpetuates economic inequality.¹¹³ Most trade agreements contain the Most Favored Nation (MFN) principle, whereby every trading member nation agrees to provide all other members with tariff treatment that is, at least, as favorable as that provided to the "most favored" nation;¹¹⁴ but GATT 1947 allowed developing countries greater freedom to use restrictive trade policies. It contained the infant industry protection, allowing for the removal of tariff concessions or the use of quotas, if necessary, to establish an industry in a developing country and providing for the compensation of any countries negatively affected.¹¹⁵ It also contained a balance-of-payments protection, allowing a nation to impose trade measures to safeguard its balance of payments.¹¹⁶ In contrast to the infant industry protection, surveillance and approval procedures proved less burdensome, and affected countries did not need compensation. Not surprisingly, no country has invoked the infant industry provisions of the GATT since 1967, though numerous countries have made use of balance-of-payments protection procedures.

The balance-of-payments protection was revised in the Uruguay Round and surveillance procedures were tightened. The WTO members must now publicly announce time schedules for the removal of restrictive import measures taken for balance of payments purposes and must, in principle, use price-based measures, such as tariffs. Rules of origin, which the GATT 1947 also implicitly permitted,¹¹⁷ are not currently restricted by any specific terms of the GATT 1994. Rules of origin permit states to determine the "nationality" of a product by distinguishing between different foreign

be permitted if they produce the greatest possible benefit for those least well off in a given scheme of inequality. Although Rawls does not espouse egalitarianism, he rejects basic structures that incorporate arbitrary inequalities. JOHN RAWLS, A THEORY OF JUSTICE 60, 302-03 (1971).

112. See STIGLITZ, *supra* note 61, at 247.

113. See Dunoff, *supra* note 97, at 153.

114. See, e.g., General Agreement on Tariffs and Trade art. I.i, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947].

With respect to . . . charges of any kind imposed on or in connection with importation or exportation . . . any advantage, favour, privilege, or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Id.

115. *Id.* arts. XVIII.a & XVIII.c.

116. *Id.* art. XVIII.b.

117. *Id.* art. XXIV.

sources of a given product.¹¹⁸ In their applications, it means that any African state desiring to export its products to the developed countries must show that most, if not all, of the raw materials used in the manufacture of such products originate in the country.¹¹⁹ These harsh rules work as roadblocks on the few African countries that attempt to diversify into manufacturing for exports.

Rules of origin also exclude African goods from preferences to which they are entitled. Satisfying these rules involves costs and reduces the extent to which the preferences raise actual returns, aside from the costs and difficulties associated with providing necessary documentation.¹²⁰ If the industrial countries sincerely want to assist Africa in meeting international standards, they ought to provide resources that would enable the Continent to comply with such requirements on a voluntary basis, rather than impose standards that cannot be met for lack of resources. The same argument goes for the WTO; as George Soros persuasively argues: "Instead of introducing a rule in the WTO prohibiting child labor, we ought to provide the resources for universal primary education. We could then demand that the recipients of support eliminate child labor as a condition of receiving that support."¹²¹

The Agreement on Textiles and Clothing also mandated the elimination of global textile and apparel quotas by the end of December 2004 (now a part of history). Yet, an accelerated phasing-out of quotas harms Africa, as most countries in the Continent already enjoy some quota-free access to some Western markets through Special and Differential Treatment (SDT) schemes. The African, Caribbean and Pacific (ACP)-EU economic cooperation has been up and running since 1975¹²² and integral to this cooperation was the principle of non-reciprocity. Under this principle, the EU offers preferential conditions for access to its markets for products originating in the ACP states, without a corresponding requirement for reciprocal concession. Deemed contrary to WTO rules, these preferences are being phased out under the Cotonou Trade Agreement of 2000.¹²³ The argument is that these

118. John Coyle, *Rules of Origin as Instruments of Foreign Economic Policy: An Analysis of the Integrated Sourcing Initiative in the U.S.-Singapore Free Trade Agreement*, 29 YALE J. INT'L L. 545, 548 (2004); Bernard Hoekman, *Rules of Origin for Goods and Services*, J. WORLD TRADE, Aug. 1993, at 81, 82.

119. See, e.g., Bernard Hoekman, *Rules of origin for goods and services: conceptual issues and economic considerations*, CEPR DISCUSSION PAPER SERIES 821 (1993), available at <http://www.cepr.org/pubs/dps/DP821.asp> (last visited Sept. 10, 2005).

120. See, e.g., UNCTAD, *Improving Market Access for Least Developed Countries*, UNCTAD/DITC/TNCD/4, at 14 (2001), available at <http://www.unctad.org/en/docs/poditctn4.en.pdf> (last visited Sept. 10, 2005).

121. GEORGE SOROS ON GLOBALIZATION 37 (2002).

122. See generally Dominique David, *40 Years of Europe-ACP Relationship*, ACP-EU COURIER, Sept. 2000, at 11.

123. Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part art. 36, June 23, 2000, 2000 O.J. (L 317) 3 [hereinafter Cotonou Agreement]. For an analysis of the Agreement and its implications for Africa, see Nsongurua J. Udombana, *Back to Basics: The ACP-EU Cotonou Trade Agreement and Challenges for the Africa Union*, 40 TEX. INT'L L.J. 57 (2004).

preferences, being non-reciprocal, cannot qualify under Article XXIV of GATT 1994. They are also considered discriminatory, being extended to a particular group of developing countries and, therefore, not covered by Part IV of GATT 1994.

The Cotonou Agreement, however, provides ACP states with an extension of existing non-reciprocal preferential access for certain ACP agricultural and other goods to the EU market for an interim period of eight years.¹²⁴ This concession was allowed to enable “ACP countries [to] build their capacities to withstand freer trade.”¹²⁵ The Agreement also recognized that the development of most ACP countries depends heavily on the preferential arrangements governing the access, at guaranteed prices, of commodities — in particular bananas, rice and sugar — to the EU market. Under the Cotonou Agreement, these preferences will be phased out at the end of this transition period; meaning that after 2008, the ACP countries and EU will begin a two-way free trade arrangement that conforms to WTO rules.¹²⁶ When that happens, when the remaining hope of a lifeline for developing countries disappears, the international trade becomes a game of survival of the fittest.

WTO rules place institutional demands and burdens on developing countries in many ways and these rules cover a variety of new areas — services, standards, and intellectual property. New rules require constant negotiation and agreement to govern the conduct of international trade. Implementing them requires additional institutional capacity on the part of member governments, which is presently lacking in Africa and other developing countries.¹²⁷ Second, negotiations on the liberalization of various sectors require continuous participation by the members and, again, developing countries lack the institutional capacities to engage in these long and drawn out negotiations.¹²⁸

4. *The Damocles of Subsidy and Protectionism*

The “supply side” constraints to trade in Africa are compounded by “the disgraceful protectionism” that Africa faces in the markets of the developed world and the need to compete with heavily subsidized developed country exports. The industrial countries are not committed to reciprocity in tariff reduction but use subsidies to obstruct Africa’s optimization of world trade. Whereas African farmers fight under cruel disadvantages, their

124. Cotonou Agreement, *supra* note 123, art. 36(3).

125. Int’l Cent. For Trade and Sustainable Dev., *EU, ACP Agree to New Trade and Aid Accord*, BRIDGES, Feb. 8, 2000, available at <http://www.ictsd.org/html/weekly/story2.08-02-00.htm> (last visited July 27, 2005).

126. For a discussion of these and related issues, see Matthew McQueen, *ACP-EU Trade Cooperation after 2000: An Assessment of Reciprocal Trade Preferences*, 36 J. MOD. AFRI. STUD. 669 (1998).

127. MICHALOPOULOS, *supra* note 80, at 3.

128. *Id.*

Western counterparts enjoy all forms of direct and indirect subsidies from their governments. In rationalizing the global protests over globalization that began in Seattle, Stiglitz explains:

While these [advanced] countries had preached — and forced — the opening of the markets in the developing countries to their industrial products, they had continued to keep their markets closed to the products of the developing countries, such as textiles and agriculture. While they preached that developing countries should not subsidize their industries, they continued to provide billions in subsidies to their own farmers, making it impossible for the developing countries to compete.¹²⁹

Commentators like Alan Sykes do not believe that a subsidy arises each time a government program benefits the private actors. Such a suggestion, according to him, “ignores the other side of the ledger — the numerous government programs that impose costs on those same actors.”¹³⁰

In principle, the WTO is expected to eliminate most subsidies on grounds that they are trade distorting and protectionist. In practice, rich countries get away with un-free trade and craftily win exemptions for various forms of subsidies that they use, while prohibiting those that developing countries apply. The EU spends nearly half of its collective budget on the Common Agricultural Policy (CAP), typically in the form of subsidies.¹³¹ Sugar provisions in the CAP have led to overproduction, with excess sugar from European countries “end[ing] up in places such as Algeria, Ghana, Congo and Indonesia, displacing sugar produced in countries such as South Africa and India.”¹³² On October 15, 2004, the WTO Panel found the European Communities (EC) in breach of their obligations under the WTO Agreement on Agriculture,¹³³ by exporting more than three times the level of quantity commitments they had made and for exporting export subsidies to exports of ACP/India equivalent imports.¹³⁴ The Panel recommended that the EC sugar regime should be brought into conformity with Agreement on

129. STIGLITZ, *supra* note 61, at 244.

130. Alan Sykes, *The Economics of WTO Rules on Subsidies and Countervailing Measures*, JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 186 (2D Series) 3 (2003), available at http://www.law.uchicago.edu/Lawecon/WkngPprs_176-200/186.aos.subsidies.pdf (last visited July 27, 2005).

131. Richard Ebbs, *Global Finance or Economic Crimes Against Humanity?* (July 4, 2002) (unpublished essay), available at <http://www.feedback.nildram.co.uk/richardebbs/essays/gfinance.htm> (last visited July 27, 2005). Cf. Jonathan Derrick, *The World's Unfair Trade*, AFR. TOPICS 9, 10 (Jan.– Mar. 2000) (stressing that the EU's subsidies to agriculture under CAP and to exports “have meant that it is an unfair competitor with the developing world for exports of many products and even undercuts local producers on domestic markets”).

132. *Oh, Sweet Reason*, THE ECONOMIST, Apr. 17, 2004, at 73. See also Kevin Watkins, *Dumping on the World: How EU Sugar Policies Hurt Poor Countries*, OXFAM BRIEFING PAPER 61, Mar. 2004, at 1 *et seq.*

133. See Agreement on Agriculture, April 15, 1994, available at http://www.wto.org/english/docs_e/legal_e/14-ag.pdf (last visited Oct. 20, 2005).

134. See WTO PANEL, EUROPEAN COMMUNITIES – EXPORT SUBSIDIES ON SUGAR – COMPLAINT BY AUSTRALIA, WTO Doc. 04-4209, ¶¶ 8.1 (d)&(f) and 8.3 (Oct. 15, 2004).

Agriculture¹³⁵ and that it should also “consider measures to bring its production of sugar more in line with domestic consumption whilst fully respecting its international commitments with respect to imports, including its commitments to developing countries.”¹³⁶ The WTO Appellate Body upheld the Panel’s report on April 28, 2005,¹³⁷ but, if precedent is anything to go by, it is unlikely that these decisions will impel the EC to change an institution that is bent on preserving the quaint lifestyles of uncompetitive farmers.

The United States is not any better; rather, “[i]ts ways of asserting economic power at the developing countries’ expense are sometimes worse than the EU’s.”¹³⁸ The country has subsidized agricultural exports for years and regularly renegotiates its sugar import quotas, which it could alter unilaterally.¹³⁹ In 2002, Congress reportedly passed a farm bill allocating an additional \$190 billion in subsidies over a ten-year period; two-thirds of that sum went to farmers growing export crops, such as wheat, soybeans, corn, cotton, and rice.¹⁴⁰

Like the EU and United States, the OECD is gregarious in supporting subsidies in member countries. Its trade policy is “to support . . . the multilateral system through objective, fact-based analysis and dialogue on a wide range of trade policy issues. It seeks to strengthen the constituency for free trade, build bridges among stakeholders on sensitive issues, and facilitate WTO negotiations.”¹⁴¹ The practice of OECD betrays this policy. A recent World Bank study shows that “[s]ubsidies in OECD countries amount to US\$330 billion — of which some US\$250 billion goes directly to producers.”¹⁴²

The negative effects of subsidies in developing countries are substantial, given the sheer size of subsidies relative to the size of the market. Cotton subsidies in the United States and the EU stand at about \$4.4 billion annually, in a \$20 billion market!¹⁴³ For many African countries where cotton accounts for more than one-third of their export earnings — Burkina Faso, Mali and Chad — the losses are huge; indeed, West African cotton exporters lose about \$250 million a year as a direct result of United States subsidies.¹⁴⁴ Northern subsidy of coffee and the corresponding

135. *See id.* ¶ 8.5.

136. *Id.* ¶ 8.7.

137. *See* WTO APPELLATE BODY, ECONOMIC COMMUNITIES –EXPORT SUBSIDIES ON SUGAR, AB-2005-2, WTO Doc. 05-1728, ¶ 346(d)&(f) (April 28, 2005).

138. Derrick, *supra* note 131, at 10.

139. *Id.*

140. Global Exchange, Food Security, Farming, and the FTAA and WTO, (Oct. 2003), <http://www.globalexchange.org/campaigns/wto/FTAAWTOAgriculture.html> (last visited July 27, 2005).

141. *OECD Web site*, <http://www.oecd.org>.

142. WORLD BANK, GLOBAL ECONOMIC PROSPECTS 2004: REALIZING THE DEVELOPMENT PROMISE OF THE DOHA AGENDA xvii (2003) [hereinafter GLOBAL ECONOMIC PROSPECTS 2004].

143. *See* Aksoy, *supra* note 102, at 3.

144. *See* Ebbs, *supra* note 131.

decline in global prices at the beginning of the millennium cost Ethiopia — a country that started coffee production — \$300 million in export revenues.¹⁴⁵ The loss represented a fifty percent decline in the country's annual export earnings and led to household food shortages.¹⁴⁶

In all, subsidies upset the market access expectations associated with trade agreements; they “lead recipients to reduce prices and expand output;”¹⁴⁷ they inhibit entry by inducing procyclical surplus production by noncompetitive, often large, producers; and they “stimulate overproduction in high-cost rich countries and shut out potentially more competitive products from poor countries.”¹⁴⁸ Agricultural subsidies have particularly worsened global income distribution, with farmers in industrial countries earning more, on average, than the national income average, in contrast to the very low income of rural farmers in developing countries.¹⁴⁹

Protection is another major barrier to trade. While African and other developing countries blindly reform their trade policies and practices and implement the Uruguay Round commitments, developed countries openly refuse to yield any meaningful ground in terms of a reduction in protection. The United States regards domestic policies in other countries as barriers to its market access and, hence, “inappropriate” in areas it has a competitive disadvantage,¹⁵⁰ but it continues to retain the benefits of its antidumping laws, which it could invoke for protection against low cost imports. The resurgence of protectionism by the developed countries,¹⁵¹ through dirty tariffication, is costing developing countries over \$700 million annually from losses in export earnings.¹⁵²

Protectionism is also a major contributor to the public health crisis in Africa, particularly in the area of HIV-AIDS scourge. The United States trade policy and pharmaceutical patent protection in Africa have ensured that most HIV-infected persons go untreated due to the prohibitive costs of AIDS drugs. Meanwhile, many African states do not have laws that protect local industries; where they do, such laws are rarely invoked against the North. The avalanche of multinational corporations operating in developing

145. See Celine Charveriat, *Bitter Coffee: How the Poor are Paying for the Slump in Coffee Prices*, OXFAM POLICY PAPER, May 2001, at 1, 3-4, available at http://www.oxfam.org.uk/what_we_do/issues/trade/downloads/bitter_coffee.pdf (last visited Oct. 5, 2005).

146. See *id.*

147. Sykes, *supra* note 130, at 7 (noting further that “[s]uch behavior by a subsidized firm will attract customers away from unsubsidized firms”).

148. GLOBAL ECONOMIC PROSPECTS 2004, *supra* note 142, at xvii. See generally Warren Schwartz & Eugene Harper, Jr., *The Regulation of Subsidies Affecting International Trade*, 70 MICH. L. REV. 831 (1972).

149. See Aksoy, *supra* note 102, at 20-21.

150. See Howse, *supra* note 98, at 101.

151. See Algiers Declaration, *supra* note 85. Cf. Pascal Lamy, *Hong Kong Ministerial is Last and Best Chance to Conclude the Round by Next Year*, Remarks at the International Monetary and Financial Committee of the IMF (Sept. 24, 2005), available at http://www.wto.org/english/news_e/sppl_e/sppl03_e.htm (last visited Oct. 17, 2005) (“[M]ake no mistake, signs of resurgent protectionism are all too evident.”).

152. See Derrick, *supra* note 131, at 11 (citing study estimates by Oxfam).

countries makes internal regulation of markets by African countries particularly difficult, if not impossible. In 1997, the South African Government attempted to enact a domestic legislation to allow for compulsory licensing of pharmaceuticals. About forty multinational-dominated pharmaceutical companies took the government to court, arguing that its action violated TRIPS.¹⁵³ (The suit was dropped in 2001 only due to bad publicity.)¹⁵⁴ The fact is that TRIPS permits such measures;¹⁵⁵ Articles 31 and 2:1 of TRIPS, read in conjunction with Article 5.A.2 of the Paris Convention, clearly provide authority for the issuance of compulsory licenses.¹⁵⁶ The real problem is that most multinationals operating in Africa are more powerful than their host governments and are capable of destabilizing or, at least, holding these governments hostage at will. "Every African government," says Julius Ihonvbere, "has reason to watch its back."¹⁵⁷

Sadly, the WTO system has been unable to check these trends towards omnipotence by industrial countries. Instead, the organization has taken away the gains that developing countries had in GATT 1947 — through painful negotiations — allowing governments, *inter alia*, to impose antidumping and countervailing duties and safeguard measures. The Agreement on Agriculture, in particular, has tied the "hands" of African countries, preventing them from protecting themselves against dumping — the selling of products in another country below the cost of production — by Western countries. By providing SDT in favor of developed countries, the market access pillar of the Agreement on Agriculture is as incomprehensible as it is insensitive to the large number of people living in poverty in Africa.¹⁵⁸ Absent this Agreement, African countries could put up their tariffs to defend themselves and their peoples against some highly subsidized

153. See Sarah Boseley, *At the Mercy of Drug Giants: Millions Struggle with Disease as Pharmaceutical Firms Go to Court to Protect Profits*, GUARDIAN, Feb. 12, 2001, available at www.guardian.co.uk/Archive/Article/0,4273,4134799,00.html (last visited Sept. 10, 2005) (reporting that approximately forty pharmaceutical companies were engaged in a legal challenge to § 15(c) of South Africa's 1997 Medicines Act).

154. See Karen DeYoung, *Makers of AIDS Drugs Drop S. Africa Suit*, WASH. POST, Apr. 19, 2001, at A13 (reporting that the world's major pharmaceutical companies planned to drop their suit against the South African Government due to the "public relations nightmare").

155. See Frederick M. Abbott, *The TRIPS-Legality of Measures Taken to Address Public Health Crises: A Synopsis*, 7 WIDENER L. SYMP. J. 71, 72 (2001) (arguing that the TRIPS Agreement "manifestly permits governments to authorize . . . compulsory licenses").

156. *Id.* at 74.

157. JULIUS O. IHONVBERE, *ECONOMIC CRISIS, CIVIL SOCIETY, AND DEMOCRATIZATION: THE CASE OF ZAMBIA* 224 (1996).

158. Cf. Gonzalez, *supra* note 100, at 436 n. 11 ("While the WTO Agreement on Agriculture did not create the inequitable economic relations between industrialized and developing countries, . . . it exacerbates the asymmetries and may limit the options available to developing countries to promote food security.").

imports; but with this Agreement, African markets are flooded unchecked with manufactured goods that the impoverished people of the continent cannot buy.

Like the WTO, the IMF maintains a strong institutional position against exchange restrictions, including antidumping measures and taxes on trade, restrictions it regards as indicative of inadequate exchange rate policies.¹⁵⁹ Although the IMF defines exchange restrictions in a limited fashion — for purposes of its jurisdiction¹⁶⁰ — its conditionality covers a wide scope of economic and financial policies that often extends to liberalization of trade measures. The IMF's standard condition for continued receipt of financing requires members to refrain from imposing or intensifying import restrictions for balance-of-payments reasons.¹⁶¹ Trade restrictions may invite surveillance as giving rise to fiscal imbalances or, more generally, indicate poor macroeconomic policies.¹⁶² Since it is the "power of the purse" that often drives governmental decisions, developing countries stand to lose more from such stringent conditionality. Developing countries need funds more than industrial countries and, therefore, are more pliable to IMF conditions.

5. *World Trade Accentuates Poverty in Africa*

The WTO ties the domestic goals of full employment, poverty reduction, and social stability to the international trading system. This is based on the belief that economic growth through free trade leads to greater promotion and protection of human rights, particularly the right to development. The WTO even praises itself for offering a range of benefits to humanity, "[f]rom the money in our pockets and the goods and services that we use, to a more peaceful world."¹⁶³ Yet, it is difficult to reconcile this paradisiacal portrait with the fact that most indices measuring the quality of life and human development show worsening conditions in Africa and many other developing countries.

More than half of Africa's population still lives on a less-than-a-dollar-a-day threshold; NEPAD laments that "340 million people, or half the population, live on less than U.S. \$1 per day" at the turn of the millennium.¹⁶⁴ Africa's share of people living in absolute poverty in the world is higher than any other region; likewise the ratio of income to poverty line; and about fifty percent of the poor in SSA are concentrated in five

159. See, e.g., Decision No. 5392-(77/63) (Apr. 29, 1977), *SELECTED DECISIONS*, *supra* note 73, at 10 (discussing surveillance over exchange rate policies).

160. According to the IMF, "The guiding principle in ascertaining whether a measure is a restriction on payments and transfers for current transactions under Article VIII, Section 2, is whether it involves a direct governmental limitation on the availability or use of exchange as such." Decision No. 1034-(60/27), para. 1 (June 1, 1960), *SELECTED DECISIONS*, *supra* note 73, at 428.

161. See, e.g., the standard form for stand-by arrangements, *SELECTED DECISIONS*, *supra* note 73, at 171.

162. See Siegel, *supra* note 47, at 566.

163. 10 BENEFITS OF THE WTO TRADING SYSTEM, *supra* note 54, at 1.

164. NEPAD, *supra* note 99, para. 4.

countries of East Africa and Nigeria!¹⁶⁵ The continent's poverty stands in stark contrast to the prosperity of the developed world.¹⁶⁶

It is true that not all poverty related suffering is due to neo-liberalism — the belief that market forces, not governments, should regulate the global economy — and that “[p]overty-related suffering might have much more to do with the extremely corrupt, often genocidal political leadership in the least developed countries than with international economic policies.”¹⁶⁷ Nevertheless, the global economic disorder has compounded Africa's efforts at economic self-reliance, “measured by reductions in the ratio of imports to total supply of particular goods and services, and of foreign factors of production to total factors employed.”¹⁶⁸ The living standards of Africans have been declining, which occurs when public welfare is subordinated to private profit and when, in the scathing words of Frank Garcia, “those already holding an unequal share of the world's natural and social resources continue to receive an unequal share of the gains from trade.”¹⁶⁹

Countries most adversely affected by free trade are the LDCs. Africa accounts for 34 of the 49 currently classified,¹⁷⁰ representing 69.39 percent of the total. Of the thirty-four African LDCs, twenty-five or 73.53 percent are in the WTO, while two others — Ethiopia and Sudan — are in the process of accession to the body.¹⁷¹ The common denominators among the LDCs are rising debts, falling commodity prices, and sharp declines in development aid and Foreign Direct Investments (FDI), leading to poverty. The LDCs constitute fifteen percent of the world's population but almost twenty-four percent of the world's poor, with eighty-two percent of them living in rural areas.¹⁷² Nearly three-fifths of the population of SSA lives in the LDCs, with abject poverty as their lot. Surely, a more equitable IEO can contribute towards making people less miserable.¹⁷³

165. AU COMMISSION, AFRICA, OUR COMMON DESTINY: GUIDELINE DOCUMENT 8 (2004) [hereinafter OUR COMMON DESTINY].

166. *Id.* at 7.

167. See Andras Sajó, *Socioeconomic Rights and the International Economic Order*, 35 N.Y.U. J. INT'L L. & POL. 221 (2002).

168. Douglas Rimmer, Book Review, 96(385) AFRI. AFFAIRS 618, 618 (1997) (reviewing R. OMOTAYO OLANIYAN, FOREIGN AID, SELF-RELIANCE, AND ECONOMIC DEVELOPMENT IN WEST AFRICA (1996)).

169. Frank J. Garcia, *Trade and Inequality: Economic Justice and the Developing World*, 21 MICH. J. INT'L L. 975, 976-77 (2000).

170. See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, STATISTICAL PROFILES OF THE LEAST DEVELOPED COUNTRIES 5, U.N. Doc. UNCTAD/LDC/Misc.72 (2001) [hereinafter UNCTAD/LDC].

171. The African LDCs in WTO are Angola, Benin, Burkina Faso, Burundi, Central African Republic, Chad, DR Congo, Djibouti, Gambia, Guinea, Guinea Bissau, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Senegal, Sierra Leone, Tanzania, Togo, Uganda, and Zambia. WTO, Enhancing Trade Opportunities, http://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief20_e.htm (last visited Sept. 10, 2005).

172. See Aksoy, *supra* note 102, at 17, 18.

173. See Sajó, *supra* note 167, at 222.

6. Northern Initiatives and Hypocrisies on Africa's Development

Africa's development crisis has become part of industrial countries' agendas at their annual G8 summits, which have produced avalanches of commitments to assist the continent. The most recent of such summits was the July 2005 Gleneagles Summit in England, which was nearly marred by the terrorist attacks in London.¹⁷⁴ Its main agenda was how to end poverty in Africa and it ended with an agreement to boost aid for developing countries by \$50 billion (£28.8bn).¹⁷⁵ The industrial countries have also employed SDT as key elements in their efforts to assist the integration of the LDCs into

the world economy.¹⁷⁶ Notable amongst these trade preferences are the Everything But Arms (EBA) initiative of the EU¹⁷⁷ and the African Growth and Opportunity Act (AGOA), enacted into law in the United States as part of the Trade and Development Act of 2000.¹⁷⁸ The EBA regulation grants duty-free access to imports of all products from the LDCs, with the exception of arms and munitions, and without any quantitative restrictions. Such duty-free access aims to significantly enhance export opportunities and, hence, potential income and growth for these countries. The initiative, however, excludes three products — fresh bananas, rice, and sugar — where tariffs will be gradually reduced to zero (2006 for bananas and 2009 for rice and sugar).

The AGOA, on its part, is the latest in a series of regional initiatives in United States trade policy. It is a part of the "post-Cold War constructive re-engagement" in Africa and is based on the philosophy that trade, not aid, is the chief tool for promoting economic development.¹⁷⁹ The AGOA, which was first proposed at the height of the banana trade wars between the United

174. See Steve Schifferes, *London Bombs Make G8 Impact*, BBC NEWS ONLINE, July 8, 2005, available at <http://news.bbc.co.uk/1/hi/business/4662679.stm> (last visited July 13, 2005).

175. See *G8 Leaders Agree \$50bn Aid Boost*, BBC NEWS ONLINE, July 8, 2005, available at <http://news.bbc.co.uk/1/hi/business/4662297.stm> (last visited July 13, 2005) (reporting that the debt of the eighteen poorest nations in Africa is also being cancelled, and a commitment by the G8 to work towards cutting subsidies and tariffs).

176. For a critique of SDT in international trade, see Michael Hart & Bill Dymond, *Special and Differential Treatment and the Doha "Development" Round*, 37 J. WORLD TRADE 395, 395 (2003) (deeming as "misguided and perverse" the theory that the economies of developing countries require sheltering from full application of liberalized trade rules; and arguing that differential trade treatment is "more likely to retard than aid economic development").

177. See Joe Kirwin, *U.S., EU, Japan, Canada to Expand, Speed Up Concessions for Poor Countries*, 18 INT'L TRADE REP. (BNA) No. 22, at 847 (May 31, 2001).

178. See Trade and Development Act of 2000 (African Trade Bill), 19 U.S.C. § 3702(1),(4),(5) (2000), 2001 O.J. (L60) [hereinafter AGOA]. For a description, see U.S. Trade and Investment with Sub-Saharan Africa, Second Annual Report, USITC Pub. 3476, at 15-21 (Dec. 2001).

179. See Brown, *supra* note 22, at 862 n. 231 (stressing: "This shift in U.S. foreign aid thinking, with its insistence on self-reliance, governmental reform, and adoption of free trade policies, contrasts sharply with the more traditional foreign aid and development paradigm outlined in the Lome Convention").

States and the EU¹⁸⁰ — though the United States does not produce bananas, —¹⁸¹ offers trade preferences to the beneficiary countries as a complement to foreign aid. It expands the scope of preferences in such key areas as clothing and encourages the beneficiary countries to adopt reforms in their economic, investment, and trade policies. AGOA is aimed, more specifically, at encouraging increased trade and investment between the United States and sub-Saharan Africa; negotiating reciprocal and mutually beneficial trade agreements, including the possibility of establishing free trade areas that serve the interests of both the United States and the countries of SSA; and focusing on countries committed to the rule of law, economic reform, and the eradication of poverty.¹⁸²

To be fair, the SDT has brought some marginal gains to Africa. The 2002 U.S. Report on AGOA notes that “U.S. imports from [SSA] have increased 61.5 percent over the last two years,”¹⁸³ though it glossed over the fact that these imports declined by 9.3 percent during 2001.¹⁸⁴ The trouble is that even such modest gains come at the expense of other African countries that are penalized by the discrimination. Besides, most of the SDT contains restrictive conditions on terms of market access, such as the application of rules of origin. The EBA stipulates that vessels must be at least fifty percent owned by nationals of the beneficiary country, the EU, or by companies with a head office in either the beneficiary or an EU state of which the chairman and the majority of the board members are nationals of those countries.¹⁸⁵

Preferences under the EBA are of no real value to several LDCs because nearly all exports are concentrated in products for which the EU external tariff is zero. The key issue for these countries is the extent to which the EU scheme of preferences can assist in stimulating diversification into a broader range of exports. In general, the promises of a better life for

180. See Regime for the Importation, Sale, and Distribution of Bananas, Decision By the Arbitrators, WT/DS27/ARB (April 9, 1999).

181. See, e.g., Ruth Gordon, *Racing U.S. Foreign Policy* 17 NAT'L BLACK L.J. 1, 23 (2003) (“Not a single banana is grown in the United States and thus this dispute is to protect American capital, not American jobs.”).

182. See AGOA, *supra* note 178, § 103(1).

183. See, e.g., U.S. TRADE REPRESENTATIVE (USTR), 2002 COMPREHENSIVE REPORT ON U.S. TRADE AND INVESTMENT POLICY TOWARD SUB-SAHARAN AFRICA AND IMPLEMENTATION OF THE AFRICAN GROWTH AND OPPORTUNITY ACT (2002) 1 [hereinafter USTR 2002 AGOA REPORT].

184. *Id.* at 24. See generally UNCTAD, *The African Growth and Opportunity Act: A Preliminary Assessment*, UNCTAD/ITCD/TSB/2003/1, available at http://www.unctad.org/en/docs/itcdtsb20031_en.pdf (last visited Sept. 10, 2005) (offering an early assessment of the utility of the AGOA tariff preferences as an instrument of SDT for the beneficiary countries).

185. See Paul Brenton, *Integrating the Least Developed Countries into the World Trading System: The Current Impact of EU Preferences under Everything But Arms*, WORLD BANK POLICY RESEARCH WORKING PAPER 3018, at 24 (Apr. 2003) (evaluating the impact of the EBA initiative on LDCs' exports and showing that changes introduced by the EBA in 2001 are relatively minor, primarily because over 99 percent of EU imports from the LDCs are in products which the EU had already liberalized and the complete removal of barriers to the key remaining products, rice, sugar and bananas has been delayed).

Africa have never quite materialized because of insincerity on the part of the promisors. Donor nations often use their sunshine SDT schemes to blackmail or coerce Africa and other developing countries into accepting their dictations during trade negotiations. The defunct OAU hinted at such duplicity on the part of donor nations when it declared in 1999:

While expressing satisfaction at the various co-operation initiatives and approaches in favour of Africa, we reaffirm our readiness and willingness to promote, with all our partners, a genuine partnership *devoid of any selfish calculations for influence*; a partnership that respects the unity of the continent and aims at the development of Africa, rather than *using it as a mere reservoir of raw materials and market for manufactured goods*; a partnership that enables Africa to achieve its integration, ensure its development for the benefit of its peoples and occupy its rightful place on the international scene for the mutual and inclusive benefit of the International Community as a whole.¹⁸⁶

Critics have also argued that AGOA was more an attempt by the United States to address WTO concerns over the former's perceived foreign policy inconsistencies toward Africa than a genuine and informed domestic African foreign policy framework reassessment.¹⁸⁷ The post-AGOA United States' policies towards Africa and other developing countries appear to give credence to such criticisms. The Bush administration is reportedly committed to withholding some concessions on the importation of textiles promised to African and Caribbean countries.¹⁸⁸ European countries, on their parts, always threaten to veto any modest trade proposal to change farm policies in favor of developing countries.¹⁸⁹ Such actions shortchange Africa in every conceivable way. As Stiglitz cries out, "so unfair has the trade agenda been that not only have the poorer countries not received a fair share of the benefits; the poorest region in the world, [SSA], was actually made worse off as a result of the last round of trade negotiations."¹⁹⁰

It is the height of hypocrisy for the North to continue to use its dominance in the WTO and power politics to block welfare increasing trade liberalization for the South. Such actions go to show that "when the crunch comes it is governed by the reality that states have no principles, only interests."¹⁹¹ Yet, such doublespeak poses grave threats to future Development Rounds, as the Cancun debacle demonstrated.

186. Algiers Declaration, *supra* note 85 (emphasis added).

187. See, e.g., Hunter R. Clark, *African "Renaissance": and U.S. Trade Policy*, 27 GA. J. INT'L & COMP. L. 265, 283 (1999) (noting that the real impetus for the shift in U.S. foreign policy toward Africa stemmed from a congressional directive to address the WTO's criticisms in a concrete legislative initiative). See also Brown, *supra* note 22, at 864.

188. See GEORGE SOROS, *supra* note 121, at 34.

189. *Cap It All*, THE ECONOMIST, June 28, 2003, at 16.

190. STIGLITZ, *supra* note 61, at 245.

191. Trotman, *supra* note 67, at 22.

II. EXAMINING THE NATURE OF WTO REMEDIES

The last Part attempted to establish that Africa has been greatly chanced in the game of free trade, given that the rules of the game are anything but free. In general, rules usually contain sanctions for breaches; and the WTO system is no exception. This Part examines the effectiveness of the WTO remedies for breaches of international trade obligations. It argues that, although the WTO has succeeded in creating a system in which asymmetry in countries' sizes does not affect the outcome of a dispute, it remains a series of biases affecting the performance of developing countries.

A. *An Outline of the WTO Dispute Settlement Understanding*

The rules and procedures governing the WTO dispute resolution are formalized in the Dispute Settlement Understanding (DSU).¹⁹² Given the breadth of WTO membership, the DSU is the most extensive network of compulsory dispute settlement systems in contemporary international law. It replaces the GATT dispute settlement system, which has been described as "the history of improvising on the extremely inadequate language of Article XXIII [of the GATT], which concerns remedies for 'nullification and impairment' of negotiated liberalization commitments."¹⁹³ Its twenty-seven articles create a two-tiered trade dispute settlement, utilizing consultations between the parties, mediation, conciliation, and arbitration. As Kim der Borghat observes, "[t]he DSU changed the nature of the dispute settlement process from a diplomatic to a legalized process and from a power-based to a rule-based procedure."¹⁹⁴ The DSU is the backbone of the multilateral trading system. Its rules were legalized in order to enforce the substantive rules of the WTO agreements, with the potential to constrain members, particularly the powerful ones, from engaging in unilateral or rule-breaking behavior.¹⁹⁵

At the center of the DSU is the arrangement for referring disputes to panels made up of independent experts, whose role resembles that of arbitrators. Panel reports form part of the WTO *acquis*; and though not legally binding precedents, they exercise a considerable influence on later panels.¹⁹⁶ There is a right of appeal to the Appellate Body,¹⁹⁷ established in

192. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2 [hereinafter DSU], in LEGAL TEXTS, *supra* note 24, at 354; 33 I.L.M. 114.

193. JOHN H. JACKSON, GATT MACHINERY AND THE TOKYO ROUND AGREEMENTS (1983), quoted in JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 333 (2d ed., 1986).

194. Kim Van der Borghat, *The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate*, 14 AM. U. INT'L L. REV. 1223, 1224 (1999).

195. See Robert O. Keohane et. al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457 (2000); JOHN JACKSON, RESTRUCTURING THE GATT SYSTEM 56-80 (1990).

196. For a discussion, see David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398 (1998).

197. See DSU, *supra* note 192, art. 16.

1995. The Appellate Body is a standing body of seven persons that reviews panel reports¹⁹⁸ and addresses possible errors in misinterpreting the law, a development that was “unique and unprecedented . . . in international trade.”¹⁹⁹ It can uphold, modify, or reverse panel reports and the parties to the dispute must accept Appellate Body Reports once adopted. Statistically, approximately 114 of the WTO disputes have resulted in the adoption of eighty-seven Panel Reports and fifty-six Appellate Body Reports, in “just under 25,000 pages of jurisprudence.”²⁰⁰

Like the GATT before it, the DSU is based on the notion of the “nullification or impairment” of benefits, rather than breach of WTO obligations. The Dispute Settlement Body (DSB) recommends what steps should be taken to end the dispute and gives a ruling authorizing the complainant to suspend WTO obligations with respect to the respondent member.²⁰¹ Countermeasures, retaliations, and reprisals are strictly regulated and can take place only within the framework of the DSU;²⁰² and the amount of retaliation shall be equivalent to the amount of harm suffered as a result of the illegal action.²⁰³ The next segment examines the extent to which the DSU has been effective in stemming trade breaches.

B. Assessing the Effectiveness of the DSU

In principle, the DSU facilitates multilateral approval for punitive measures and gives rich and poor countries alike equal rights to challenge each other. It underscores the rule of law and makes the trading system more secure and predictable. Its rationale is that a trade agreement of the WTO type can succeed only if it includes scope for enforcement which, theoretically, ensures that each country receives all the benefits for which it negotiated and that no country is required to make concessions to which it has not agreed.²⁰⁴ Although the DSU is based on the system of dispute settlement set out in Articles XXII and XXIII of GATT 1947, and the fundamental political nature of both systems are identical, its mechanism is stronger. The procedure under GATT 1947 had no fixed timetables, rulings were easier to block, and many cases dragged on inconclusively.²⁰⁵ Under

198. *Id.* art. 17.

199. Patrick Specht, *The Dispute Settlement Systems of GATT and NAFTA—Analysis and Comparison*, 27 GA. J. INT’L & COMP. L. 517, 580 (1998).

200. John H. Jackson, *The Changing Fundamentals of International Law and Ten Years of the WTO*, 8 J. INT’L ECON. L. 3, 5 (2005).

201. See, e.g., GATS, *supra* note 95, art. XXIII. See also JOHN COLLIER & VAUGHAN LOWE, *THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES* 100 (1999).

202. See generally ELAGAB OMER YOUSSEF, *THE LEGALITY OF NON-FORCIBLE COUNTER-MEASURES IN INTERNATIONAL LAW* (1988).

203. See DSU, *supra* note 192, art. 22.

204. See John Ragosta et al., *WTO Dispute Settlement: The System is Flawed and Must be Fixed*, 37 INT’L LAW. 697, 698 (2003).

205. See generally Thomas Schoenbaum, *WTO Dispute Settlement: Praise and Suggestions for Reform*, 47 INT’L & COMP. L.Q. 647 (1998); DISPUTE RESOLUTION IN THE WORLD TRADE ORGANIZATION (James Cameron & Karen Campbell eds., 1998); ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM:*

the DSU, one party to a dispute can no longer block the establishment of a dispute settlement panel and the adoption of a panel report, unless all members of the DSU agree by consensus not to adopt it.²⁰⁶ There are now strict time schedules, intended to enhance timely compliance with procedural requirements and, thus, address the question of unnecessary delays and deadlocks in the resolution of trade disputes.²⁰⁷

There is also evidence of expansive judicial law-making by the Appellate Body, which increasingly clarifies ambiguities and fills in gaps in the GATT and WTO agreements,²⁰⁸ though such “activism” is not without criticisms.²⁰⁹ The essential question relates to the effectiveness of the DSU enforcement mechanism. To what extent does the DSU ensure compliance with its decisions and provide compensation for damages? These are legitimate questions, because disputes are essentially about broken promises and the mechanism for settling such disputes gains legitimacy as parties to it comply — and the mechanism itself ensures compliance — with its decisions.

1. *The Question of Transparency in the Deliberative Processes of the DSB*

The first problem with the WTO dispute mechanism is that much of the deliberative processes of the DSB, like the WTO structure itself, are shrouded in secrecy. Some commentators, in a near irrational exuberance, have attempted to defend this secrecy on “several sound reasons.” One reason is that such secrecy shields “the adjudicator from outside pressures and from the passions of the day that do not relate to the merits of the legal issues pending before the court.”²¹⁰ Another reason is that “[a]ny more transparency than what already exists in the deliberative process of these bodies would threaten the integrity of the WTO dispute settlement process.”²¹¹ Both points may be correct, but neither is compelling, let alone

INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT(1997); Claudio Cocuzza & Andrea Forabosco, *Are States Relinquishing Their Sovereign Rights? The GATT Dispute Settlement Process in a Globalized Economy*, 4 TUL. J. INT'L & COMP. L. 161 (1996); Special Issue: WTO Dispute Settlement System, 1 J. INT'L ECON. L. 2 (1998); and Norio Komuro, *The WTO Dispute Settlement Mechanism—Coverage and Procedures of the WTO understanding*, 29 J. WORLD TRADE 5 (1995).

206. DSU, *supra* note 192, art. 16.

207. *Id.* art. 4(3) (reply to request for consultations to be within ten days); art. 4(7) (sixty days for the successful completion of consultations); art. 20 (time frame for DSU decisions).

208. See Richard Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 248 (2004).

209. See, e.g., Karl Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT'L L. 401 (2000) (expressing concern that the WTO DSU is simultaneously generative and insular). See generally CLAUDE E. BARFIELD, *FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION* (2001).

210. Kevin Kennedy, *Globalization and Its Discontents*, 35(1) GEO. WASH. INT'L L. REV. 251, 260 (2003).

211. *Id.*

convincing. These arguments fail to recognize the interest that shapes social structures and legal institutions — the invisible hand of objective necessity.²¹²

The DSU is constrained by politics and does not operate in isolation; it interacts regularly with political institutions and processes and the responsibility of the major industrial players — as legislators — underpins the system. Richard Steinberg stresses this constraint when he writes: “[P]owerful WTO members each have a unilateral veto over the selection of Appellate Body members, and a candidate’s approach to judicial decision-making figures prominently in those members’ decisions on whether to block a candidacy.”²¹³ Memberships of the DSB, besides being selected, are *ad-hoc* and not permanent, which further compromises their independence. The DSU itself does not contain the procedural protections essential to due process, equity, and transparency in a binding judicial environment. The procedural rules governing the panel, arbitration, and appellate body proceedings receive only passing attention. As John Ragosta and others argue:

If the agreements were clearly defined, panels could simply determine the facts and apply the negotiated provision appropriately. But when different parties to an agreement have differences of opinion about the meaning of a negotiated provision (much of it intentional, resulting from an inability to reach more precise agreement in the Uruguay Round negotiations), judicial interpretation or “construction” becomes almost inevitable.²¹⁴

2. *The Question of Access and Capacity of Developing Countries*

Another criticism of the DSU is that its mechanism is largely inaccessible to, and ineffective in the hands of, most developing countries.²¹⁵ Accessing the DSU involves high resource and monetary costs, thus raising genuine concerns regarding the institutional capacities of developing countries to benefit from these remedies. Though the DSU enables developing countries to address their grievances, it poses tremendous strains in terms of institutional capacities to initiate and sustain actions against more

212. See Gordon, *Critical Legal Histories*, 36 STAN L. REV. 57, 70-71 (1984). For a comprehensive critique of objectivist/necessitarian modes of social analysis, see ROBERTO UNGER, *SOCIAL THEORY: ITS SITUATION AND ITS TASKS* (1987).

213. Steinberg, *supra* note 208, at 249.

214. Ragosta et al., *supra* note 204, at 700. Cf. Joel Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT’L L.J. 333 (1999) (explaining the problem in terms of Dworkinian rules and standards). According to Trachtman, were the applicable legal provision of the DSU to have the characteristics of a rule—“clear, self-executing, fully specified in advance . . . once the facts are determined,” then the dispute resolution process will have little more to do. Where, however, the legal provision has the characteristics of a standard, with need of interpretation or even construction, then the determination of the law and the application of the law to the facts become much more complex. *Id.* at 337-38.

215. JAWARA & KWA, *supra* note 1, at 302.

powerful nations.²¹⁶ Many aspects of the DSU merely provide the developed countries with new instruments to put pressure on developing countries in pursuit of their own commercial agendas.

The DSU also involves interpretations of hundreds of rules, clauses, sub-clauses, curved and square brackets, and technical jargons that may be fully understood, if at all, only after hours upon hours of painful study. As Leroy Trotman argues:

The only parties which may be expected reasonably to understand what each commitment is under a rule, are those parties who in one way or the other were involved in the original conceptualization and the subsequent drafting and development of the enabling legislation. It is they, and sometimes only they, who know where the escape clauses are and how particular regulations may be waived or otherwise disregarded to achieve a specific objective for the country of that party, and who equally know from the first step of the novitiate where that new club member has gone wrong, where the maze of the regulations will take the member and how, if at all, the member may re-emerge with any of his/her country's sovereignty intact.²¹⁷

There is evidence of a rise in the number of disputes under the DSU, about 324 complaints since the WTO's inception.²¹⁸ Some commentators attribute this rise to "a broad desire by WTO member states, including developing and least developing countries as well as the industrial and richer countries, to utilize this DS procedure presumably to their benefit."²¹⁹ A more plausible explanation for the increase might involve the broader scope of the WTO agreements — compared to GATT 1947 — rather than confidence in the system.²²⁰ In any event, most of these disputes involve Western countries,²²¹ again underscoring the inaccessibility of the DSU to many developing countries. Of course, the legal debates arising from these disputes may serve to clarify for the lesser players what pitfalls they should come to expect.

3. *The Question of Compliance with Decisions of the DSB*

Although the WTO rules are binding in the traditional international law sense and the DSU "establishes a preference for an obligation to perform the recommendation," doubts remain regarding whether these rules actually "nail down" the issue as to the domestic application of obligations set forth

216. See MICHALOPOULOS, *supra* note 80, at 3.

217. Trotman, *supra* note 67, at 20-21.

218. Jackson, *supra* note 200, at 5.

219. See *id.* (stressing "Smaller countries have achieved some remarkable successes in cases brought against large powerful members").

220. See Robert Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 17 (1999). *Contra* Sebastiaan Princen, *EC Compliance with WTO Law: The Interplay of Law and Politics*, 15 EUR. J. INT'L L. 555, 556 (2004) (stating that the rise in the number of disputes possible reflects greater confidence in the DSU system).

221. See, e.g., 9(1) EUR. J. INT'L L. 182 *et seq.* (1998) (briefly noting some decisions of WTO Appellate Body, most of them against Western countries—US, Canada, Japan, and the European Communities).

therein.²²² Compliance with the DSU is largely the outcome of domestic political process, though international commitments and developments do exert an influence on this process.²²³ The reason, basically, is that the DSU is a “court without bailiff.”

Many theories compete for attention on the potency of the DSU. Some commentators argue that the mere threat of a ruling tends to induce an early settlement by a defendant. According to Sebastiaan Princen, “resorting to formal WTO dispute settlement procedures can be used as a threat. In addition, states may anticipate adverse legal rulings or threats from other countries and ensure compliance before a dispute arises.”²²⁴ Eric Reinhardt argues that defendants concede more prior to GATT judgments than afterwards, despite GATT’s lack of enforcement power.²²⁵ He develops an incomplete information model of trade bargaining with the option of adjudication, according to which the plaintiff has a greater resolve prior to a ruling, believing that the defendant might be compelled to concede to an adverse judgment, even if that belief later proves false.²²⁶

Practice, however, shows that the conventional belief regarding the efficacy of the WTO sanctions in light of remedies is questionable or, at best, exaggerated.²²⁷ Much of the evidence points in the opposite direction. Decisions of the DSB and the consequent remedies have proved ineffective in stemming the tide of breaches of international trade obligations. Some countries simply defy decisions of the DSB that are politically unpalatable at home, preferring to suffer retaliation than to honor their legal obligations.²²⁸ Other rich countries may opt to “buy out” of their obligations by providing “compensation” or enduring “suspension of obligation” while retaining measures that harm and distort trade.²²⁹ Even municipal tribunals do not feel bound by WTO panel findings, treating them as sources of information rather than binding decisions.²³⁰ Subsidy cases have become the most difficult to

222. John Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT’L L. 60, 62–64 (1997).

223. See Princen, *supra* note 220, at 556 (analyzing the interplay of international law and domestic politics in producing compliance with WTO law and concluding, *inter alia*, that the role of European trade officials is crucial in producing compliance).

224. *Id.* at 557. See also Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlements in GATT/WTO Disputes*, 24 FORDHAM INT’L L.J. 158, 159 (2000) (arguing that “cases in which the regime’s bluff has been called (i.e., those in which judgments are issued) are likely to be those in which the regime’s normative power holds little sway over the defendant”).

225. See Eric Reinhardt, *Adjudication Without Enforcement in GATT Disputes*, 45(2) J. CONFLICT RES. 174 (2001).

226. See *id.* at 174.

227. See generally Sungjoon Cho, *The Nature of Remedies in International Trade Law* 65 U. PITT. L. REV. 763 (2004) (questioning the efficacy of WTO sanctions in light of the remedies).

228. See Steinberg, *supra* note 210, at 249.

229. John Jackson, Editorial Comment, *International Law Status of WTO Dispute Settlement Reports: Obligations to Comply or Option to ‘Buy Out’?* 98 AM. J. INT’L L. 109, 120–21 (2004).

230. *Hyundai Elec. Co., Ltd. v. United States*, 23 Ct. Int’l Trade 302 (1999).

remedy,²³¹ arguably because they often require radical changes to the domestic legislation of the major trading countries, which they are not prepared to make. Anti-WTO sentiment in the United States Congress often makes it difficult to effect amendments to domestic legislation that violate trade rules.

The United States' "Byrd Amendment" — the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA) — is one example of the helplessness of the DSB in the face of domestic intransigence. *The Economist* regards the CDSOA as one of "the most outrageous weapons in America's trade-protection arsenal."²³² It provides for distribution to certain "affected domestic producers" of amounts assessed pursuant to countervailing duty orders, antidumping duty orders and findings under the Antidumping Act of 1921, in order to cover certain "qualifying expenditures."²³³ A complaint was lodged before the WTO Appellate Body, alleging that the U.S. measure violated the provisions of the Antidumping Agreement and SCM Agreement prohibiting "specific action against" dumping or subsidies except in accordance with GATT as interpreted by those agreements. The Appellate Body found that the CDSOA is a specific action against dumping and subsidies, as it provides disincentives for exporters to dump or receive subsidies.²³⁴

It is unlikely that the Bush administration will amend the CDSOA, which is "extremely popular" among American senators.²³⁵ As *The Economist* bemoaned: "It is a pity that, while America's lawmakers squeal about the importance of fair rules for global trade, they are reluctant to accept the WTO as a judge of what is fair and what is not."²³⁶

231. See Carolyn B. Gleason & Pamela D. Walther, *The WTO Dispute Settlement System Implementation Procedure: A System in Need of Reform*, 31 LAW & POL'Y INT'L BUS. 709, 709-13 (2000). See also J. Michael Showalter, Notes, *A Cruel Trilemma: The Flawed Political Economy of Remedies to WTO Subsidies Disputes*, 37 VAND. J. TRANSNAT'L L. 587 (2004) (examining the effectiveness of WTO at remedying disputes involving trade subsidies).

232. *Byrd-brained*, THE ECONOMIST, Sept. 4, 2004, at 73.

233. An 'affected domestic producer' is a person that was a petitioner or interested party in support of the petition with respect to which an anti-dumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order was entered. 'Qualifying expenditures' are expenditures incurred to produce the relevant product after entry of the relevant order.

234. Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, para. 239, Jan. 27, 2003, WT/DS217,234/AB/R.

[A] measure that may be taken only when the constituent elements of dumping or a subsidy are present, is a 'specific action' in response to dumping within the meaning of Article 18.1 of the Anti-Dumping Agreement or a 'specific action' in response to a subsidization within the meaning of Article 32.1 of the SCM Agreement. In other words, the measure must be inextricably linked to or have a strong correlation with the constituent elements of dumping or of a subsidy.

Id.

235. *Byrd-brained*, *supra* note 232, at 73 (reporting that over \$700m was distributed under the Byrd law by 2003 and that an estimated sum of \$2.35 billion is expected to be distributed to companies by 2009).

236. *Id.*

III. COUNTERMEASURES AS REMEDIES FOR BREACHES OF INTERNATIONAL TRADE OBLIGATIONS

Clearly, the existing WTO remedies are ineffective in checking breaches of international trade obligations by the powerful WTO members. What then, are the remedies available to weak states, such as those in Africa? Are they entitled to withdraw trade concessions and to adopt other unilateral measures to protect their economies? Are the WTO obligations *erga omnes*, such that no divorce is permitted for marriages contracted under its agreements? The last question is particularly in order to put the question of countermeasures in its right setting. This Part of the Article argues that, given the ineffectiveness of existing WTO remedies, African states are justified in adopting unilateral but collective countermeasures to remedy breaches of international trade rules, in line with general principles of international law. It suggests specific measures that African countries could adopt to preserve their economies from total collapse.

A. Are WTO Obligations *Erga Omnes* or Reciprocal?

A secondary, yet critical, question is the nature of WTO obligations; are they reciprocal or *erga omnes*? Is it correct to assert, as does Debra Steger, that WTO agreements are no longer simply contracts “with provisions that governments can interpret in their own way or withdraw from at their own convenience?”²³⁷ This question is not merely moot; rather, answering it serves the purpose of permissibility of *inter se* modifications to WTO agreements and the acceptability of suspension of such obligations in response to a breach.²³⁸ Brownlie asserts that a corollary of the sovereignty and equality of states is the dependence of obligations arising from customary law and treaties on the consent of the obligor.²³⁹ Such an assertion implies that the power of an international organization — in this case the WTO — to determine its own competence, to take decisions by majority vote and to enforce decisions depend on the consent of member states.²⁴⁰

According to Gerald Fitzmaurice, multilateral treaties give rise to two types of obligations, “reciprocal” or “integral.”²⁴¹ Treaties of the reciprocating or concessionary type provide for “a mutual interchange of benefits between the parties, with rights and obligations for each involving specific treatment at the hands of and towards each of the others

237. Debra P. Steger, *Afterward: The “Trade and . . .” Conundrum – A Commentary*, 96 AM. J. INT’L. L. 135, 138 (2002).

238. See Joost Pauwelyn, *The Nature of WTO Obligations*, JEAN MONNET WORKING PAPER 1/02, at 3-4 (2002) [hereinafter Pauwelyn, *WTO Obligations*] (arguing that a further reason for classifying WTO obligations relates to rules on standing to bring a complaint before a WTO panel).

239. See BROWNIE, *supra* note 52, at 289-90.

240. See *id.*

241. G.G. Fitzmaurice, *Law of Treaties: Third Report of the Special Rapporteur*, 2 Y.B. INT’L L. COMM’N 20, U.N. Doc. A/CN.4/115 (1958).

individually.”²⁴² Contrariwise, treaties of the “integral type” are those “where the force of the obligation is self-existent, absolute and inherent for each party.”²⁴³ The Genocide Convention²⁴⁴ provides a classic example of a multilateral treaty of an integral or *erga omnes* obligation. In the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,²⁴⁵ the International Court of Justice (ICJ) stated:

In such a convention [as the Genocide Convention] the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.²⁴⁶

In his dissenting opinion, Judge Alvarez went further to classify treaties of the type of the Genocide Convention as follows: “To begin with, they have a universal character; they are, in a sense, the *Constitution* of international society, the *new international constitutional law*. They are not established for the benefit of private interests but for that of the general interest.”²⁴⁷ Joost Pauwelyn enumerates other instances “where a treaty was characterized as transcending the interests of the parties directly concerned and as constituting a so-called objective regime, binding even on non-parties.”²⁴⁸ One instance was the *Wimbledon case*,²⁴⁹ where the Permanent Court of International Justice (PCIJ) found that the international regime for the Kiel Canal (set out in the Versailles Peace Treaty) was binding also on Germany, even though Germany was not a party to the treaty. Another

242. *Id.* art. 18(2).

243. *Id.* art. 19. Fitzmaurice adds a third type of multilateral treaties, namely those of an “interdependent nature,” where “the participation of all the parties is a condition of the obligatory force of the treaty.” Fitzmaurice, *Second Report*, art. 29.1(iii). Disarmament treaties can serve as examples of interdependent treaties.

244. See Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, U.N. GAOR, at 174, U.N. Doc. A/810, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

245. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15 (1951) [hereinafter *Reservations to the Genocide Convention case*].

246. *Id.* at 23. It was with reference, *inter alia*, to these “objects” that the Court made its main finding in the case:

The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation.

Id. at 24. Cf. Vienna Convention on the Law of Treaties, May 23, 1969, art. 19(c), 1155 U.N.T.S. 331, 339 [hereinafter Vienna Convention] (prohibiting reservations that are “incompatible with the object and purpose of [a] treaty”).

247. *Reservations to the Genocide Convention case*, *supra* note 5, at 51.

248. Pauwelyn, *WTO Obligations*, *supra* note 238, at 4.

249. *Wimbledon case*, PCIJ Reports 1923, Series A, No. 1 (1923).

instance was the *Dispute on the Regime of Demilitarization for the Aaland Islands*, where an *ad hoc* Committee of Jurists decided that the Paris Peace Settlement of 1856 setting out international obligations on demilitarization was binding on, and could be invoked by, Sweden and Finland, though they were not parties to the settlement.²⁵⁰

According to Pauwelyn, “the fact that WTO rules derive from a multilateral treaty is not enough for WTO obligations to be of the integral type.”²⁵¹ He explicitly endorses the contractual analogy as a model for international treaties, though other scholars point out its limitations. Evangelos Raftopoulos argues that while treaties are like contracts in form, they are unlike contracts in interpretation and enforcement.²⁵² Pauwelyn cites the Commentary to Article 42(a) of the ILC Final Draft Articles on State Responsibility to support his thesis. The Commentary confirms that the “bilateral obligations” referred to are

intended to cover cases where the performance of an obligation under a multilateral treaty or customary international law is owed to one particular State . . . although a multilateral treaty will characteristically establish a framework of rules applicable to all the States parties, in certain cases its performance in a given situation involves a relationship of a bilateral character between two parties. Multilateral treaties of this kind have often been referred to as giving rise to ‘bundles of bilateral relations.’²⁵³

Pauwelyn’s central thesis, which he advances elsewhere,²⁵⁴ is that there is no systemic reason why obligations under non-WTO treaties should not prevail over WTO law as *leges speciales*. In any event, “it is for the party claiming that a treaty has ‘contracted out’ of general international law to prove it.”²⁵⁵ Pauwelyn, however, argues that obligations of the reciprocal type should not be confused with obligations, the performance of which is inherently conditional on reciprocity, since reciprocal obligations may well

250. See Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands Question, League of Nations 1920 O.J. SPEC. ED. 3.

251. Pauwelyn, *WTO Obligations*, *supra* note 239, at 11.

252. See EVANGELOS RAFTOPOULOS, *THE INADEQUACY OF THE CONTRACTUAL ANALOGY IN THE LAW OF TREATIES* (1990) (observing that, although treaties resemble contracts in form, they differ in interpretation and enforcement). Cf. P. Allott, *The Concept of International Law*, 12 EUR. J. INT’L L. 31, 44 (1999).

253. International Law Commission (ILC), *Report on the work of the fifty-third session*, para. 8 (Aug. 10, 2001) General Assembly, Official Records, 55th Sess., Supp. No. 10 (A/56/10), at 298. See also Pauwelyn, *WTO Obligations*, *supra* note 238, at 11.

254. See Joost Pauwelyn, *The Role of Public International Law in the WTO: How far Can We Go?* 95 AM. J. INT’L L. 535 (2001).

255. See generally JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (2003). Cf. ILC, James Crawford, *Third Report*, in SPECIAL RAPPORTEUR ON STATE RESPONSIBILITY, A/CN.4/507, para. 150 (2000) (discussing the “presumption against the creation of wholly self-contained regimes in the field of reparation”).

be unconditional, objective and self-existent in the sense that they must be complied with irrespective of compliance by other state parties.²⁵⁶

The present writer agrees with Pauwelyn that the WTO agreements are reciprocal and that obligations arising therein are *erga omnes partes*, that is, owed not to all states but to all the parties to the agreements. These agreements concern obligations that expressly or by necessary implication relate to matters of common interest of the parties.²⁵⁷ Parties to the WTO agreements must fulfill obligations arising therein in good faith, based on the sacred principle *pacta sunt servanda*.²⁵⁸ However, to argue, as does Debra Steger, that the Marrakesh Agreement “is no longer simply a contract, with provisions that governments can interpret in their own way or withdraw from at their own convenience,”²⁵⁹ is to do violence to legal and rational thought. It is both odd and silly to expect some states to observe provisions of a treaty that other, albeit powerful, states are at liberty to flout.

Observably, most African states that have ratified or acceded to the WTO agreements have made strenuous efforts to honor their obligations therein, sometimes at great economic and social costs. Yet, international law does not generally prevent a state from taking appropriate measures to safeguard its essential interests.²⁶⁰ The Articles on Responsibility of States for Internationally Wrongful Act of 2001²⁶¹ permits an injured state to take countermeasures in response to an internationally wrongful act.²⁶² This, of course, is without prejudice to other remedies that may be available under international law, such as cessation, non-repetition, and reparation. Are countermeasures limited to the temporary non-performance of one or some of the international obligations of the injured state or can they be more extensive? The ILC suggests such a limitation,²⁶³ but Cassese has argued that “[i]n the event of a breach of international law, the injured State is legally entitled to *disregard* an international obligation owed to the delinquent State.”²⁶⁴ Even so, countermeasures may be taken only against the state responsible for the wrongful act;²⁶⁵ and a failure to observe such a

256. See Pauwelyn, *WTO Obligations*, *supra* note 238, at 12 (citing the MFN clause as an example of an unconditional obligation).

257. See Siegel, *supra* note 47, at 563 (arguing that, “as a legal matter, members’ substantive obligations under the WTO Agreements flow from one member to another, as under the GATT”).

258. Cf. Vienna Convention, *supra* note 248, art. 26 (providing “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”).

259. See Steger, *supra* note 237, at 138 (arguing further that “somewhere between the end of the Tokyo Round and the end of the Uruguay Round, [the GATT] became an international system of rules, of legal norms, considerably more extensive and binding than the reciprocal exchanges of bindings and concessions that had characterized the original GATT”).

260. See, e.g., ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 300-04 (2000).

261. See Articles on Responsibility of States for Internationally Wrongful Act, annexed to G.A. Res. 56/83 (Dec. 12, 2001) [hereinafter ARSIWA].

262. *Id.* art. 49(1).

263. *Id.* art. 49(2),(3).

264. ANTONIO CASSESE, *INTERNATIONAL LAW* 234 (2001).

265. ARSIWA, *supra* note 261, art. 49(1).

limitation “will constitute an internationally wrongful act, giving rise to state responsibility and possible countermeasures.”²⁶⁶

The Vienna Convention permits any party to a treaty — not just the party specially affected by the breach — to suspend the treaty, in whole or in part, with respect to itself “if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.”²⁶⁷ Neither the suspension of treaty obligations nor the adoption of protective measures is strange to the WTO treaty regime. The Agreement on Safeguards and Article XIX of GATT 1994²⁶⁸ provides that a WTO member may apply safeguard measures if, following an investigation by competent authorities, it determines that imports have increased, that the increase was a result of unforeseen developments, and that the increased imports have caused, or threatened to cause, its domestic industry to suffer serious injury.²⁶⁹ Unilateral trade measures are also permitted to protect the environment,²⁷⁰ a practice that the WTO Appellate Body has upheld in many of its decisions. In the *United States—Import Prohibition of Certain Shrimp and Shrimp Products*,²⁷¹ the Appellate Body held that the United States embargo on turtle-unfriendly shrimp qualified as a *bona fide* conservative measure. This decision, according to Robert Howse, “enfranchised the previously ‘external’ constituencies, who had been marginalized as ‘critics,’ as ‘trade and . . . people.’”²⁷²

The WTO Appellate Body has held that unilateral trade measures directed at other countries’ policies are not excluded from justifiability under GATT;²⁷³ to be justified, however, such measures must not be applied with “arbitrary” or “unjustified” discrimination. In the *Shrimp/Turtle* case, the Appellate Body held that, in taking conservative measures, the United States failed to make a serious effort to reach a negotiated agreement with the complainants; that the scheme was applied in an inflexible manner to different countries where different conditions prevailed; and that its

266. N.D. White and A. Abass, *Countermeasures and Sanctions*, in *INTERNATIONAL LAW* 505, 508 (Malcolm Evans ed., 2003).

267. Vienna Convention, *supra* note 246, art. 60(2)(c).

268. The Agreement on Safeguards and the GATT 1994 are each part of the body of substantive rules that make up the WTO and are binding on all members. They are contained in Annex IA to the Agreement Establishing the WTO. See General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement, Annex 1A, [hereinafter GATT], in *LEGAL TEXTS*, *supra* note 24.

269. The Agreement, however, provides that the competent authorities must issue a “report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.” *Id.* art. III.i.

270. *Id.* art. XX(g).

271. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp/Turtle* case].

272. Howse, *supra* note 98, at 111.

273. See *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, paras. 107, 137-38 (Oct. 22, 2001).

enforcement at the border lacked due process and transparency.²⁷⁴ General international law also requires that countermeasures should be commensurate with the injury suffered, "taking into account the gravity of the internationally wrongful act and the rights in question."²⁷⁵

Some commentators have argued that countermeasures related to subsidy should be limited to cases where the subsidy in question has a "cross-border" effect via an effect on the output of the recipients.²⁷⁶ Such an argument is weakened by the fact that national borders are no longer natural firebreaks in an age of globalization; the contagious effects of subsidies are likely to spread beyond national frontiers.

B. *The Imperatives of Unilateral Countermeasures by Africa*

Many states have come to recognize that trade, not aid, is the engine of economic growth and the most potentially serious and sustainable stimulus to development. Thus, some powerful countries have refused to let the canoes of the WTO and Bretton Woods institutions drive their economies in the cold waters of globalization; the sovereignties of these states have remained impenetrable. The United States has clearly specified that WTO agreements shall not supersede federal laws: "No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect. . . . Nothing in this Act shall be construed to amend or modify any law of the United States."²⁷⁷ Courts in the United States also recognize the supremacy of the Constitution over treaties arguably to secure the country's sovereignty. Thus, in *Reid v. Covert*,²⁷⁸ the United States Supreme Court held that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."²⁷⁹

The present writer asserts that African states cannot afford to adhere blindly to WTO rules even when they hurt their economies and pose serious threats to their sovereignties. So what are the options?

1. *What Africa Must do*

Africa must fashion effective measures to checkmate flagrant breaches of international trade obligations by industrial countries, in the light of the

274. See *Shrimp/Turtle* case, *supra* note 271 (citing GATT, *supra* note 268, preambular paragraph of art. XX).

275. See ARSIWA, *supra* note 261, art. 51. See also *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ REP. 7, paras. 83-85 (1997).

276. See Charles J. Goetz et al., *The Meaning of "Subsidy" and "Injury" in the Countervailing Duty Law*, 6 INT'L REV. L. & ECON. 17 (1986).

277. 19 U.S.C. § 3512(a)(1),(a)(2) (2000). See also *id.* § 3512(b)(2)(a) (providing that no state law "may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purpose of declaring such law or application invalid").

278. *Reid v. Covert*, 354 U.S. 1 (1957).

279. *Id.* at 16.

DSU's failure to provide effective remedies. First, African states should constantly reevaluate each of the WTO agreements in order to know when to suspend treaty obligations. They should unilaterally withdraw trade until there is evidence of good-faith performance by the industrial countries. Second, they should make no further concessions until they can bring home to their people trophies for earlier concessions. Jeffrey Schott believes that the industrial countries have very little left to offer Africa in terms of market access, "except what is very difficult to give — that is, the protection in agriculture and textiles that has survived eight previous rounds of multilateral trade negotiations and that is of major export interest to developing countries."²⁸⁰ Yet, he disingenuously asks developing countries to offer more "concrete reductions in their protection" in order to get the industrial countries "to commit to significant reforms."²⁸¹ The present writer believes that a government has no business granting market access and tariff reductions to another government if it is not sure that the corresponding access of its exporters to that country's market is secure.

Third, African states should select their import tariffs in a way that best achieves their policy objectives and should not take on new WTO commitments until other parties have fulfilled their commitments to liberalize trade in specific areas of interest to Africa. Fourth, they should ensure that future trade negotiations with the North take into account the development and industrialization needs of Africa and address existing barriers that industrial countries continue to place on the path of the continent's development. These barriers include access to industrial country markets; the application of SDT for developing countries; trade capacity building, including technical assistance to enable African countries take advantage of the WTO dispute settlement mechanism; the application of antidumping and safeguard measures; and the problems of LDCs.²⁸² African states should ensure that compliance with future WTO rules is in deference to Africa's political choices and development priorities and that it "promote[s] the sustainable development of [Africa], contribute[s] to poverty eradication and facilitate[s] the smooth integration of African countries into the world economy."²⁸³

Fifth, African states should take the lead in TRIPS negotiations and in implementing measures identified for promoting access to affordable generic drugs — in line with the decision of the AU Assembly at its January 2005 summit in Abuja, Nigeria.²⁸⁴ Africa will continue to experience stunted

280. FREE TRADE AGREEMENTS: U.S. STRATEGIES AND PRIORITIES 17 (Jeffrey J. Schott ed., 2004) [hereinafter FREE TRADE AGREEMENTS].

281. See *id.*

282. See, e.g., Sam Laird, *The WTO Agenda and the Developing Countries*, in TRADE LIBERALIZATION, COMPETITION AND THE WTO, 227, 229 (Chris Milner & Robert Read eds., 2002).

283. Declaration on the Economic Partnership Agreement (EPA) Negotiations, AU Assembly, 2d Ord. Sess., para. 9, AU Doc. Assembly/AU/Decl.5 (II) (July 2003) [hereinafter Declaration on EPA Negotiations].

284. See Decision on the Interim Report on HIV/AIDS, Tuberculosis, Malaria and Polio, AU Assembly 5th Ord. Sess., para. 7(a), Assembly/AU/Dec.55 (IV) (Jan. 2005).

economic growth so long as preventable diseases like HIV/AIDS, tuberculosis, and malaria continue to kill millions of its workforces. Sixth, and the most important of all, African states should take the subsidy of agriculture more seriously and should make fertilizer and other essentials not only available to, but also affordable for African farmers. They should curb imports to protect local production and should impose necessary tariffs to enable local farmers and pastoralists to receive fair prices for their products.

States should adopt special policies and strategies targeted at small scale and traditional farmers in rural areas, in line with the AU Declaration on Agriculture of 2003.²⁸⁵ They should create conditions that will engineer private sector participation in agricultural development, “with emphasis on human capacity development and the removal of constraints to agricultural production and marketing, including soil fertility, poor water management, inadequate infrastructure, pests and diseases.”²⁸⁶ They should support the provision of irrigation equipment and develop arable lands, particularly when private agents are unwilling to do so.²⁸⁷ They should seize the opportunity provided by the Food and Agricultural Organization (FAO) — which is providing funding to forty-nine countries for medium-term investment programs to fast-track the implementation of Comprehensive African Agriculture Development Program (CAADP)²⁸⁸ — to strengthen their respective agricultural sectors.

Lastly, Africa should continue to explore new bilateral and regional trade agreements and build linkages with other regional trade organizations, such as the Association of South-East Asian Nations [ASEAN] and the Economic Community of the Southern Cone [MERCOSUR]. Of course, the “spaghetti bowl” of customs union, common markets, regional and bilateral free trade areas, preferences, and an endless assortment of miscellaneous trade deals undermine the most basic principle of multilateral trade and of the WTO: non-discrimination, which now appears to be the exception rather than the rule.²⁸⁹ However, the stampede towards new trading arrangements may be indicative of the Uruguay Round’s failure to deliver on its enticing promises.²⁹⁰ In any event, groups based on regional trade arrangements and other configurations may be more effective, since the sheer number of actors in global trade talks makes coalitions difficult to build and consensus elusive.

The ACP-EU Cotonou partnership agreement offers one possible route to the realization of Africa’s economic interest. The Cotonou Agreement is a “comprehensive and integrated approach for a strengthened partnership

285. See Declaration on Agriculture and Food Security in Africa, AU Assembly, 2d Ord. Sess., para. 1, AU Doc. Assembly/AU/Decl.5 (II) (July 2003) [hereinafter Declaration on Agriculture & Food Security].

286. *Id.*

287. See NEPAD, *supra* note 99, para. 135.

288. See Decision on the Implementation of the New Partnership For Africa’s Development (NEPAD), AU Assembly 3d Ord. Sess. para. 8, Assembly/AU/Dec.38 (III) (July 2004) [hereinafter Decision on Implementation of NEPAD].

289. See THE FUTURE OF THE WTO, *supra* note 21, at 19.

290. See generally Carlos Primo Braga, *Comments on the Proliferation of Regional Integration Arrangements*, 27 L. & POL’Y INT’L BUS. 963 (1996).

based on political dialogue, development cooperation, and economic and trade relations.”²⁹¹ Success in the partnership, however, requires synergies between the EPA process and ACP-EU cooperation, notably in the context of regional indicative programs. If effectively managed, the partnership could provide the answer to the continent’s concerns, enhance regional integration process and development in Africa, and build regional markets through the removal of production, supply, and trade constraints. It could also enhance cooperation in areas that are important to trade, such as labor standards and environment, issues that the current WTO regime neglects.

Africa need not be apologetic when taking unilateral countermeasures; such measures have become facts of international trade politics, reflecting the fact that, “in some cases an individual state might actually need to increase trade protection to manage a crisis in an adequate manner.”²⁹² The United States — always a unique case study — regularly acts unilaterally, rather than behind the cloak of the WTO, when its special economic interest is at stake. As Joseph Stiglitz reveals:

The U.S. Trade Representative or the Department of Commerce, often prodded by special interests within the United States, brings an accusation against a foreign country; there is then a review process—involving only the U.S. government—with a decision made by the United States, after which sanctions are brought against the offending country. The United States sets itself up as prosecutor, judge, and jury. There is a quasi-judicial process, but the cards are stacked: both the rules and the judges favor a finding of guilty. When this arsenal is brought against other industrial countries, Europe and Japan, they have the resources to defend themselves; when it comes to the developing countries, even large ones like India and China, it is an unfair match. . . . The process itself does little to reinforce confidence in a just international trading system.²⁹³

2. *Are Countermeasures Self-destructive?*

There may be genuine questions regarding the efficacy of countermeasures to check breaches of international trade obligations and how Africa can employ such weapons without doing damage to its economy and the goals of trade liberalization. With regards to efficacy, there is no doubt that “a government’s temptation to withdraw a concession would be moderated if it believed that the other government would retaliate by withdrawing its own concession, as a withdrawal would induce movement back toward the unilateral outcome.”²⁹⁴ Unilateral countermeasures might make it possible, though by no means certain, for the industrial countries to begin some measured compliance with the existing trade rules.

With regards to the possible effects of countermeasures, one may surmise that such measures might make Africa to “shoot itself in the foot,” by restricting imports and, thus, hurting its own industrial users, importers,

291. Cotonou Agreement, *supra* note 123, pmbl.

292. Howse, *supra* note 98, at 95.

293. STIGLITZ, *supra* note 61, at 62.

294. Bagwell et al., *supra* note 78, at 57.

and consumers. Some believe that Africa's economy stands in danger of going down the drain on account of retaliatory measures,²⁹⁵ given its hibernated state. This potential danger, however, needs not to be exaggerated, since it is not only the welfare of each state that stands in such danger; the system as a whole stands in danger of going down the drain when each nation retaliates and turns inward to protect itself. No country is an island, entire by itself, no matter how powerful. "It is a law of the natural universe," says C. S. Lewis, "that no being can exist on its own resources. Everyone, everything, is hopelessly indebted to everyone and everything else."²⁹⁶

Market access is not about charity; it is about justice and mutual benefits. It is sheer arrogance for the North to think that it can do without Africa's markets for its finished products. Being both a participant and victim in the game of globalization, the North can only ignore Africa to its own hazard. It needs Africa's wealth, and Muammar Ghaddafi gave the reasons during his groundbreaking welcome address to the AU Assembly in Libya, in July 2005:²⁹⁷

Fifty per cent of the world's gold reserves are in Africa, a quarter of the world's uranium reserves are in Africa, and 95% of the world's diamonds are in Africa. A third of chrome is also in Africa, as is cobalt. Sixty-five per cent of the world's production of cocoa is in Africa. Africa has 25,000 km of rivers. Africa is rich in unexploited natural resources, but we were [and still are] forced to sell these resources cheaply to get hard currency. And this must stop.²⁹⁸

3. *The Role of the AU*

To be effective, countermeasures must be collective, since no African state is economically powerful enough to construct a modern economy on its own, let alone confront Western capitalism.²⁹⁹ Africa must unite, otherwise the industrial countries will continue to use the WTO to exploit their differences in national priorities and regulations as, indeed, they have done in the past. The AU should spearhead the crusade for countermeasures, in line with its undertaking to "take up the multifaceted challenges that confront our continent and peoples in the light of the social, economic and political changes taking place in the world."³⁰⁰

295. CHARLES P. KINDLEBERGER, *THE WORLD IN DEPRESSION 1929-1939*, at 242 (1973).

296. C.S. LEWIS, *GOD IN THE DOCK* 63 (1979).

297. See Welcome address by Muammar Ghaddafi of Libya to the Fifth Ordinary Session of the African Union (AU) Assembly in Sirte, Libya, in July 2005, *NEW AFRICAN*, Aug./Sept. 2005, at 31 (expressing disappointment over the AU's "unsatisfactory" performance since its creation and warning that its inability to deliver on its promise "makes the African people feel frustrated that the Union which is supposed to achieve their aspirations has slid into the same mire which engulfed the [OAU]"). *Id.*

298. *Id.* at 33.

299. See generally REGINALD GREEN & ANN SEIDMAN, *UNITY OR POVERTY? THE ECONOMICS OF PAN-AFRICANISM* (1968).

300. AU Act, *supra* note 6, pmbl.

The objectives of the AU include the raising of living standards of Africans through cooperation in all fields of human activity,³⁰¹ including, of course, trade. It also has the promotion and defense of "African common positions on issues of interest to the continent and its peoples."³⁰² It seeks, more importantly, to establish "necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;"³⁰³ but, as Ghaddafi asks,

how can we prepare the continent to play such a role when, for example, The Gambia is negotiating with the giant blocs on an individual basis, or Tunisia, Libya, Djibouti and so on. What are we going to achieve? What weight do these states have vis-à-vis the huge markets and great blocs: China, Japan, Nafta or Euro?³⁰⁴

Surely, the AU Act provides the normative basis for the AU to regulate the exercise of free trade in Africa, which should include the harmonization of technical and regulatory frameworks for trade, such as customs tariffs for imports to Africa.³⁰⁵ The AU should also assist its members in developing antidumping rules, as dumping of products is killing African domestic industries. These measures are necessary not only to meet the demands of sustainable development but also to prevent the social apartheid and exclusion that inevitably accompany globalization and free trade.

IV. REFORMING THE WTO FOR A TRUE GLOBAL GOVERNANCE

The imperatives of globalization make the existence of international institutions an attractive option because they present themselves as bulwarks to governments in times of crisis, when they like to feel that an international agency is in charge and doing something. Both critics and supporters of the WTO agree that international economic cooperation is needed to address challenges of globalization and that a strong multilateral trading system is a vitally important part of an emerging system of global governance.³⁰⁶ Obviously, "[a] stronger and more open multilateral trading system can make a broader contribution to international peace and stability through the forging of ever closer and mutually beneficial ties between nations, and cementing these ties through legally binding commitments."³⁰⁷ For these and other reasons, some commentators believe that it is "an odd prescription" to advocate a turn away from the WTO.³⁰⁸

This final Part examines some perspectives on WTO reform and suggests critical areas requiring immediate attention in order to strengthen the institution for a true global governance.

301. *Id.* art. 3(k).

302. *Id.* art. 3(d).

303. *Id.* art. 3(i).

304. Ghaddafi, *supra* note 297, at 31.

305. *Cf.* NEPAD, *supra* note 99, para. 161.

306. *See* Lamy, *supra* note 151.

307. WTO Annual Report 2003, *supra* note 79, at 3.

308. Guzman, *supra* note 43, at 307.

A. Perspectives on the WTO Reform

Contemporary international economic law raises concerns regarding the capability and legitimacy of the WTO, as presently fashioned, to bring about a just IEO. The reason is because the WTO appears to be "an over-worked and controversial" body,³⁰⁹ operating under some shadow of a legitimacy crisis, and grappling with what its Director-General calls "fundamental tensions."³¹⁰ Some commentators believe that one of the biggest challenges confronting the institution is to determine its mission.³¹¹ Questions remain as to whether one global institution has the capacity to organize and guarantee fair trade in this "multipolar and multicivilizational" era.³¹²

Scholars of different hue are also grappling, both at the theoretical and practical levels, with how to deal with the current neo-liberalism. Enrique Carrasco, for example, argues for an analytical model that remains constructively critical of neo-liberalism but without proposing radical systemic change to the prevailing model of socio-economic organization.³¹³ Others, however, call for new international norms and parallel institutions to address core issues of concern to a majority of states. Eleanor Fox calls for a free standing "World Competition Forum."³¹⁴ Andrew Guzman calls for a "World Economic Organization," which entails restructuring the WTO along departmental lines that "permit its expansion into new areas while taming its trade bias."³¹⁵ Others call for a revision or even jettisoning of existing trade law for one that offers flexibility and enables "plurilateral agreements" that are binding only for a limited number of willing members.³¹⁶ Still, some call for a stop to the expansion of the WTO into non-trade areas.³¹⁷

These perspectives suggest a deep uncertainty, if not a deeper ambivalence, regarding the ultimate implications of neo-liberalism.³¹⁸ They suggest, in particular, that all is not well with the WTO and that it needs reinforcement in order to meet future expectations and withstand possible challenges. The present writer believes that the time has come for the international community to change the rules currently shaping the IEO. A genuine spirit and a common hope must drive any new IEO, a spirit that

309. DUNKLEY, *supra* note 49, at 270.

310. Panitchpakdi, *supra* note 21, at 3.

311. Steve Charnovitz, *Triangulating the World Trade Organization*, 96 AM. J. INT'L L. 28, 28 (2002).

312. Cf. SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 19-29 (1996).

313. See Enrique R. Carrasco, *Opposition, Justice, Structuralism, and Particularity: Intersections Between LatCrit and Law and Development Studies*, 28 U. MIAMI INTER-AM. L. REV. 313, 314-17, 327-36 (1997).

314. See generally Eleanor M. Fox, *Competition Law and the Millennium Round*, 2 J. INT'L ECON. L. 665 (1999) (advocating the creation of a "free standing World Competition Forum").

315. Guzman, *supra* note 43, at 307.

316. Cf. Marrakesh Agreement, *supra* note 24, arts. II.3. & X.9.

317. See, e.g., John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 514 (2000).

318. See Brown, *supra* note 22, at 810.

seeks to restore human dignity for all. The basic objectives of an integral development must include equality of opportunity, equitable distribution of wealth and income, and the full participation of countries and their peoples in decisions relating to their own development. These objectives will remain mere pipe dreams as long as the North continues to use the WTO and allied institutions as instruments of trade and financial imperialism against the South.

B. Critical Matters to be Addressed

The present writer believes that the WTO might be able to realize parts of its visions if it changes its methodology for delivery and if, more especially, it allows developing countries, which form two-thirds of its current membership, to have a sense of ownership in the free trade agenda. The starting point should be to democratize the institution to allow for proportional representation and decision-making by developing nations. It is only within a framework of inclusive global governance, one that recognizes the values of partnership among all peoples, that Africa can participate meaningfully in the global economy and body politic.³¹⁹ As Paul Martin, the Canadian Prime Minister, said, "policies to promote development . . . will work only if the developing countries and emerging markets help shape them, because inclusiveness lies at the heart of legitimacy and effectiveness."³²⁰

The DSU also requires reconstruction, as it is seriously flawed in its current form. Some commentators have suggested an aggressive application of certain non-WTO norms by the DSB and that these panels should take international commitments made outside the WTO into account when evaluating state conduct.³²¹ Others advocate limited use of "non-violation" complaints under Article XXIII 1(b), and the abolition of "situation" complaints under Article XXIII 1(c) of GATT 1994,³²² though this is met with strident disagreements. For Debra Steger, "if we accept that the WTO Agreement is rules based, then the logical and meaningful cause of action for transgressions of those rules is a claim of violating them."³²³

The WTO is a Trojan horse that influences domestic policymaking both in trade and non-trade areas, including environmental policy, human rights,

319. Nsongurua J. Udombana, *How Should We Then Live? Globalization and the New Partnership for Africa's Development*, 20(2) B.U. INT'L L.J. 293, 322 (2002).

320. Honorable Paul Martin, Address to the Royal Institute of International Affairs (Jan. 24, 2001), available at www.fin.gc.ca/news01/01-009e.html (last visited Sept. 10, 2005). Cf. Algiers Declaration, *supra* note 85 (calling for a genuine democratization of international relations based on the active participation and a balanced consideration of the legitimate concerns of all nations). The Honorable Paul Martin also asserted: "We believe that globalization should be placed within the framework of a democratically conceived dynamics, and implemented collectively to make it an institution capable of fulfilling the hope for a concerted development of mankind and prosperity shared by all peoples." *Id.*

321. See PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW *supra* note 256, at 456-72.

322. See PETERSMANN, *supra* note 205, at ch. 4.

323. Steger, *supra* note 237, at 138.

labor, and competition.³²⁴ Yet, it has been developing in isolation, “a fact which produced a single-minded free trade perspective.”³²⁵ It must construct complementary structures on non-trade, social goals and must concern itself with the abuse of labor rights and the protection of the health and safety of indigenous populations, including trade restrictions aimed at preserving the natural resources on which their future relies. The DSB should, meanwhile, take these and related human rights problems into consideration when interpreting the WTO agreements.³²⁶ The same should be true for environmental issues; on this, the North American Free Trade Agreement (NAFTA)³²⁷ offers an example on how to mesh the demands of free trade with the protection of the environment. The NAFTA expressly gives priority to several named multilateral environmental agreements whenever trade restrictions undertaken in pursuit of their terms would otherwise violate its expansive “GATT-plus” trade disciplines.³²⁸

The WTO and the industrial countries must work towards building capacities of African and other developing countries to take advantage of opportunities that free trade offers. It is too late in the day for the WTO to insist that its “core role is trade opening” and “not a development agency,”³²⁹ in a global environment where trade, investment, finance, and development are increasingly intertwined. Those who pursue trade at the expense of justice, human rights, and development must realize that there is more to life than profit and GDP and that “a country could have a high overall per capita GDP but also have a majority of the population living in poverty.”³³⁰ Life is primarily about promoting human dignity, happiness, and values; profit and GDP are means to these ends. There is a fatal tendency in human activities for the means to encroach upon the very ends they were intended to serve; and when the means are autonomous, they are deadly.

CONCLUSION: A QUESTION OF JUSTICE

This Article concludes that the struggle for a fair global trade is a legitimate struggle, as it raises legitimate questions of justice. It is a struggle between freedom and enslavement, including the right of workers in developing countries to be free from foreign government’s unfair trade

324. See *id.* at 135 *et seq.* (analyzing the non-trade, social, issues). See also Guzman, *supra* note 43, at 306 (noting that “[t]he power of the WTO has already caused its reach to extend into non-trade related issues such as health and safety, intellectual property, and the environment”); Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT’L L. 733, 739-45 (1999) (discussing several “trade and . . .” issues, including environment, labor, competition, intellectual property, investment, and culture).

325. See ROBERT HOWSE & MAKAU MUTUA, *PROTECTING HUMAN RIGHTS IN A GLOBAL ECONOMY: CHALLENGES FOR THE WORLD TRADE ORGANIZATION* 11 (2000).

326. See generally Stephen J. Powell, *The Place of Human Rights Law in World Trade Organization Rules* 16 FLA. J. INT’L L. 219 (2004).

327. North American Free Trade Agreement, Dec. 8, 1992, 32 I.L.M. 605 (1993).

328. See *id.* art. 104.

329. Lamy, *supra* note 151.

330. Wesley T. Milner et al., *Security Rights, Subsistence Rights, and Liberties: A Theoretical Survey of the Empirical Landscape*, 21 HUM. RTS. Q. 403, 411 (1999).

practices. An honest impact assessment of international trade since Africa's union with the WTO reveals a fairy tale ending in reverse: "and so they lived unhappily ever after." The reason for this unhappy union is that the "matrimonial law" governing free trade is not about equality; it is another form of inequality. The WTO, which implements this law, is Janus-like in nature, offering freedom with one face and denying it with the other.

The burgeoning anti-globalization movement, including the Seattle and Cancun debacle, graphically demonstrate that the post Cold War multilateral trade liberalization is unsustainable and requires fine-tuning to meet current economic and political realities. They demonstrate that international cooperation and globalization cannot continue with a focus on trade alone, ignoring justice, human rights, and development. The banners hoisted at the Seattle and Cancun protests express, in unambiguous terms, that the stated objectives of the WTO did not serve, are not serving and, maybe, were never intended to serve the mass of humanity. Drastic reforms of the WTO are needed to address current trade injustices; and unless such reforms are urgently undertaken, the WTO and its Northern Allies will find it increasingly difficult to refute the charge that globalization is another word for colonization. It is a mistake for perpetrators of the current trade injustices to think that seekers of true and fair global governance will fade away. Everyone needs an opponent to keep him on his toes; likewise for every international institution.

While debates continue on the normative and institutional scope and restructuring of the WTO, Africa must devise effective means of meeting the challenges of globalization — in the spirit of the AU Act — and finding relevance in a world where economic growth is the major means to human and social development. Free trade, as conceived and delivered by the North, is not a bowl of cherries; it is a rat race where the end justifies the means. Africa must see unilateral countermeasures as a legitimate and effective means of survival and of drawing the attention of the international community to contemporary trade injustices, particularly as the existing WTO remedies have patently proved to be ineffective. "The prize," says Yoweri Museveni, "is an international trading system based on rules that promote African development by stimulating trade and investment and by reducing Africa's often-crippling dependence on foreign aid."³³¹

It is possible, and even probable, that free trade offers Africa the ultimate road to economic salvation; but that is if, only if, and always if, the continent is allowed to walk that road freely and not through blackmail or arm-twisting. C. S. Lewis writes: "Men are not angered by mere misfortune but by misfortune conceived as injury. And the sense of injury depends on the feeling that a legitimate claim has been denied."³³²

331. Yoweri Museveni, *Letter to African Heads of States and Ministers*, Sept. 6, 2003, reprinted in JAWARA & KWA, *supra* note 1, at lxxii.

332. C. S. LEWIS, *THE SCREWTAPE LETTERS* 111 (1942).

