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## Sub-Saharan Africa and the Brave New World of the WTO Multilateral Trade Regime

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# Sub-Saharan Africa and the Brave New World of the WTO Multilateral Trade Regime

Ruth Gordon\*

## INTRODUCTION

The multilateral trade paradigm has become increasingly complex, comprehensive and universal as it grows ever more powerful.<sup>1</sup> The character of Third World<sup>2</sup> involvement has also evolved as these nations become increasingly significant players in the system they once shunned as a rich nation club.<sup>3</sup> However, the experiences of the “least-developed” nations—of which the nations of Sub-Saharan Africa<sup>4</sup> (SSA) are disproportionately

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\* Professor of Law, Villanova University School of Law. The ideas in this essay were presented as part of an excellent symposium on Africa and the Caribbean at the University of California at Berkeley School of Law (Boalt Hall). I would like to thank the Members of the *Berkeley Journal of African-American Law & Policy* for gathering scholars to address these crucial matters, and for including me in a fascinating gathering that provocatively probed important issues that profoundly impact much-neglected parts of the world.

1. The World Trade Organization (WTO) completed the troika of international economic institutions originally envisioned at Bretton Woods, New Hampshire in 1944. See Kevin C. Kennedy, *The GATT-WTO System at Fifty*, 16 WIS. INT’L L.J. 421, 422-23 (1998). It is now the most sophisticated international legal organism in history although it would probably be unrecognizable to its founders because the extraordinarily broad scope of its agenda and its large, diverse and almost universal membership far exceed the contemplation or imagination of most of the post-World War II leaders who negotiated the Bretton Woods Agreements. See *id.* at 423. There are now 149 members of the WTO. <http://www.wto.org> (follow “The WTO’s 149 members” hyperlink) (last visited Mar. 6, 2006).

2. Denoting nations that the World Bank and the WTO commonly designate as least developed is problematic. Post-development theorists have demonstrated that terminology such as “underdeveloped,” “undeveloped,” “developing” or “least-developed” are pejorative and indicate inferiority and inadequacy. See Ruth Gordon & Jon Sylvester, *Deconstructing Development*, 22 WIS. INT’L L.J. 1, 2-22 (2004). Consequently, this article will attempt to avoid these terms, if possible. Because they are customarily employed in international instruments, however, at times their use will be unavoidable. Moreover, discerning alternatives can be somewhat perplexing as most terms utilized to represent “the other” present their own set of problems.

3. See, e.g., Surya P. Subedi, *The Road From Doha: The Issues for the Development Round of the WTO and the Future of International Trade*, 52 INT’L & COMP. L.Q. 425, 426 (2003).

4. Despite the fact that Africa is a diverse continent whose nations boast many cultures, peoples, languages, governments and circumstances, it is often lumped together and simply discussed as “Africa.” This author is guilty of this transgression and hereby acknowledges as

represented—within the brave new world of international trade diverge significantly from those nations at the center of power. This essay will focus on Sub-Saharan African efforts and potential to become viable players in the emerging multilateral trade edifice.

Subsisting on the margins of the global economy, SSA has often been disregarded in international economic discourse as an afterthought at best or entirely irrelevant at worst. Economic development is the primary conduit through which SSA intersects with the international economy and trade ideology, and these nations now consider trade to be a central consideration in their economic development.<sup>5</sup> With the founding of the World Trade Organization (WTO), and the proclamation of globalization as the new international economic order, the place of SSA within the trade paradigm will continue to shift as the powerful multilateral institution at its center continues to expand and develop. Furthermore, as the economic interests of the Third World fracture, the location of Sub-Saharan African nations in the global economy will in all probability continue to mutate. Accordingly, this essay also examines and reflects on the contemporary narrative of SSA within an international trade regime that now purports to focus on trade as an instrument of development.

Part I will discuss the position of the Third World generally, and the nations of SSA specifically, within the international trade construct created by the General Agreement on Tariffs and Trade (GATT), and later the WTO. This part begins with a brief description of some of the basic tenets underlying the multilateral trade system and how they were achieved under GATT. It also treats SSA's evolving position within the structure of GATT as it matured and became increasingly complex during the fifty or more years that GATT prescribed trade rules. Because the connection to development in one form or another remained a constant part of postcolonial economic discourse and policy, Part I also considers the intersection between development and trade.

Part II reflects upon an embryonic WTO and the location of an increasingly multifaceted Third World within this expanding and increasingly powerful international institution. The WTO was undoubtedly a clear

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much. Accordingly, the generalizations made here can be, and should be, challenged in individual situations, where they may not apply, and the heterogeneity one finds in Sub-Saharan Africa (SSA) is hereby noted and acknowledged. For a brilliant discussion of amalgamating African nations into a homogenous and indistinguishable whole, see Gavin Williams, *Modernizing Malthus: The World Bank, Population Control, and the African Environment*, in *POWER OF DEVELOPMENT* 158 (Jonathan Crush ed., 1995).

5. In writing *Deconstructing Development*, Professor Sylvester and I concluded that development is a devastating concept that relegates peoples, nations, and communities to a subordinate role in the international system. Gordon & Sylvester, *supra* note 2, at 2-6. It deems them inferior, and in need of evolving into something else, for after all, what does it really mean to be "undeveloped"? Africa is always at the center of development discourse, being viewed as the region most in need of advancement. *Id.* The focus on trade as a central principle of economic development is part of the current development discourse. *Id.* at 44-49.

departure from GATT. The trade regime came to include services, intellectual property and trade related investment measures, as well as one of the most sophisticated dispute settlement systems to emerge in the international legal system. Part II briefly explores the parameters of the more comprehensive and complex regime that emerged from the Uruguay Round, and its ramifications for SSA as well as the larger Third World. Issues of particular interest to Third World nations, such as agricultural products and textiles, were finally addressed by the WTO trade regime. Whether the modifications made can be considered meaningful will also be briefly examined.

Part III explores how Third World nations have participated in a WTO regime that is now deemed critical to their development efforts. It undertakes this inquiry through the lens of the current WTO negotiating round, christened the Doha Development Round. The Uruguay Round was widely viewed as a point of fundamental change in Third World participation in trade negotiations,<sup>6</sup> whereas the Doha Round has not yielded the results this participation would seem to merit. One might surmise that the WTO consensus-based approach to negotiations, and voter equality, could result in numerous small nations having a quite powerful voice.<sup>7</sup> However, the potential power of this voice may be diminishing due to disparities in resources and power, evolving mercurial alliances and interests, and the counter-balance of a more or less unified industrialized world. Moreover, the emergence of Third World economic giants such as China and India<sup>8</sup> is rapidly and profoundly

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6. Robert Stern, *Developing Country Interests in the Forthcoming WTO Negotiations* 3 (Research Seminar in International Economics, University of Michigan, Discussion Paper No. 456, 2005), available at <http://www.fordschool.umich.edu/rsie/workingpapers/Papers451-475/r456.pdf>. Surely SSA nations have participated in the multilateral trade system in an unprecedented fashion over the last ten years and have wielded more power than ever before. The fundamental issue, however, is whether participation has been or ever can be sufficient to achieve their goals.

7. The WTO approach differs from the International Monetary Fund (IMF) and World Bank, which have voting systems rooted in sovereign inequality, resulting in the rich unabashedly wielding more influence and absolute power than the poor, who are completely beholden to them. See Articles of Agreement of the International Monetary Fund, art. XII, sec. 5, Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39, available at <http://www.imf.org/external/pubs/ft/aa/> and Articles of Incorporation of the International Bank for Reconstruction and Development, art. V, sec. 3, July 22, 1944, 60 Stat. 1440, 2 U.N.T.S. 134.

8. According the National Intelligence Council:

Most forecasts indicate that by 2020 China's gross national product (GNP) will exceed that of individual Western economic powers except for the United States. India's GNP will have overtaken or be on the threshold of overtaking European economies. [] Because of the sheer size of China's and India's populations-- projected by the US Census Bureau to be 1.4 billion and almost 1.3 billion respectively by 2020 -- their standard of living need not approach Western levels for these countries to become important economic powers. []Barring an abrupt reversal of the process of globalization, or any major upheavals in these countries, the rise of these new powers is a virtual certainty.... The economies of other developing countries, such as Brazil could surpass all but the largest European countries by 2020.

NATIONAL INTELLIGENCE COUNCIL, MAPPING THE GLOBAL FUTURE 13 (2004), available at

changing the meaning of the terms “developing country” and “Third World.”. Part III concludes that ultimately the least developed nations and particularly SSA’s smallest, poorest nations may be in a weak position, possibly foregoing considerable, albeit unenforceable, preferences that they have enjoyed over the last thirty years.<sup>9</sup>

Finally, the Conclusion critically appraises the situation facing SSA nations. Unfortunately, it offers no magic bullet, as the prospects for Sub-Saharan Africa within the global economy appear dim. These nations appear destined to remain mere repositories of cheap labor and exporters of agricultural and labor-intensive goods, for that is where their comparative advantage appears to lie.<sup>10</sup> African governments seem to covet this outcome at least in the short-term, because it is posited as a catalyst to development. As Part IV explains, it is debatable whether this result is desirable or whether the current international trade regime can deliver. In a world with nations large enough to occupy the entire “development” space, the so-called “take-off” industries may fail to materialize in the smallest, least-industrialized nations. It may be impossible to compete within an international system where major players occupy the spaces of cheap labor, natural resources, technology and large, growing markets. Thus, even if a genuine effort is made by governments and international institutions to bring SSA into the decision-making center of the trade regime (an effort this writer believes is highly unlikely) there remains little incentive to invest in Africa beyond agricultural and natural resource production. Part IV thus concludes that although globalization discourse holds to the contrary, the only solution for these nations may be to disengage from the international trade regime and explore regional solutions.

## I.

### THE THIRD WORLD AND THE INTERNATIONAL TRADE PARADIGM

Third World countries have had an uneven relationship with the world trade system. They were largely absent at the birth of GATT and through most of its evolution and growth. For African and other Third World nations, the concern during the GATT period was development, and they considered GATT to be a rich nation club rather than an ally in their development. With the victory of the United States and global capitalism over the Soviet Union and

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[http://www.cia.gov/nic/NIC\\_globaltrend2020.html](http://www.cia.gov/nic/NIC_globaltrend2020.html).

9. As under the General Agreement on Tariffs and Trade (GATT), the special treatment accorded all developing countries, including the least developed, is “soft” law meaning there is no redress for its violation and no obligation as to its implementation. Gustavo Olivares, *The Case for Giving Effectiveness to GATT/WTO Rules on Developing Countries and LDCs*, 35 J. WORLD TRADE 545, 548 (2001).

10. “Comparative advantage,” however, takes place in a global economy mired in colonial dynamics and threatens to lock some nations into an economically colonial status—an outcome that should be discussed and questioned. See text and notes, *infra* at Part I.A. (discussing the theory of comparative advantage).

international communism, however, the liberal consensus prevailed as the paradigm to bring development to the underdeveloped.<sup>11</sup> As a result, the nations of Africa explicitly entered trade discourse through the development paradigm. After briefly describing some of the fundamental premises of the GATT system, this part analyzes the point at which, and characteristics of, SSA's entry into international trade discourse and the GATT regime.

### A. A Short Primer on GATT

For almost fifty years, GATT and the GATT Secretariat were at the core of the international trade system.<sup>12</sup> GATT's central tenet is the promotion of free trade, and it accomplished this goal through a system that laid the foundation for an open and level playing field liberated from non-economic barriers.<sup>13</sup> Underlying the premise of a market driven trade regime is the theory of comparative advantage according to which each nation concentrates on producing what it makes most efficiently and trades to obtain the products it makes less efficiently.<sup>14</sup> In so doing, nations theoretically maximize global

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11. According to the "liberal consensus," Third World nations are to be hospitable to foreign investment through monetary policy, accommodating governmental policies and trade liberalization. See Gordon & Sylvester, *supra* note 2, at 44-49; see also *Poorest Nations Opt Out of WTO Block*, ALERTNET, Sept. 22, 2003, <http://www.alertnet.org/thefacts/reliefresources/106423847080.htm> [hereinafter *Poorest Nations*] (discussing three groups that define different views represented at the Cancun negotiations, including the "first" representing the liberal consensus).

12. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947], available at [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm). At Bretton Woods, the United States and the United Kingdom proposed a comprehensive economic and financial plan for post World War II reconstruction and development. Kennedy, *supra* note 1, at 422-23. It envisioned three international economic and financial institutions: the World Bank, the International Monetary Fund (IMF) and an International Trade Organization (ITO). *Id.* GATT was part of this system. *Id.* Negotiations for an ITO were launched in 1946, while several nations were simultaneously organizing multilateral negotiations for tariff reductions. See John H. Jackson, *GATT and the Future of International Trade Institutions*, 18 BROOK. J. INT'L L. 11, 16-17 (1992). In 1947, the latter negotiations resulted in the GATT. *Id.* When the U.S. Senate failed to approve the ITO Charter, GATT (along with the World Bank and IMF) was left as the central component of the international economic and trade structure. *Id.* GATT 1947 remains a key part of the WTO agreements.

13. See generally JOHN H. JACKSON, *THE WORLD TRADING SYSTEM, LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 31-43 (2nd ed. 1999) [hereinafter JACKSON, *TRADE LAW AND POLICY*] (describing the history and foundations of the GATT system).

14. See Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. J. INT'L & COMP. L. 257, 260-61 (2000); see generally JOHN H. JACKSON, WILLIAM J. DAVEY, ALAN O. SYKES, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS CASES, MATERIALS AND TEXT* 7-12 (4th ed. 2002) [hereinafter JACKSON, *LEGAL PROBLEMS*]. A nation's factor endowments are considered a given, as is technological progress, which is determined exogenously. The comparative advantage hypothesis also assumes perfect markets, well functioning price mechanisms, market institutions, and perfect factor mobility. At least in theory, if it is adhered to it will give rise to a world operating at maximum efficiency. See S. Olofin, *Trade and Competitiveness of African Economies in the 21st Century*, AFR. DEV. REV. 298, 306 (2002) (explaining that SSA nations are competitive in primary exports and labor intensive

economic efficiency and international trade should flourish so long as governments do not intervene in favor of domestic interests.<sup>15</sup>

However, the predicted outcomes of comparative advantage can be problematic even accepting the theory on its own terms. Aggregate gains may simultaneously result in critical dislocations within individual nations and communities,<sup>16</sup> prompting nations to erect trade barriers. That is, even as nations pursue free trade they may have incentives to undermine it.<sup>17</sup> Thus, in leveling the economic playing field, GATT targeted socially, culturally, and politically motivated government interference in economic transactions.

GATT employed four fundamental legal principles to achieve its goal of free trade. First, tariffs were declared the only acceptable trade barrier,<sup>18</sup> and they were progressively reduced through a series of multilateral trade rounds.<sup>19</sup> Second, under the most-favored-nation principle, GATT generalized tariff concessions by requiring that any tariff concessions granted to one party apply to all parties.<sup>20</sup> Third, the national treatment obligation sought to level the playing field between imported and domestic products.<sup>21</sup> Fourth, GATT regulated the use of quantitative restrictions (quotas) and other non-tariff barriers (NTBs),<sup>22</sup> and barred subsidies, dumping, and other acts considered

manufactures, and the Heckscher-Ohlin model's "static comparative cost advantage" theory).

15. JACKSON, *LEGAL PROBLEMS*, *supra* note 14, at 7-12; *see also* JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 329-30 (1969) [hereinafter JACKSON, *LAW OF GATT*] (discussing an underlying premise of GATT that "better allocation of international resources" will result in a reduction of "governmental interference").

16. *See* Olofin, *supra* note 14, at 302 (explaining how SSA's "price taker" status can impact the balance of payments of nations in the region).

17. JACKSON, *TRADE LAW AND POLICY*, *supra* note 13, at 20 (explaining the competing interests within a nation that may result in particular groups being harmed even when a nation as a whole is prospering from trade).

18. The tariff schedules for each GATT signatory have been central to the system. *See* GATT 1947, *supra* note 12, at art. II. As a tax of sorts, they also raise revenue for the nation utilizing them. *Id.* Tariffs are favored because they are transparent, easy to comply with, straightforwardly accounted for by private parties in the marketplace, readily withdrawn and explicitly targeted at protecting specific goods. *See generally* Inaamul Haque, *Doha Development Agenda: Recapturing the Momentum of Multilateralism and Developing Countries*, 17 *AM. U. INT'L L. REV.* 1097 (2002).

19. There have been eight GATT negotiating rounds: Geneva (1947), Annecy (1949), Torquay (1950), Geneva (1956), Dillon (1960-61), Kennedy (1962-67), Tokyo (1973-79) and Uruguay (1986-94). *See generally* MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION LAW: PRACTICE AND POLICY* 6 (2003). On average, tariffs have been reduced to their lowest point in modern history. *See* Kennedy, *supra* note 1, at 427; *see also* Tiefenbrun, *supra* note 14, at 263-64 (detailing the trend of decreasing tariffs at GATT negotiating rounds).

20. GATT 1947, *supra* note 12, at art. I; *see also* Asoke Mukerji, *Developing Countries and the WTO—Issues of Implementation*, 34 *J. WORLD TRADE* 33, 35 (2000).

21. *See* GATT 1947, *supra* note 12, at art. III; *see also* JACKSON, *TRADE LAW AND POLICY*, *supra* note 13, at 213-28.

22. GATT 1947, *supra* note 12, at art. XI. Quotas on goods will skew markets based on supply and demand, and will tend to favor domestic producers who will have fewer imports to compete against. *See* JACKSON, *TRADE LAW AND POLICY*, *supra* note 13, at 129. However, eliminating their use has not always been very successful.

unfair trade practices.<sup>23</sup> Of course, GATT did incorporate exceptions allowing parties to deviate from obligations when necessary.<sup>24</sup>

Significantly, GATT was not intended to create an organization, with the result being that mechanisms to assist GATT in functioning as an effective institution were non-existent.<sup>25</sup> Subsequently, GATT was institutionally feeble even though during approximately the first fifty years of its history, GATT Contracting Parties improvised a series of measures to buttress its inevitable weaknesses in this regard.<sup>26</sup>

Further, the unanimity requirement to amend GATT ultimately thwarted effective institutional development, and over time the GATT agreements became fragmented as various issues were addressed in stand-alone treaties that only some GATT Contracting Parties joined.<sup>27</sup> One area that realized relative success was the dispute settlement system, which gradually evolved to handle the inevitable disputes that arose between GATT Contracting Parties.<sup>28</sup>

23. See GATT 1947, *supra* note 12, at art. VI (dumping); see also JACKSON, TRADE LAW AND POLICY, *supra* note 13, at 227-28 (describing subsequent anti-dumping provisions enacted by GATT signatories); see also *id.* at 249-73 (discussing the vexing problem of government subsidies and GATT's equally perplexing rules regarding them).

24. See GATT 1947, *supra* note 12, art. XX (protecting domestic health and safety); see *id.* at art. XII & art. XVIII (addressing balance of payments difficulties); see *id.* at art. XIX (impeding import surges that cause politically and economically untenable domestic dislocations); see also JACKSON, TRADE LAW AND POLICY, *supra* note 13, at 175-212 (discussing safeguards against imports that cause injury to domestic industries).

25. See Kennedy, *supra* note 1, at 423. GATT was only meant to be a multilateral trade agreement, and to serve as an interim agreement until the ITO, and its founding document, the Havana Charter, could be approved by national legislatures. *Id.* See also Havana Charter for an International Trade Organization, art. 46.1, U.N. Doc. E/CONF. 2/78 (1948) [hereinafter Havana Charter]. The GATT Secretariat was forced to operate as an organization only when the proposed ITO failed to win U.S. Senate approval and thus, became dead on arrival. JOHN H. JACKSON, THE WORLD TRADE ORGANIZATION CONSTITUTION AND JURISPRUDENCE 15-22 (1998) [hereinafter JACKSON, CONSTITUTION & JURISPRUDENCE]. GATT was never ratified and its status under U.S. law was always subject to debate. *Id.* Between 1947 and 1994, GATT operated, informally in some respects, as a forum to affect multilateral trade negotiations and over time to deal with conflict-ridden trade disputes. See also MATSUSHITA, *supra* note 19, at 5-6.

26. During subsequent negotiating rounds, GATT members expanded and improved provisions on dispute settlement, dumping, subsidies and other matters. WTO SECRETARIAT, GUIDE TO THE URUGUAY ROUND AGREEMENTS 1-2 (1999) [hereinafter WTO SECRETARIAT].

27. For example, The Tokyo Round (1973-79) addressed the many non-tariff barriers that were believed to be hindering international trade and contributing to a very uneven playing field. See The Agreement on Technical Barriers to Trade (Standards Code), GATT B.I.S.D. (26th Supp.), *available at* [http://www.wto.org/english/docs\\_e/legal\\_e/prevto\\_legal\\_e.htm#tokyoroundcodes](http://www.wto.org/english/docs_e/legal_e/prevto_legal_e.htm#tokyoroundcodes). Because not all GATT Contracting Parties joined the various codes, many legal quandaries arose, such as forum shopping to resolve disputes, and determining the applicability of most favored nation to non-code signatories.

28. The primary dispute settlement mechanisms under GATT are contained in Articles XXII and XXIII. See GATT 1947, *supra* note 12, at arts. XII-XIII. Article XXII establishes the right to consultation between GATT Contracting Parties, while Article XXIII give parties the right to bring claims of nullification or impairment of tariff concessions due to violation or non-violation activities by another GATT Contracting Party. *Id.*



*B. Colonialism, Post-Colonialism and the Development Paradigm*

The current economic condition of Sub-Saharan African nations is rooted in their colonial experience. Before political independence, these countries served simultaneously as subordinate economic adjuncts and sources of crucial natural resources for industrializing colonial powers in need of the components for industrialization. Colonies were both a source of primary commodities and a market for industrialized goods produced by governing colonial powers. Colonial powers were disinterested in enhancing the industrial capacity of their colonies because those colonies might then become undesirable sources of competition. Indeed colonizers discouraged and often proscribed industrialization.<sup>29</sup> The trade patterns established during the colonial period continue to predominate in SSA, and its comparative advantage is currently said to be raw materials and agricultural products.

Upon gaining independence, African nations invariably sought to develop and “catch up” to their former colonial masters. Development has come to mean many things, but originally the goal was modernization, which meant acquiring and nurturing an industrial base. When this quest proved illusive, development gradually evolved into an all-embracing concept— a concept that defines the Third World.<sup>30</sup> Members of the Third World are now designated as undeveloped, underdeveloped, developing, or more recently least-developed.<sup>31</sup> Discussions of SSA invariably emanate from within the development paradigm, which now explicitly includes and defines their role in the international trade system.

However, as African colonies were emerging from the colonial abyss, the GATT trade system was evolving largely without them. It is to the intersection of the emergence of SSA and the evolution of GATT that we now turn.

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29. Bartram S. Brown, *Developing Countries in the International Trade Order*, 14 N. ILL. U. L. REV. 347, 357-58 (1994); see also Gordon & Sylvester, *supra* note 2, at 49-56 (discussing the effects of colonial control over natural resources and development in Third World nations).

30. International financial institutions, development agencies, think tanks, foundations, scholars and governments have promulgated countless theories on how to “develop” these nations, *i.e.*, advance them beyond what was and is judged to be an underdeveloped and, by definition, defective and inadequate condition. See Gordon & Sylvester, *supra* note 2, at 2-6. While these theories have often been contradictory and most of the policies have been ineffective, they are invariably rooted in Western notions of progress and modernization, and are often based on theories that are fashionable within industrialized countries. *Id.* The theory of Basic Needs followed the War on Poverty, Sustainable Development followed the Western discovery of Environmentalism, and the theory of Women and Development appeared with the emergence of Western-style Feminism. *Id.* at 6.

31. For a discussion of the meaning and significance of these terms, see note 2 *supra*. While there are also problems with such terms as “Third World,” “Southern Tier” or “post colonial,” they are preferred to “underdeveloped” and its variations. See Gordon & Sylvester, *supra* note 2, at 2-6.

### C. The Third World and GATT

#### 1. In the Beginning: Ineffectual and Absent

GATT's membership steadily expanded as former colonies were gaining political independence and the Soviet Empire was dissolving.<sup>32</sup> Yet most nations then comprising the Third World, and certainly the majority of the nations of SSA, were subject to colonial rule in 1947 when GATT was founded.<sup>33</sup> As such, these nations had little impact on the establishment of the Bretton Woods Institutions or GATT.<sup>34</sup> Of the twenty-three GATT founding members, only ten were Third World nations,<sup>35</sup> and they had a somewhat insignificant influence on both the negotiations and the final agreement.<sup>36</sup> In fact, of GATT's thirty-five original articles, only one addressed the declared needs of Third World nations, and obtaining this article was not only a struggle, but its ultimate contents were disappointing.<sup>37</sup> Losing this battle reinforced the Third World perception that GATT would not serve its interests. It seemed that industrialized nations were unwilling to undertake measures to assist in economic development; they were ignoring the demands of Third World nations, while catering to the interests of industrialized nations.

#### 2. Missing or Unsuccessful During the Evolution

Given this inauspicious beginning, many Third World nations were reluctant to participate in GATT, although they continued to urge that GATT

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32. See Olofin, *supra* note 14, at 309 (noting that twenty-five SSA nations joined as they gained independence in the 1960s, and that by 1995, thirty-eight of forty-eight SSA nations had become members of GATT, while twenty-six had ratified the WTO agreement).

33. See Brown, *supra* note 29, at 357 (discussing the colonial status of many developing countries at the time of Bretton Woods and the Havana Charter).

34. Given the substantial role the World Bank and the IMF currently play in the affairs of Third World nations, their role at the founding of these entities is especially disquieting.

35. Hansel T. Pham, *Developing Countries and the WTO: The Need for More Mediation in the DSU*, 9 HARV. NEGOT. L. REV. 331, 333 (2004). The ten Third World GATT charter members were Brazil, Burma, Ceylon, Chile, China, India, Lebanon, Pakistan, Syria and South Africa. *Id.* Whether Apartheid South Africa should be counted as a Third World nation is certainly open to debate.

36. For a discussion of the preparatory work for GATT Article XVIII, see JACKSON, LAW OF GATT, *supra* note 15, at 628-38.

37. The original American proposals contained no language addressing the needs of Third World nations. See *id.* at 630-36. Only after these nations complained, was a special committee formed to draft a chapter on industrial development, which permitted departures from general trade rules with permission from the organization. *Id.* The battle centered on quantitative restrictions, with industrialized nations desiring and eventually prevailing in obtaining an exception for agricultural and fishery products, and industrializing nations unsuccessfully seeking to broaden the exception to include infant industry products. *Id.* Instead, industrializing nations obtained a meager exception for protective measures in very limited cases. *Id.* Only at a later point were they permitted to withdraw concessions, impose quantitative restrictions to protect balance of payments positions, and provide governmental assistance to protect infant industries, in the interest of development. *Id.*

rules be modified to support economic development.<sup>38</sup> They perceived few advantages in being active members<sup>39</sup> of an organization that did not cater to their needs, as abundantly evidenced by GATT exceptions for the agricultural products and textiles that were the “bread and butter” of the Third World. Even as comparative advantage ordained that most poor nations should specialize in primary products and farm goods,<sup>40</sup> agricultural policies in most industrialized nations completely protected their farmers.<sup>41</sup> Agricultural goods were repeatedly exempted from the principle of limiting tariffs,<sup>42</sup> generally immune from the ban on quantitative restrictions, and heavily subsidized.<sup>43</sup> Even though these policies made it exceedingly difficult for Third World farmers to compete with industrialized nations, GATT allowed the situation to remain unchanged. As to textiles, industrialized countries refused to permit comparative advantage to work its purported magic. They were protected by way of a comprehensive series of side agreements that imposed quotas and permitted industrialized countries to react to “import surges.”<sup>44</sup> Because textile manufacturing has customarily been regarded as a “take-off” industry and a key to industrialization, it was of immense interest to Third World nations, and it

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38. See *id.* at 627 (noting that these nations wanted to increase trade so they could boost foreign exchange earnings and use those earnings to hasten their development).

39. One result was that some Third World nations did not maintain official representation at GATT headquarters and participation was often passive or marginal before the Uruguay Round. See Pham, *supra* note 35, at 336.

40. Susan Demske, *Trade Liberalization: De Facto Neocolonialism in West Africa*, 86 GEO. L.J. 155, 158-60 (1997).

41. See Carmen Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security and Developing Countries*, 27 COLUM. J. ENVTL. L. 433, 442-43 (2002). At one point, the United States obtained a waiver of its GATT Article XI:2 obligations, thus enabling the U.S. to impose import quotas that were not connected to domestic production control programs and would otherwise violate Article XI. *Id.* See also Stern, *supra* note 6, at 9-10 (discussing agriculture and domestic agriculture-related policies in trade negotiations).

42. See Gonzalez, *supra* note 41, at 440 (explaining that tariffs on agricultural goods are much higher than on manufactured goods); see also Mukerji, *supra* note 20, at 45-46 (discussing agriculture's role within the GATT).

43. This was the case even as quotas on manufactured goods were prohibited or strongly discouraged. See GATT 1947, *supra* note 12, at art. XI. GATT Article XVI:3 permitted agricultural subsidies as long as the country providing them did not gain more than an equitable share of world export trade in the subsidized product. *Id.* at art. XVI para. 3. Nevertheless, given the complexity of international markets, it was often very difficult to prove that a particular subsidy caused changes in market share and GATT dispute resolution panels were reluctant to find that subsidized exports from one Contracting Party displaced the exports of a complaining party, and thus, article XVI:4 proved ineffective. *Id.* See also Gonzalez, *supra* note 41, at 440-49.

44. Since 1974, an extensive and complex network of bilateral agreements permitted quantitative limits on exports of specific textile and clothing products from particular countries. For a detailed recounting of the history of these agreements, see Alice J.H. Wohn, Comment, *Towards GATT Integration: Circumventing Quantitative Restrictions on Textiles and Apparel Trade Under the Multi-Fiber Arrangement*, 22 U. PA. J. INT'L ECON. L. 375, 388-405 (2003). Northern nations have protected textiles at the behest of domestic industries. See WTO SECRETARIAT, *supra* note 26, at 65. If there were a *bona fide* free market, the Third World would clothe the world. See generally Stephen E. Lamar, *The Apparel Industry and African Economic Development*, 30 LAW & POL'Y INT'L BUS. 601 (1999).

made protectionism by GATT contracting parties particularly sensitive and problematic.<sup>45</sup>

Thus, while GATT purported to facilitate trade liberalization, Third World nations accurately perceived that the products in which they had a comparative advantage were systematically disadvantaged.<sup>46</sup> The persistence of protections for goods of interest to Third World nations, and other anomalies such as tariff peaks and escalation,<sup>47</sup> further alienated the Third World from GATT. Believing they were being stymied in their efforts to develop and that the international economic structure pushed development while allowing for protectionism, many Third World nations simply declined to participate in GATT or did so only on the margins. Nearly all turned to the United Nations Conference on Trade and Development (UNCTAD) for relief.

### 3. UNCTAD, the Generalized System of Preferences, and the Evolving International Economic Order

UNCTAD was dominated by Third World nations and was considered more sympathetic to their needs and desires than GATT.<sup>48</sup> As a result, UNCTAD became the voice of Third World nations in international trade during their push for a New International Economic Order and a Charter of Economic Rights and Duties of States.<sup>49</sup> UNCTAD also passed resolutions calling for trade preferences in favor of Third World nations, and urged GATT

45. Textile manufacturing requires few skills, little education and pays very low wages. These characteristics typify the labor force plentiful in poorer nations, thus creating a comparative advantage in textile production. See Lamar, *supra* note 44. Trade in textiles and clothing has been a major source of foreign exchange and employment for nations in the Third World, making it a sector of intense interest to these nations. *Id.* Of course, expansion of the textile industry marked the birth of industrialization in Europe and the United States, as well. Wohn, *supra* note 44, at 388.

46. It is questionable whether Third World participation would have differed if the systematic disadvantages were not present, given what has transpired since the Uruguay Round (from which time they have been full participants). See *infra* at Part II.

47. See Robert Curry, Jr., *Africa and the Generalized System of Preferences*, 10 J. MODERN AFR. STUD. 285, 286 (1972) (discussing the treatment of goods of interest to developing countries by developed countries in the early stages of GSP).

48. See BRANISLAV GOSOVIC, UNCTAD: CONFLICT AND COMPROMISE: THE THIRD WORLD'S QUEST FOR AN EQUITABLE ECONOMIC ORDER 198-217 (1972); Anindya K. Bhattacharya, *The Influence of the International Secretariat: UNCTAD and Generalized Tariff Preferences*, 30 INT'L ORG. 75, 76 (1976) (discussing the influence of UNCTAD in negotiations for GSP).

49. See, e.g., DIANA TUSSIE, THE LESS DEVELOPED COUNTRIES AND THE WORLD TRADING SYSTEM: A CHALLENGE TO THE GATT 33 (1987) (discussing the influence of UNCTAD in GATT negotiations); Subedi, *supra* note 3, at 427 (noting that the momentum to create a New International Economic Order had an impact on the GATT). See also G.A. Res. 3201, Supp. No. 1 at 3, U.N. Doc. A/9559 (1974) (making a declaration on the establishment of a New International Economic Order), available at <http://www.rrojasdatabank.org/basdv03.htm>; Charter of Economic Rights and Duties of States, G.A. Res. 3281, Supp. No. 31 at 50, U.N. Doc. A/9631 (1974), available at <http://law.dal.ca/kindred.intllaw/ECRsandDuties.htm>.

to adopt such a system.<sup>50</sup> In 1971, GATT Contracting Parties finally acquiesced to these demands and adopted the Generalized System of Preferences (GSP).<sup>51</sup>

GSP permitted industrialized nations to unilaterally grant non-reciprocal duty-free treatment and other special tariff preferences to products from designated developing countries.<sup>52</sup> To the extent that Sub-Saharan African nations derived particular benefits from GATT, it was primarily due to their special status as developing countries under the GSP program.<sup>53</sup> Nevertheless, as with all preferential programs in favor of small economies, GSP was (and is) soft law.<sup>54</sup> Indeed, industrialized nations were not required to grant preferences, and while most established GSP programs, they were (and are) varied in form, limited in scope, and complex.<sup>55</sup> Because they were at the whim of industrialized nations and could be withdrawn without recourse by their intended beneficiaries, Third World nations have been rendered powerless. At the same time, enactment of GSP programs required enormous concessions from Third World nations.<sup>56</sup> This was the case even though the

50. See, e.g., Expansion and Diversification of Exports of Manufactures and Semimanufactures of Developing Countries, UNCTAD Res., at 38, U.N. TDBOR, 2d Sess., Vol. I, Annex 1, Agenda Item 11, U.N. Doc. TD/97/Annexes (Mar. 26, 1968). The idea of a system of preferences was first raised by Argentine economist Raul Prebisch in 1964 at the first United Nations Conference on Trade and Development. D. Robert Webster & Christopher P. Bussert, *The Revised Generalized System of Preferences: "Instant Replay" or a Real Change?*, 6 NW. J. INT'L L. & BUS. 1035, 1036 (1985) (maintaining that such a system would help unindustrialized countries "overcome the entry barriers they frequently encountered in export markets."). UNCTAD, and especially its Secretariat, performed several important functions including: fashioning an ideology that made preferences a significant issue; lobbying rich countries to support general, rather than selective, preferences; and enabling the creation of specific, functional agreements through "incremental and pragmatic" negotiations. See Bhattacharya, *supra* note 48, at 75-77. GATT had discussed preferences, but rejected them in the name of avoiding discrimination and interference with multilateral tariff reductions. *Id.*

51. Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development, Feb. 8, 1965, 17 U.S.T. 1977, 572 U.N.T.S. 320. GATT attempted to incorporate some of the principles of the New International Economic Order through the Generalized System of Preferences. Subedi, *supra* note 3, at 426.

52. See Brown, *supra* note 29, at 362-63 (describing the GSP program as derogation from the GATT non-discrimination principle). This system derogates from the principle by permitting preferential treatment to some states rather than all. *Id.* See also Webster & Bussert, *supra* note 50, at 1036.

53. See Olofin, *supra* note 14, at 304 (noting also that there was some degree of protection for import substituting industries under the infant industry rubric). Additionally, preferential treatment was available during the period under the Lome Convention. See ACP-EEC Convention of Lome, Feb. 28, 1975, 14 I.L.M. 595.

54. See Olivares, *supra* note 9, at 548.

55. For example, the United States did not enact its GSP program until 1974, making it the twenty-third nation to do so. Webster & Bussert, *supra* note 50, at 1036. Additionally, because the systems were usually limited, it was entirely possible that some or no Third World exports came within a particular scheme. See Brown, *supra* note 29, at 362.

56. See Webster & Bussert, *supra* note 50, at 1037 (reporting that when the GSP program was originally enacted in the United States as part of the Trade Act of 1974, the President could designate eligible countries – a power retained even today). The Trade Act of 1974 includes

GSP created significant benefits for manufacturers in industrialized countries who gained access to cheaper parts and components.<sup>57</sup> From the perspective of its beneficiaries, the GSP has generally been inadequate and unacceptable.<sup>58</sup>

Hence, Third World nations were largely absent at GATT's founding, prejudiced throughout its evolution, and generally dissatisfied with the few concessions that were eventually made. During this same period, within development discourse, theories such as import substitution and basic needs predominated.<sup>59</sup> While trade was considered a factor, it was not a focal point and GATT was in a sense on the periphery. In a world split into opposing communist and capitalist camps and with a radicalized Third World pressing for accelerated change, UNCTAD seemed more pertinent to Third World concerns and needs. The oil shocks of the 1970s and 1980s, however, led to severe dislocations within poor countries with small economies, and precipitated a debt crisis that continues to this day. Third World nations found themselves at the mercy of international financial institutions that subsequently imposed structural adjustment policies that led to further dislocations. With the collapse of the communist order, the ascendancy of the United States as the sole superpower,<sup>60</sup> and the rise and reinforcement of the global economy, trade moved to the center of development. Once trade and development became closely intertwined, it was no longer possible to sit on the GATT sidelines. Thus, by the time the Uruguay Round bequeathed the WTO, small, poor countries were greatly weakened, but becoming more involved participants in the global trade regime.

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prohibitions on designating communist countries; countries that have seized U.S. property or nullified contracts with U.S. citizens and failed to provide prompt, adequate and effective compensation; and countries that have not sufficiently combated terrorism or not implemented commitments to eliminate "the worst forms of child labor." 19 U.S.C.A. § 2462 (2002); *see also* WILLIAM H. COOPER, GENERALIZED SYSTEM OF PREFERENCES 2-3 (CRS Report for Congress, 2004). The American GSP program is currently authorized only until December 31, 2006, making reliance on the program rather perilous. *Id.*

57. *See Webster & Bussert, supra* note 50, at 1048 (observing that consumers also generally benefit if lower costs are passed on in the form of lower prices).

58. *See id.* at 1050 (noting also that the American GSP program tended to benefit only a few countries, none of them in Africa); *see also* COOPER, *supra* note 56, at 2-3.

59. Olofin, *supra* note 14, at 304 (noting that analysts disagree on what forty years of inward looking import-substituting industrialization means for SSA nations in terms of providing a contemporary paradigm for growth and development).

60. The cold war between the United States and the USSR had a profound affect on many African nations, including proxy wars, brutal dictatorships and other dislocations. This chapter in Africa's evolution is critical but nonetheless beyond the scope of this essay.

## II.

## THE THIRD WORLD AND THE BIRTH OF THE WTO

*A. A New Multilateral Trade System*

With the creation of the WTO, and the adoption of its Annex Agreements, the GATT system changed in many fundamental respects.<sup>61</sup> The WTO Charter explicitly established the institutional structure GATT lacked.<sup>62</sup> Being a member of the WTO requires acceptance of all the Annex 1 Multilateral Trade Agreements,<sup>63</sup> which produced a more unified entity than the fragmented GATT system.<sup>64</sup> The dispute settlement system has been codified and an expansive and sophisticated jurisprudence is emerging,<sup>65</sup> provoking anger, debate, and protests, as well as praise and approval.<sup>66</sup> While GATT dealt with

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61. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter Final Act], *available at* [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#top](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#top). The WTO was a product of the eighth GATT negotiating round, which began in 1986. WTO SECRETARIAT, *supra* note 26, at 2. The Uruguay Round did not begin with the goal of forming a new WTO, but rather it emerged with the realization of the need for better institutional mechanisms and an improved system for resolving disputes. *See* MATSUSHITA, *supra* note 19, at 6. Professor John Jackson suggested utilizing the Round to found a new organization that would cure GATT's "birth defects" and the problem of GATT a la carte. *Id.* at 7.

62. *See* Final Act, *supra* note 61. At the apex of this institutional structure is the Ministerial Conference, which meets at least once every two years, is the highest decision-making body in the WTO, and is comprised of trade ministers from all WTO members. *See* MATSUSHITA, *supra* note 19, at 9. It has met five times. Decisions are adopted by consensus, which in actuality means an absence of dissent among members, although provisions are made for actual votes. *Id.* at 12. The Ministerial Conference generates declarations that delineate an agenda and deadlines for the WTO and steers the work of the organization. *See id.* at 9. Between ministerial conferences, decisions are implemented and adopted by the WTO General Council, which is made up of representatives from all WTO members. *Id.* at 9-10.

63. Final Act, *supra* note 61, at annex 1. The 1947 GATT became GATT 1994 and is the first of the WTO Annex Agreements. Annex 1B contains the General Agreement on Trade in Services (GATS), Annex 1C contains the Trade-Related Aspects of Intellectual Property Rights (TRIPS), Annex 2 contains the Dispute Settlement Understanding, and Annex 3 contains the Trade Policy Review Mechanism, [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm) (providing links to and summaries of all WTO legal texts). There are also four plurilateral agreements that are voluntary. *Id.*

64. Detailed, universal, and quite specific agreements now deal with a range of issues that the previous system dealt with in an abbreviated or fragmented fashion. *See, e.g.,* Agreement on Anti-Dumping (Article VI of GATT 1994); Agreement on Customs Valuation (Article VII of GATT 1994); Agreement on Preshipment Inspection; Rules of Origin; Agreement on Import Licensing; Subsidies and Countervailing Measures; and Safeguards, *available at* [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#top](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#top).

65. Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1226 (1994). The dispute system has addressed myriad issues including environmental matters and national health and safety measures. *See* WTO Dispute Settlement, [www.wto.org/english/tratop\\_e/dispu\\_e/find\\_dispu\\_cases\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm) (providing a search portal through which dispute cases can be accessed).

66. Some decisions have made the WTO a better-known organization than GATT, although

trade in goods, the WTO system embraces a wider range of subjects including services,<sup>67</sup> intellectual property,<sup>68</sup> foreign direct investment,<sup>69</sup> and other matters that have been judged to be trade-related and thus appropriate for WTO disciplines. Moreover, the Uruguay Round marked an important, albeit disparate, transformation in the involvement of Third World nations in global trade negotiations and in the trade regime itself.

Unlike at the founding of GATT, Third World nations played a somewhat significant role in the creation of the WTO. Entities that were colonies in 1947 were sovereign states and thus at least legally entitled to sit at the negotiating table as the WTO was created.<sup>70</sup> Yet their actual participation and influence during the Uruguay Round has been the subject of debate, as has their capacity to effectively participate in the WTO.<sup>71</sup> Despite language that appears to be

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this visibility has not always been positive, with the 1999 Seattle protests at the fourth WTO Ministerial conference partly in response to WTO dispute settlement decisions, being the most notorious case in point. See, e.g., Ibrahim J. Gassama, *Confronting Globalization: Lessons from the Banana Wars and the Seattle Protests*, 81 Or. L. Rev. 707 (2002); John Ragosta, *Unmasking the WTO: Access to the DSB System: Can the WTO DSB Live Up to the Moniker World Trade Court*, 31 L. & Pol'y Int'l Bus. 739 (2000) (noting that commentators have endorsed the more rule-based system that is being utilized more extensively).

67. The General Agreement on Trade in Services (GATS) was directly modeled on GATT and contains many of the same principles, such as national treatment, most favored nation and transparency. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1168 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#top](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#top); see also WTO SECRETARIAT, *supra* note 26, at 162.

68. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1197 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#top](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#top) (purporting to afford effective protection to intellectual property rights by requiring WTO members to provide the intellectual property protections specified in the agreement); see also WTO SECRETARIAT, *supra* note 26, at 207.

69. Agreement on Trade Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 1868 U.N.T.S. 186, available at [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#top](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#top) (identifying briefly various investment measures that are deemed GATT incompatible).

70. See generally Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT'L L. & POL'Y 903 (1997) (discussing colonization, the mandate system and its affects on Third World nation development and participation in the international arena). Large powers, such as India and Brazil, were not only more engaged, but more influential.

71. Ernst-Ulrich Petersmann, *Challenges to the Legitimacy and Efficiency of the World Trading System: Democratic Governance and Competition Culture in the WTO*, 7 J. INT'L ECON. L. 585, 589 (2004); Yash Tandon, *The World Trade Organization and Africa's Marginalization*, 53 AUSTL. J. INT'L AFF. 83, 84 (1999). Part of the Third World inability to effectively participate in the WTO may have been lack of staff and resources to simply be present during negotiations. Tandon points out that the rules have been changed so that more than one meeting may be held at a time, and therefore some African countries may not have enough staff to attend every meeting. See *id.* at 84. This is a pressing problem for small countries with small delegations and meager resources to devote to international meetings that large countries can readily staff and



more sympathetic to the concerns of Third World nations, the panoply of agreements that established the WTO reflect the lack of power and influence these states possessed during the negotiations. On balance, Third World nations may have been on the receiving end of decisions made by others, and were unable to shape the substance of negotiations to their benefit.<sup>72</sup>

Nevertheless, developing countries and development are undoubtedly recognized and dealt with more extensively and visibly in the WTO Agreements,<sup>73</sup> and “developing country” status confers more rights ostensibly designed to benefit poorer countries.<sup>74</sup> The WTO explicitly recognizes “least developed countries”, a category that includes most Sub-Saharan African nations,<sup>75</sup> and WTO Agreements unambiguously include the concept of differential treatment.<sup>76</sup> However, it remains uncertain whether these provisions actually address the needs and wishes of Southern Tier nations or more resemble the GATT “exceptions” for economic development that were always believed to be inadequate. Beyond the more sympathetic rhetoric, then, the underlying system may be worse or, at best, fundamentally unchanged with respect to Third World nations.<sup>77</sup>

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consequently easily dominate. *See id.* This author observed this problem in person as an assistant to the UN Ambassador to the small island nation of Vanuatu.

72. Because African nations were sometimes absent from negotiations during the Uruguay Round, many may not have always fully grasped the implications of the new trading order for their nations and people. *See id.* at 83-84. Tandon also notes the irony in choosing the African city of Marrakesh as the venue for signing the final document. *Id.*

73. For example, the preamble of the Agreement Establishing the WTO states: “there is a 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.” Final Act, *supra* note 61, at preamble (recognizing as well the need for improved trading opportunities for least developed country products and for prescribing fewer obligations for these nations). *See also* WTO SECRETARIAT, *supra* note 26, at 226-27.

74. Developing countries are self-selected within each individual WTO agreement, as there is no formal definition for “developing country.” *See* Developing Countries of the WTO, [http://www.wto.org/english/tratop\\_e/devel\\_e/dlwho\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm) (last visited Apr. 4, 2006). Given the potential rights attached to the designation, other WTO members can challenge such status. *Id.* The WTO relies upon the United Nations designation of “least developed countries” in selecting countries for this status and currently 32 WTO members are designated as such. *See* Understanding the WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm) (last visited Apr. 4, 2006).

75. *See id.* (noting that twenty-six of these nations are in Africa).

76. *See* Peter Lichtenbaum, “Special Treatment” vs. “Equal Participation:” *Striking A Balance in the Doha Negotiations*, 17 AM. U. INT’L L. REV. 1003 (2000) (providing an in depth analysis of special and differential treatment); *see also* Frank J. Garcia, *Trade and Inequality: Economic Justice and the Developing World*, 21 MICH. J. INT’L L. 975, 989 (2000) (brilliantly defending the concept of differential treatment).

77. Many Third World nations continue to believe that the system is a rich industrialized nation club dominated by the United States, Japan, the European Union and to some extent Canada. These nations are collectively known as the “quad counties.” *See* Tandon, *supra* note 71, at 83-84; Garcia, *supra* note 76, at 1047-49 (concluding that shortcomings exist with regard to special and differential treatment). Demske, *supra* note 40, at 162-73 (discussing Uruguay Round agreement differential treatment and market access for developing nations).

There were substantial asymmetries between the Uruguay Round benefits to Third World as opposed to industrialized nations.<sup>78</sup> Generally, advantages that were to accrue to the former failed to materialize.<sup>79</sup> Manufactured goods exported from Third World nations continued to face high tariffs in industrialized nations, and by continuing such policies as tariff escalation,<sup>80</sup> the West seemed to signal it was not supportive of Third World industrialization or competition.<sup>81</sup> SSA has been one of the primary losers in this process, and may be permanently consigned to producing raw materials and selected farm products for industrialized nations.<sup>82</sup>

The WTO extended trade disciplines well beyond trade in goods,<sup>83</sup> and the inclusion of these new fields has the potential to devastate the nations of SSA. Complaints and concerns persist over textile and agricultural policies, tariff escalation and tariff peaks, and an improved dispute settlement system that nonetheless remains rather useless to small, impoverished nations. The following section sketches some of the principal objections to the Uruguay Round Agreements, and some of the concerns lodged by Third World nations both large and small. The nature and degree of that criticism has begun to splinter, however, as the Third World itself becomes more diverse and economically varied.<sup>84</sup>

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78. See Arvind Panagariya, *Developing Countries at Doha: A Political Economy Analysis*, 25 WORLD ECON. 1205, 1218-19 (2002) (noting that many civil society groups believed the Uruguay Round "shortchanged" developing countries).

79. A case in point is the Uruguay Round Agreement's promise of technical and financial assistance that was meant to facilitate compliance with WTO agreements such as TRIPS. Subedi, *supra* note 3, at 427. However, where a benefit was supposed to accrue to the Third World, in fact, TRIPS compliance served to assist industrialized nations. *Id.*

80. Tariff escalation is when industrialized nations impose a higher tariff on processed products from the Third World, than they do on raw materials. Tandon, *supra* note 71, at 87. For example, a raw hide would typically have a low 0.1% tariff, finished leather a tariff of 5% and leather goods a tariff of 8%. Other examples include transitions from textiles to clothing, or iron and steel products to transport equipment. *Id.*

81. GATT 1994 was intended to yield comprehensive trade liberalization, and Third World countries were presumed to be beneficiaries as they took advantage of labor-intensive industries to increase their competitiveness against industrialized countries. Olofin, *supra* note 14, at 298. The WTO agreement does not cover most of the products Africa trades and thus Africa is unlikely to benefit from the treaty, at least in the short run. *Id.* at 298, 309.

82. See *id.* at 309 (noting that some believe SSA nations could most effectively take advantage of trade in labor-intensive industries, while others believe such a role for SSA would actually benefit industrialized nations); Tandon, *supra* note 71, at 87.

83. GATT disciplines have been extended to services, trade related investment measures and the protection of intellectual property. See *supra* notes 63-69. See also Nsongurua J. Udombana, *Back to Basics: The ACP-EU Cotonou Trade Agreement and Challenges for the African Union*, 40 TEX. INT'L L.J. 59, 92 (2004). Developing countries were bitterly opposed to including these issues in the Uruguay Round, but they were central to the U.S. negotiating agenda and the United States ultimately prevailed.

84. See Mukerji, *supra* note 20, at 33 (discussing developing countries and implementation of the WTO Agreements).

*B. The Expanded Parameters of International Trade: GATS, TRIMS & TRIPS*

Despite vociferous objections from Third World nations, the General Agreement on Trade in Service (GATS) became part of the international trade regime.<sup>85</sup> This complex treaty applies GATT principles to all internationally traded services,<sup>86</sup> although it acknowledges the necessity of “progressive liberalization”.<sup>87</sup> Southern Tier nations worry that trade liberalization in this arena could destroy budding service industries that cannot compete with service providers from industrialized nations.<sup>88</sup> Giant western corporations dominate the service sector, and GATS is likely to perpetuate this supremacy.<sup>89</sup> As

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85. Tandon, *supra* note 71, at 88-89. Bringing services into the international trade regime was a very contentious issue between northern and southern tier nations; India and Brazil were particularly exasperated over the issue. *Id.* at 84; *see also* FATOUMATA JAWARA & AILEEN KWA, BEHIND THE SCENES AT THE WTO: THE REAL WORLD OF INTERNATIONAL TRADE NEGOTIATIONS 31-32 (2004); Mukerji, *supra* note 20, at 58-64; Olofin, *supra* note 14, at 313 (noting that there are competing arguments regarding how including services trade might affect the competitiveness of SSA nations). The categories of international tradable services include:

1. Directly tradable services across borders, such as information services;
2. Consultancy products exported through the telecommunications communication network;
3. Indirectly tradable services such as transportation, hotel accommodation, financial services, etc., and indirectly tradable services provided through factor movements such as construction.

Olofin, *supra* note 14, at 313 Indirectly tradable services include: 1) business services, such as professional, computer, research and development, real estate, rental and leasing and advertising services; 2) communications services, such as courier, postal, telecommunications and audiovisual services; 3) construction and related engineering services; 4) distribution services; 5) educational services; 6) environmental services; 7) financial services, such as insurance, banking and other financial services; 8) health and related social services; 9) tourism and travel related services; 10) recreational services; 11) cultural and sporting services, such as entertainment, news agency, libraries, archives, museums and other cultural activities; and 12) transport services, such as maritime transport services, air transport services, road and pipeline transport services and all modes of transport. *See* Mukerji, *supra* note 20, at 58.

86. Article I defines trade in services in terms of modes of supply, which is defined as cross-border, consumption abroad, commercial presence in the consuming country and temporary movement of natural persons. WTO SECRETARIAT, *supra* note 26, at 164-65. The cross border supply of services most resembles trade in goods as “only the service itself crosses national frontiers.” *Id.* Consumption abroad involves the service consumer “traveling to the supplying country” for tourism or repairing a vessel outside of the home country. *Id.* This also does not raise problems because the supplier does not have to be admitted to the consuming nation. *Id.* Supplying services through the commercial presence of a supplier in the territory of another WTO Member entails such activities as establishing bank or law branch offices abroad. *Id.* Such offices can be staffed by local personnel and thus may not require the hiring of foreign nationals, which is covered by mode 4, the presence of natural persons in providing services. *Id.*

87. Mukerji, *supra* note 20, at 58 (noting that progressive liberalization would include national treatment, most favored nation, and transparency programs).

88. *Id.* at 60 (observing that technical barriers, such as licensing, economic needs tests, visas and technical standards have restricted the movement of labor from industrializing to industrialized nations).

89. *See* Olofin, *supra* note 14, at 313-14 (noting that some argue that nascent service industries could be wiped out). The GATS blurs the traditional divide between manufacturing and services, and technology is shifting the preeminence of manufacturing sectors. This combination

Asian nations attempt to retain domestic service industries such as banking and insurance, Sub-Saharan African nations are not yet out of a starting gate that may already be closing. Thus, GATS appears to ensure the region will be dependent on western multinationals in perpetuity.<sup>90</sup>

With regard to investment, developing countries have historically used a variety of mechanisms to facilitate and control the establishment of local industry, such as requiring local participation, content and borrowing, and limiting access to local markets.<sup>91</sup> Although various types of commercial treaties have been used to protect foreign investment from local development controls,<sup>92</sup> industrialized nations sought to bring investment matters within the WTO.<sup>93</sup> They succeeded with the inclusion in the WTO regime of the Agreement on Trade Related Investment Measures (TRIMs).<sup>94</sup> TRIMs applies the national treatment principle to capital investment, meaning foreign capital must be accorded the same treatment as domestic capital.<sup>95</sup> Consequently, host nations no longer have as much control over regulating foreign investment in accord with their perceived national interests.<sup>96</sup>

#### The Agreement on Trade-Related Aspects of Intellectual Property Rights

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may mean the poorest developing countries will have a very difficult time building internal capacities in the services sector. *See also* Mukerji, *supra* note 20, at 58-59 (stating that developing countries are afforded some flexibility to open fewer sectors and in attaching conditions to whatever access is granted).

90. *See* Olofin, *supra* note 14, at 313-14 (noting that obstacles to achieving competitiveness such as the lack of freely mobile labor and business establishment rights keep the markets of industrialized nations largely inaccessible to most SSA nations).

91. Tandon, *supra* note 71, at 88.

92. The OECD developed the model for Bilateral Investment Treaties (BITs) and by the 1980s, there were hundreds of these treaties, all calculated to protect foreign capital. *See id.* Beginning with Friendship Commerce and Navigation (FCN) Treaties and then BITs, the United States, more than any other country, aimed to protect American investors from expropriations by nations emerging from colonialism with the hope of controlling the natural resources and foreign capital within their borders. *Id.* The struggle for national control over foreign direct investment and natural resources raged for several decades and were key parts of the demands for a new economic order. The West eventually prevailed, with the conclusion of numerous BITs that codified the Western standard regarding appropriation of foreign capital. For a discussion of this vociferous debate, *see* Gordon & Sylvester, *supra* note 2, at 34-49.

93. The United States, for example, sought to use GATT to challenge Canada's Foreign Investment Review Act, but was unsuccessful. *See* Report of the Panel, *Canada-Administration of the Foreign Investment Review Act*, 30S/140 (Feb. 7, 1984), GATT B.I.S.D. (30th Supp.). The European Union and Japan supported U.S. efforts to bring investment into the trade regime.

94. Agreement on Trade Related Investment Measures, *supra* note 69.

95. WTO SECRETARIAT, *supra* note 26, at 77-80; Tandon, *supra* note 71, at 88. The Agreement applies GATT Article III national treatment provisions and GATT Article XI on eliminating quantitative restrictions. Agreement on Trade Related Investment Measures, *supra* note 68. It also contains an illustrative list of measures that are inconsistent with TRIMs, such as requiring domestic sourcing or limiting the purchase or use of imported products to the volume or value of local products that are exported. *See id.*

96. Moreover, since the Uruguay Round, OECD countries have been pressing for a Multilateral Agreement on Investments that would further reinforce foreign capital's control over host governments. Tandon, *supra* note 71, at 88-89.

(TRIPS) brings intellectual property within the purview of the WTO.<sup>97</sup> TRIPS sets minimum protection standards, authorizes enforcement, and applies national and most-favored-nation treatment to intellectual property.<sup>98</sup> Conversely, intellectual property protections that might have assisted some developing countries, such as protecting products that bear geographic indicators, were not included.<sup>99</sup> Developing countries were given an additional five years to implement the agreement,<sup>100</sup> although industrialized nations have been vociferous in protecting the intellectual property rights of their nationals.<sup>101</sup> Access to life saving medicines, for example, quickly became one of the most controversial issues confronting the TRIPS regime.<sup>102</sup> More broadly, by requiring a 20-year patent on all innovations, TRIPS makes it more difficult to modernize by using borrowed or copied technology,<sup>103</sup> particularly

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97. Agreement on Trade-Related Aspects of Intellectual Property Rights, *supra* note 68. These matters had been within the jurisdiction of the World Intellectual Property Organization (WIPO), but large corporations were dissatisfied with WIPO's lack of sanctions. See Mukerji, *supra* note 20, at 54-55. For example, some nations were able to reverse engineer Western technology, make direct copies and/or build their own manufacturing plants based on Western designs and then compete in Western markets. At the behest of the pharmaceutical industry, the United States managed to get intellectual property on the Uruguay Round agenda, and by denoting it as "trade-related," it became part of the WTO agenda. Tandon, *supra* note 71, at 90. *But cf.* Alan O. Sykes, *TRIPS, Pharmaceuticals, Developing Countries and the Doha Solution*, 3 CHI. J. INT'L L. 47 (2002) (arguing that the Doha Declaration may have adverse incentives for research benefiting developing nations).

98. GUIDE TO THE URUGUAY ROUND AGREEMENTS, WORLD TRADE ORGANIZATION 207-09 (1999). It covers all the main areas of intellectual property, including copyright, trademarks, geographical indications, industrial designs, patents, and undisclosed information, including trade secrets. The agreement delineates the minimum level of protection to be accorded to each category. *Id.*

99. See Mukerji, *supra* note 20, at 55 (citing Darjeeling tea as an example, Professor Mukerji notes that TRIPS was the result of extensive lobbying by multinational corporations and only resulted in patent protection for their products); see also Subedi, *supra* note 3, at 437 (noting that wines and spirits are provided with enhanced protection but that TRIPS merely instructs the TRIPS counsel to address the issue of such protections for certain foods and handicrafts of interest to developing countries).

100. Mukerji, *supra* note 20, at 55. Developing countries were given until January 1, 2000 to delay applying TRIPS, with an extra five years for developing countries "which do not provide for product patents in any field of technology, to extend product patents to those fields of technology[.]" *Id.* at 55.

101. *Id.* Most developing countries utilized this period to enact the requisite national legislation, while industrialized countries undertook a concerted effort to prevent intellectual property issues from being raised by developing countries in the WTO. See *id.* at 55-56. This led to a quite confrontational atmosphere over these issues.

102. Panagariya, *supra* note 78, at 1206; see also Sykes, *supra* note 97, at 47-49. Given their low levels of income, this may effectively deny them access to life saving medicines altogether.

103. Because production is increasingly based on knowledge and information intensive technologies, intellectual property has become more important to industrialized nations and the multinational corporations that own most of these processes. Tandon, *supra* note 71, at 89-90. TRIPS undoubtedly tips the balance towards these corporations. Reverse engineering is now outlawed and companies alleged to be using patented technology are presumed guilty until proven innocent. *Id.* The onus is on the company using a process to prove it is a different process than

since buying such technology may be prohibitive.<sup>104</sup>

Since SSA is the last major area to industrialize, it may be more disadvantaged than nations that obtained technology under a more lenient intellectual property regime.<sup>105</sup> TRIPS may also undermine the Convention on Biological Diversity,<sup>106</sup> which recognized the rights of indigenous peoples to their biological resources.<sup>107</sup> A more equitable system might have assured that local communities obtained a fair price for their resources and a share in the final products released for commercial profit.<sup>108</sup> The patenting of agricultural, biological and genetically modified resources, where Africa (along with Asia and Central and South America) has a comparative advantage over the West, may be even more problematic.<sup>109</sup>

### *C. Old Wine in a New Bottle: Agricultural Products and Textiles*

Agricultural exceptionalism<sup>110</sup> continues to permeate the international

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that used by the challenger. *Id.* Members can institute measures to protect the theft of intellectual property, and courts can mandate the seizure of goods or machinery used to produce patented products. *Id.*

104. See Mukerji, *supra* note 20, at 56 (discussing problems faced by developing countries during the early years of the implementation of TRIPS).

105. Tandon, *supra* note 71, at 90; Olofin, *supra* note 14, at 317 (noting that SSA nations face “the indirect consequences of restricted access to advanced technologies and scope for acquiring foreign technological know-how may have impeded their changes for promoting rapid technological progress.”).

106. Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 822 (1992).

107. See Subedi, *supra* note 3, at 435-38 (discussing article 27(3) of TRIPS regarding the definition of inventions eligible for patent protection and its impact on traditional knowledge); Mukerji, *supra* note 20, at 57. During the colonial period, Western nations appropriated many agricultural and biological resources and transformed them into a monopolized food and pharmaceutical products industry. Tandon, *supra* note 71, at 90. “TRIPS [] recognizes *sui generis* systems of plant protection, but immediately qualifies this protection by stipulating that such systems must be ‘effective’” thus giving pharmaceutical companies a ready means to challenge them. *Id.* If they are found to be ineffective, corporations can seek injunctions to require access to biogenetic materials. *Id.* Article 27 forbids refusing patents to microorganisms and non-biological processes to produce plants and animals, except where it involves essentially biological processes. *Id.*

108. Tandon, *supra* note 71, at 90; see also Subedi, *supra* note 3, at 435-38 (noting that such a result may have been precluded by the structure of the negotiations).

109. As agribusiness and pharmaceutical companies solidify their gains by insisting on implementation of the TRIPS Agreement, African nations have yet to comprehend, let alone analyze, the implications of these rules for their economies or for protecting their bio-resources. See *id.* at 91; cf. Peter K. Yu, *TRIPS and Its Discontents* (Michigan State University College Of Law, Legal Studies Research Paper Series, No. 03-03, 2005), <http://ssrn.com/abstract=578577> (discussing how developing countries reform and take advantage of the TRIPS agreement).

110. The idea that agriculture is different from all other industries partly explains the domestic policies of many countries, where agriculture is subject to substantial government intervention and assistance. This view pervaded GATT law and practice before the Uruguay Round. See Randy Green, *The Uruguay Round Agreement on Agriculture*, 31 LAW AND POL’Y INT’L BUS. 819, 820 (2000) (explaining that in some respects the Uruguay Round diminished the sense of agricultural exceptionalism).

trade regime.<sup>111</sup> Despite the fact that the WTO Agreements ostensibly sought to dismantle this system, by incorporating agricultural products into GATT rules,<sup>112</sup> many industrialized nations managed to evade this obligation by such machinations as dirty tarrification<sup>113</sup> and other types of subterfuge.<sup>114</sup> Third World nations were accorded extra time to implement the new requirements and were assured their issues would be addressed, even as a variety of agricultural distortions that favored industrialized nations continued.<sup>115</sup> Nevertheless, even if all went as promised and demand for exports improved the terms of trade for agricultural exporters generally, most Sub-Saharan African nations are largely net food importers and thus are more likely to encounter worsening terms of trade that would nullify any potential gains.<sup>116</sup>

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111. See text and notes *infra* Part III.C. regarding the discrete trade system for agricultural products. No Western nation has a sustainable agricultural sector. It is heavily subsidized for myriad reasons that include food security, strong lobbies and its highly politicized nature. Tandon, *supra* note 71, at 86 (concluding that if markets were truly free, Europe and Japan would have long abandoned food production and allowed Southern Tier nations, who have a comparative advantage in agricultural production, to feed the world). Nevertheless, farmers in industrialized nations would cause political havoc if politicians abandoned them.

112. Olofin, *supra* note 14, at 310-11 (describing how GATT 1994 brought trade in agricultural products into the GATT system). The United States and European Union reached the compromise Agreement on Agriculture that required all non-tariff import restrictions or barriers be converted into equivalent customs duties, that agricultural import duties be reduced by thirty-six percent over a six-year adjustment period and that all agricultural tariffs were to be bound by the end of the adjustment period. See Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round 33 I.L.M. 1 (1994); see also Green, *supra* note 110, at 821-22; Panagariya, *supra* note 78, at 1220. In sharp contrast to the rest of the WTO Agreements, however, the Agreement on Agriculture did not outlaw export subsidies; it only required that such subsidies be reduced. See Gonzalez, *supra* note 41, at 452-63. Therefore, the agreement simply sets levels for distortion.

113. Dirty tarrification entailed setting tariff equivalents for non-tariff barriers at excessively high levels. Subsequent reductions would then be from an abnormally high level. Gonzalez, *supra* note 41, at 461. This led to higher levels of protection than under the old system. “[T]he highest tariffs were for sugar, tobacco, meat, milk products, cereals and, to a lesser degree, fruits and vegetables, precisely the products of most interest to [Third World] countries.” *Id.* While members were obligated to reduce domestic subsidies, many of the subsidies utilized by industrialized nations were exempt. *Id.* at 463-64. As a result, the WTO Agreement on Agriculture enabled industrialized nations “to maintain trade-distorting subsidies and import restrictions” and did not achieve its stated objective of “creating a fair and market-oriented trading system.” *Id.* at 468.

114. For example, OECD nations adopted complex tariff systems whose lack of transparency may complicate future negotiations. See *id.* at 462. The Agreement only required WTO members “to provide ‘access opportunities’ rather than requiring that imports actually take place.” *Id.* Staple fruits and vegetables and processed food products remained subject to very high tariffs. *Id.* at 461. The “tariff peaks on processed food illustrate the ongoing problem of tariff escalation, whereby tariffs rise as the processing chain advances.” *Id.* Countries could choose the tariffs they wished to impose and tariff escalation persists and industrialized countries also resorted to the Agreement’s special safeguard provisions. *Id.* at 462. These schemes essentially nullified the benefits of tariff bindings.

115. Olofin, *supra* note 14, at 310.

116. Sub-Saharan African nations do not subsidize agriculture. Gonzalez, *supra* note 41, at 446-48. Rather, they tax it or maintain administered prices that are below world market prices.

Moreover, SSA's preferential access to Western (especially European) markets is becoming increasingly fragile.<sup>117</sup> Thus, in the final analysis, SSA's share of the food export market is likely to decline, confirming their weak position during the negotiations leading up to these agreements.

The Agreement on Textiles and Clothing (ATC) dismantled the Multifiber Agreement,<sup>118</sup> by establishing rules to integrate textiles and clothing into the traditional GATT rules regime<sup>119</sup> over a ten-year period that ended on January 1, 2005.<sup>120</sup> Least developed countries were accorded special treatment in this process,<sup>121</sup> but new entrants, such as the nations of SSA, are unlikely to benefit

*Id.* Africa became a net food importer during the 1990s. *Id.* Nothing was included in the Uruguay Agreement to prevent Europe from dumping its subsidized food and meat onto the African market to the detriment of African producers. *Id.*; see also Tandon, *supra* note 71, at 87.

117. See, e.g., Eric J. Boos, *Between Scylla and Charybdis: The Changing Nature of U.S. and EU Development Policy and Its Effects on the Least Developed Countries of Sub-Saharan Africa*, 11 TUL. J. INT'L & COMP. L. 181, 182-83 (2003) (discussing the effect of EU and U.S. relations on SSA preferences and trade generally) and Lorand Bartels, *The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program*, 6 J. INT'L ECON. L. 507 (2003) (discussing conditionality within GSP programs); Udombana, *supra* note 83.

118. The professed goal of the ATC was to structure a steady and progressive transition from a system characterized by extensive trade restrictions to one where normal GATT rules would apply. WTO SECRETARIAT, *supra* note 26, at 65-66. The ATC lists the products it applies to and a program to integrate textiles and textile products into GATT over a 10-year period, a process that would gradually enlarge and eliminate quantitative restrictions. *Id.* Special safeguard arrangements were available during the transitional period; and arrangements to continuously supervise the entire process by a body with conciliation and quasi-judicial functions were included. *Id.*

119. Olofin, *supra* note 14, at 312 (stating that "sixteen percent of textiles imports [were] brought under GATT rules at the signing of the WTO agreement...followed by further phased integration until total integration" in 2005). Removing products from the MFA and raising the quotas on products that were still protected, was to progress in three successive stages lasting three, four and three years respectively. WTO SECRETARIAT, *supra* note 26, at 66-67. See also Wohn, *supra* note 44, at 375; Mukerji, *supra* note 20, at 40-45.

120. WTO SECRETARIAT, *supra* note 26, at 67. The transition process began with notification of all restrictions in place as of December 31, 1994. *Id.* "No new restrictions [could] be introduced, except as provided for under the agreement, or under GATT provisions such as balance-of-payments rules." *Id.* As of January, 1995 "importing WTO members were required to integrate not less than 16% of the products covered by the agreement as measured in 1990 volume of imports." *Id.* Thus, restrictions imposed under the MFA had to be removed and no new restrictions could be imposed except as permitted by GATT rules. *Id.* "An additional 17%, at least, of the covered products [would] be integrated on 1 January 1998, followed by a further minimum of 18% on 1 January 2002. The final 49% [came] under GATT rules on 1 January 2005." *Id.* Within certain parameters, the choice of products integrated at each phase was left up to the member concerned. *Id.* As integration progressed, quotas on products still under restriction were progressively enlarged. *Id.* at 68. Industrialized countries could invoke a transitional safeguard mechanism if increased imports caused serious damage or posed an actual threat. Wohn, *supra* note 44, at 406-08.

121. WTO SECRETARIAT, *supra* note 26, at 66. Article I permits special consideration for several groups of WTO members, such as "small suppliers and new entrants to the textiles and clothing trade, least-developed countries, countries which had not been signatories of the MFA since 1986, and cotton-producing exporters." *Id.* There were many complaints as this process unfolded. Mukerji, *supra* note 20, at 42. Developing countries complained before Doha that liberalization under the ATC in the initial phases had not actually expanded market access.



from liberalizing trade in textiles.<sup>122</sup> Although the ATC abolished preferential access in the textile market,<sup>123</sup> more cost efficient producers in Asia may make Africa's textiles and clothing uncompetitive.<sup>124</sup>

#### *D. Dispute Settlement*

A dispute settlement system with rules, procedures, panels, an appellate body and a dispute settlement body (DSB)<sup>125</sup> is likely to be more impartial and transparent than a power based model.<sup>126</sup> The WTO dispute settlement system

Panagariya, *supra* note 78, at 1220.

122. Olofin, *supra* note 14, at 312 (noting that nations with existing "competitive edge[s]" are "likely to edge out new entrants."). The neophyte nations of SSA would surely be among those likely to be excluded. *Id.* For example, the nations of Southeast Asia have already carved out a large share of the world market in textiles. *Id.* See also Lamar, *supra* note 44, at 601 (providing a comprehensive discussion of African prospects in the textile industry).

123. Lamar, *supra* note 44, at 608-09.

124. Even nations with established textile manufacturing industries have been concerned about the demise of quotas, fearing they will be unable to compete with China, who joined the WTO after the ATC was negotiated and whose entry has dramatically changed the economic landscape with respect to textiles. See, e.g., Saeed Azhar, *Pakistan Seeks to Widen Access to Textile Market as Quotas End*, WALL ST. J. (Europe), Dec. 31, 2004, at A4; Peter S. Goodman & Paul Blustein, *Worldwide Textiles Shake-up to Outsource Even Sweatshops*, THE SEATTLE TIMES, Nov. 22, 2004, at A3; Peter S. Goodman, *The World Textile Market: 3 Nations, 3 Strategies: China Biggest Player Set for Even Bigger Role*, THE WASHINGTON POST, Nov. 23, 2004, at A3, available at 2004 WLNR 12158552; Karl Malakunas, *China to Sew Up Asian Rivals When Garment, Textile Quotas End*, THE DAILY STAR, Mar. 29, 2004, <http://www.thedailystar.net/2004/03/29/d40329050766.htm>; Sharda Prashad, *Losing Their Shirt: Low Offshore Wages Could Spell End to Canadian Textile, Apparel Industries*, HAMILTON SPECTATOR (Ontario), Jan. 3, 2005, at A14; Sharda Prashad, *New Era for Clothing Industry 2005 Ushers in Fresh Challenges for Textile Companies*, THE TORONTO STAR, Dec. 21, 2004 at F01; *Textiles: Italian Industry Prepares for Chinese Offensive*, ANSA ENGLISH MEDIA SERVICE, Jan. 4, 2005, available at [www.lexis.com](http://www.lexis.com) (search within "ANSA English Media Service" source for "Textiles: Italian Industry Prepares for Chinese Offensive").

125. The Dispute Settlement Body (DSB) is the WTO General Council sitting for purposes of dispute settlement under a different name and with a different chairman. JACKSON, CONSTITUTION & JURISPRUDENCE, *supra* note 25, at 75-76. After consultations, the party bringing a complaint can request a panel, which will be established unless there is a consensus against it. *Id.* at 64-72. Since the party bringing the dispute will vote for a panel, there will never be a consensus against establishing a panel and thus the complaining party has a right to a panel. *Id.* at 68; Douglas Ierley, *Defining the Factors That Influence Developing Country Compliance With and Participation in the WTO Dispute Settlement System: Another Look at the Dispute Over Bananas*, 33 LAW & POL'Y INT'L BUS. 615, 616 (2002) (discussing five factors "influencing developing country participation in and compliance with WTO panel and Appellate Body decisions."). See also, e.g., Robert Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1 (1999) (evaluating the first three years of the WTO disputes procedures) and Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. OF INT'L L. 247 (2004) (critically analyzing what is labeled the GATT/WTO consensus decision-making process).

126. The old GATT system was not entirely power based. Some scholars maintain that it contained elements of both a rule and power based system, and may have been both, tending to be rule-based until the powerful believed the stakes were simply too high to abide by the rules in a particular case. JACKSON, CONSTITUTION & JURISPRUDENCE, *supra* note 25, at 66-69.

builds on procedures that slowly evolved under GATT and addresses some of the shortcomings of that system, such as panel reports that were not adopted by GATT Contacting Parties and the related tendency to handle GATT disputes within domestic systems. The new system is embodied in the WTO Dispute Settlement Understanding. Its most salient features are an absolute right to invoke the dispute settlement process as well as an obligation to use this system to resolve disputes; prescribed timetables for carrying out the process, thereby foreclosing delay as a means of avoiding resolution; nearly automatic adoption of panel reports; and the right to appeal panel decisions. The system is widely viewed as moving the international trade regime beyond a more power-based system and towards a more rule-based system, an evolution begun under GATT, but that could not adequately develop under GATT's more limited prescriptions.

A rule-based system favors smaller, less powerful nations since they ostensibly have a greater chance to vindicate their rights.<sup>127</sup> Indeed, more Third World countries have used the new system and some have become repeat players.<sup>128</sup> Given the larger number of disputes lodged under the current system, it is widely viewed as a significant success. Nonetheless, it has not been widely utilized by small, impoverished nations, and certainly not by the nations of SSA.<sup>129</sup> This underutilization ultimately implicates disparities in resources and power within the system. Utilizing the dispute settlement system requires both sufficient technical capacity and monetary resources. Lack of trained personnel with sufficient expertise to pursue a claim from the initial consultation stage through the panel and appellate process hampers Third World access to the system.<sup>130</sup> Legal counsel is often prohibitively expensive and does not contribute to nations' internal capacity to bring claims.<sup>131</sup> Furthermore, less powerful countries have been discouraged from bringing suit against large economic powers unless there is some support from interests in a more powerful country, suggesting the system remains power-based in many

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127. See Kim Van Der Borght, *The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate*, 14 AM. U. INT'L L. REV. 1223, 1230 (1999) (discussing the benefits to developing countries of the rule-based dispute settlement system).

128. Brazil, India, Mexico, Korea, Thailand and Argentina have become repeat players, which partly accounts for statistics demonstrating more Third World participation. See CALVIN MANDUNA, DARING TO DISPUTE: ARE THERE SHIFTING TRENDS IN AFRICAN PARTICIPATION IN WTO DISPUTE SETTLEMENT? 2 (Tralac Trade Brief, No. 3/2005, 2005), [http://www.tralac.org/pdf/TB3\\_Calvin\\_Manduna\\_web.pdf](http://www.tralac.org/pdf/TB3_Calvin_Manduna_web.pdf).

129. Two requests for consultations have been lodged against South Africa. African nations have been involved in only a few disputes and only as third parties. *Id.* at 3.

130. Ierley, *supra* note 125, at 642. Most of these nations also assert that the WTO has not devoted sufficient resources to technical assistance in the dispute settlement system. *Id.* at 643.

131. Some have noted that private firms may have some interest in prolonging disputes to generate fees. See, e.g., *id.* at 644-45. In any case, private law firms have no incentive to train local attorneys or officials and thus using expensive outside counsel does not assist in building internal expertise. *Id.*

respects.<sup>132</sup> Lastly, even if a claim is successfully pursued, given the huge disparities in economic power, poor nations are hard-pressed to enforce compliance against a recalcitrant large economic power. The reverse, however, is not true, since large players can more easily ensure compliance by smaller, economically weak nations.<sup>133</sup>

Thus, with the attainment of the WTO, small poor nations found themselves playing a much larger role in a greatly expanded international trade system that acknowledged them, but was not particularly geared toward their unique needs. Indeed, as Third World countries surveyed the legal landscape left in the wake of the WTO Agreements, and struggled to comply with its countless requirements while witnessing how industrialized nations were implementing them, they began to question whether they might have been duped on some level.<sup>134</sup> Complaints escalated over a system that still did not meet their unique needs.

### III.

#### THE DOHA "DEVELOPMENT" ROUND

By the time of the 1999 debacle in Seattle,<sup>135</sup> the seventy percent of designated low-income WTO member countries<sup>136</sup> were articulating varied reasons for their conviction that the WTO system was inequitable and steadily becoming more unfair and irrelevant to their development needs. They contended that trade barriers inhibiting pro-poor growth strategies in low-income countries persisted, and that the continuously expanding trade agenda focused on issues that only concerned high-income countries.<sup>137</sup> Participating

132. *Id.* This would explain the recent case lodged by Antigua and Barbuda against U.S. rules regarding internet gambling.

133. *See* Ierley, *supra* note 125, at 646-51. Of course, this does not mean that powerful countries do not usually comply with Panel and Appellate Body Rulings. Most do, even when the complainant is a Third World nation. *Id.* The difference is the perception that they have more discretion in deciding whether or not to comply, a choice economically weaker members do not have.

134. *See generally* Mukerji, *supra* note 20. As detailed in this section, problems with trade liberalization that would be of interest to developing countries, and other issues of implementation abounded.

135. *See* Tiefenbrun, *supra* note 14, at 257-58 (discussing the "battle" at the Seattle Ministerial).

136. Low income is defined as *per capita* income of US \$1,000 or less. T. ADEMOLA OYEJIDE, *Development Dimensions in Multilateral Negotiations, in DOHA AND BEYOND THE FUTURE OF THE MULTILATERAL TRADING SYSTEM* 68 (Mike Moore ed., 2004).

137. *See* Subedi, *supra* note 3, at 428-29 (noting that the Group of 77 and China issued a Declaration stating "Due to systematic shortfalls in the international economic and trading system, a large majority of the developing countries have, so far, failed to accrue a share in the global and economic prosperity."). The Declaration went on to discuss the shortcomings of the Uruguay Round Agreements in terms of market access, tariff peaks, tariff escalation and non-tariff barriers such as technical barriers to trade. *Id.* at 429. It also cited abuse of trade remedies such as anti dumping and safeguard actions, particularly in sectors of interest to developing countries, such as textiles and agricultural products. *Id.*

in the WTO was becoming ever more difficult, as negotiations on many issues were becoming so complex that they were having difficulty marshalling the technical expertise to fully understand their complete implications. The now compulsory multilateral rules emanating from these negotiations essentially codified and harmonized rules and practices already prevailing in high-income countries.<sup>138</sup> They were not always useful or appropriate for low-income countries, and the institutional structures needed to implement them were costly.<sup>139</sup>

Third World countries had serious concerns about a multilateral trade system they perceived as antithetical to their needs,<sup>140</sup> and they were decidedly unenthusiastic about launching a new trade round that they surmised would be detrimental to their interests.<sup>141</sup> Nonetheless, in November 2001, at the Fourth WTO Ministerial Conference in Doha, Qatar, the Members of the WTO managed to launch the very first WTO trade round and it was christened the Doha Development Agenda.<sup>142</sup> With development apparently at the forefront of the WTO agenda, it seemed that the international trade system had come full circle and the current state of affairs was about to change. The Doha Ministerial Declaration proposed a detailed plan to negotiate a range of topics by January 1, 2005.<sup>143</sup> By the Fifth Ministerial Conference in Cancun, Mexico, in September 2003, negotiations collapsed when WTO ministers fell short of

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138. It is not surprising that WTO rules would personify Western laws and regulations, because the goal of globalization is to universalize Western economic, legal, social, political, technological and cultural norms.

139. The institutions and measures necessary to implement these rules reflect the prevailing environment in high-income nations, but creating and maintaining these institutions is often too costly for low-income nations. Oyejide, *supra* note 136, at 69.

140. These nations believed trade barriers remained. *Id.* The trade agenda was being expanded to cover issues that were only of interest to industrialized countries, and multilateral rules were increasingly becoming codifications of laws and rules prevailing in industrialized countries that often were unsuitable for Third World nations. *Id.* See also Haque, *supra* note 18, at 1111-12.

141. Third World countries feared they would be the primary targets for extracting concessions, that subjects of interest to industrialized countries would be emphasized, and topics of interest to them would be disregarded as emphasis was placed on industrialized nation concerns. Haque, *supra* note 18, at 1112.

142. The Doha Round is the first round of global trade negotiations since the Uruguay Round concluded in 1994. A number of factors led to a reversal of the outcome at Seattle, including U.S. determination to launch a new trade round after the events of September 11, 2001, and a new Republican administration that was willing to eliminate labor standards from the WTO agenda. Panagariya, *supra* note 78, at 1205. Even so, the Round was launched only after marathon negotiating sessions and hard bargaining. Haque, *supra* note 18, at 1098-99.

143. Sungjoon Cho, *A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancun and the Future of Trade Constitution*, 7 J. INT'L TRADE 219, 227 (2004). Negotiations are to focus on agriculture, services, non-agricultural market access, and many other issues. *Id.* It also established a structure and series of interim negotiation deadlines that were to culminate at the fifth ministerial conference in Cancun, Mexico. *Id.* at 231. The Doha Declaration also established a Trade Negotiations Committee (TNC) that was open to all WTO Members, to oversee the negotiations, as well as several subsidiary bodies. *Id.* at 225.

realizing any of the goals in the Doha Declaration and were unable to bridge broad differences on individual negotiating issues.<sup>144</sup> The content and focus of the Doha Declaration and the eventual breakdown of negotiations at Cancun explains much about how the role of Third World nations in the WTO is both evolving and remains similar to their position under the GATT regime.<sup>145</sup>

### A. The Promise of Doha

It was becoming increasingly evident that its more impoverished members were deeply disappointed in the WTO,<sup>146</sup> and the Doha Declaration promised to prioritize recognizing and addressing their problems and concerns. The Declaration acknowledged that the majority of WTO members were low-income countries<sup>147</sup> and declared that their needs and interests would be at the center of the Doha Round's work program.<sup>148</sup> It committed to negotiations towards remedying what Third World nations perceived to be imbalances in the Uruguay Round Agreements.<sup>149</sup> Agricultural export subsidies;<sup>150</sup> the intellectual property regime and access to life saving medicines; tariff peaks and tariff escalation;<sup>151</sup> non-tariff barriers on products of particular export interest to developing countries; and unresolved implementation issues were all

144. The Fifth ministerial conference in Cancun was held on September 10-14, 2003. UNITED STATES GENERAL ACCOUNTING OFFICE, WORLD TRADE ORGANIZATION CUNCUN MINISTERIAL FAILS TO MOVE GLOBAL TRADE NEGOTIATIONS FORWARD: NEXT STEPS UNCERTAIN 5 (2004). Cancun concluded with an agreement to continue consultations and convene a meeting of the General Council by mid-December 2003 to determine how the negotiations could be revived. *Id.*

145. Regrettably, it may also foreshadow a trend towards regional and bilateral agreements, as industrialized nations are unable to achieve all of their trade goals in a consensus-based organization such as the WTO. For example, industrialized nations have sought to "ratchet up protection" by negotiating around TRIPS. See Fredrick Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 AM. J. INT'L L. 317, 349 (2005). See generally Boos, *supra* note 117 (discussing European Union and American trade agreements with Africa).

146. See, e.g., Mukerji, *supra* note 20, at 33-36; Panagariya, *supra* note 78, at 1218-23.

147. World Trade Organization, Ministerial Declaration of 20 Nov. 2001, WT/MIN(01)/DEC/1 [hereinafter Ministerial Declaration], available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.pdf](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf).

148. *Id.* at arts. 42-43 (promising to make efforts to ensure that these nations secured a share in the growth of world trade that was commensurate with their economic development needs). See also Oyejide, *supra* note 136, at 69; see also Peter Lichtenbaum, *Special Treatment vs. Equal Participation: Striking A Balance in the Doha Negotiations*, 17 AM. U. INT'L L. REV. 1003, 1021-25 (2002).

149. See Panagariya, *supra* note 78, at 1210-14 (discussing the Doha work program).

150. The Declaration called for fundamental agricultural reform that included: substantially improving market access; reducing export subsidies, with a goal of phasing them out; and significantly reducing trade-distorting domestic subsidies. UNITED STATES GENERAL ACCOUNTING OFFICE, *supra* note 144, at 10.

151. Third World nations complained bitterly about peak tariffs being applied to their exports and the Declaration explicitly approves reducing or eliminating tariff peaks, high tariffs, tariff escalation and non-tariff barriers, particularly on products of export interest to developing countries. See Panagariya, *supra* note 78, at 1211.

slated for discussion.<sup>152</sup> Special and differential treatment was an integral part of the negotiations,<sup>153</sup> and there was an entire section on the problems of small economies.<sup>154</sup> Impoverished nations were also afforded a more prominent role in the WTO study agenda.<sup>155</sup> Development is always at the center of the Third World agenda,<sup>156</sup> and the Declaration dutifully claimed that trade liberalization could play a major role in promoting economic development and reducing poverty.<sup>157</sup> Indeed this Round was hailed as the Development Round,<sup>158</sup> because the Declaration emphasizes the development benefits of trade and the need to bring developing countries within the free trade tent.<sup>159</sup> Global trade

152. The Doha negotiating agenda had seven items, including implementation, agriculture, services, market access for non-agriculture products, trade and the environment, WTO rules, TRIPS and dispute settlement. *Id.* at 1210-14.

153. Special and differential treatment was to be discussed with regard to the schedule of concessions and commitments, and concerning negotiated rules and disciplines. *Id.* at 1210. The Declaration did not make any concrete promises in this arena, however. *See also* Subedi, *supra* note 3, at 435 (noting that although special and differential treatment were taken into account, the Doha Conference did not go beyond acknowledging and reviewing provisions "with a view to strengthening them and making them more precise, effective, and operational.") (internal citations omitted). *See also* Lichtenbaum, *supra* note 148, at 1022-26 (discussing the Doha negotiations from the perspective of Third World nations including the issue of special treatment).

154. Four articles of the Declaration are devoted to a section entitled "Technical Cooperation and Capacity Building of Least Developed Countries." Ministerial Declaration, *supra* note 147, at arts. 38-41. Other special provisions were included for least developed countries and WTO members committed to the objective of duty- and quota- free market access for products from these countries. Subedi, *supra* note 3, at 434. They also committed to "consider[ing] additional measures for progressively improvement in market access for LDCs." *Id.* The goal was not concrete, however, despite being a genuine objective. *See id.* at 434-35.

155. The Declaration's study agenda contained new matters pressed by developing countries, including an Agreement to Study the Problems of Small Economies. Ministerial Declaration, *supra* note 147, para. 35. The protection of traditional knowledge and folklore was also placed on the study agenda. *Id.* at art. 19. At the insistence of developing countries, especially Brazil and India, the Declaration charged the TRIPS Council with examining the relationship between the TRIPS Agreement, the Convention on Biological Diversity and the protection of traditional knowledge and folklore. Panagariya, *supra* note 78, at 1205-06; Ministerial Declaration, *supra* note 147, at art. 19.

156. Oyejide, *supra* note 136, at 69 (noting that what "remains to be specified are the development dimensions which must be integrated into the framework of trade negotiations as a means of ensuring that these beneficial outcomes are fully realized.").

157. *See* Oyejide, *supra* note 136, at 71-72. Oyejide notes that reducing poverty is generally viewed as the most fundamental of low income country development objectives, with the only challenge being determining the most appropriate way to achieve this goal. As Professor Oyejide explains, the narrative generally goes as follows: economic growth is an important contributor to poverty reduction and when poverty and inequality are reduced, there will be an additional benefit in terms of stimulating stronger economic performance. Thus, poverty reduction is not only a desirable end in itself, but also constitutes a means of achieving more growth. Yet, while economic growth is generally associated with poverty alleviation, there is no guarantee of this outcome because some growth strategies may be less attuned to poverty reduction than others. The question then becomes what policy to pursue. *Id.*

158. Of course, development is almost incapable of definition. *See* text and notes *supra* at Introduction; *see also* Gordon & Sylvester, *supra* note 2, at 2-19; *see also* Oyejide, *supra* note 136, at 70-71.

159. The Declaration notes the need to provide assistance to developing countries to help

within the WTO regime was to support development through the adoption of a development-friendly approach.<sup>160</sup> The “Doha Development Round” appeared to indicate that the needs and interests of small, impoverished economies would be more prominent and that the WTO was finally being responsive to their demands.<sup>161</sup>

Yet what began as an ambitious agenda that seemed to favor, or at least acknowledge and account for developing country needs, has so far failed to fulfill most of its mandate.<sup>162</sup> The reasons are manifold and complex, with some commentators believing that the concessions to Third World demands were ephemeral, illusive and doubtful from the beginning.<sup>163</sup> Moreover, even in a consensus-based system where each state has a vote, some states have more influence than others. The states of SSA possess insignificant influence

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them take advantage of the benefits it provides. UNITED STATES GENERAL ACCOUNTING OFFICE, *supra* note 144, at 6. Indeed, one of the Round’s professed goals is to further integrate developing countries into the world economy. *Id.* The WTO position on trade and development has been summarized as follows:

Trade is a key factor for economic growth, and can help to alleviate poverty. [] While trade is not an end in itself, it can enhance a country’s access to a wider range of goods and services, technologies and knowledge. It stimulates the entrepreneurial activities of the private sector. It creates jobs. It fosters vital learning processes. It attracts private capital. It increases foreign exchange earnings. Above all, it generates the resources for sustainable development and the alleviation of poverty. [] For trade to have an impact on poverty reduction it needs to be an integral part of a country’s development strategy. Led by the government, this requires raising awareness and active engagement by a wide range of stakeholders[.] Countries should be aware that this process will require a long-term commitment by all stakeholders, particularly since it involves systemic change.

The Integrated Framework for Least Developed Countries, [http://www.wto.org/english/tratop\\_e/devl\\_e/teccop\\_e/f\\_e.htm](http://www.wto.org/english/tratop_e/devl_e/teccop_e/f_e.htm) (last visited Apr. 5, 2006).

160. Haque, *supra* note 18, at 1099. *See also* Ministerial Declaration, *supra* note 147, at arts. 42-43.

161. Indeed one commentator believes that industrialized nations making concessions to developing nations, so that the negotiations could begin, was among the most important procedural developments to emerge from Doha. Peter M. Gerhart, *Reflections on the WTO Doha Ministerial: Slow Transformations: The WTO as a Distributive Organization*, 17 AM. U. INT’L L. REV. 1045, 1045, 1074-79 (2002) (arguing towards the thesis that Doha may signal the beginning of a WTO that is concerned with not only how wealth is created, but also with how it is distributed).

162. *Cf.* Haque, *supra* note 18, at 1122-23. Representatives of Third World nations generally concluded that their objectives remained largely unfulfilled; African nations were most disappointed of all. *See id.*

163. The Doha Declaration did not include any tangible measures regarding poor Third World nations. It only made a series of promises that all hoped would eventually result in concrete actions. *See* Subedi, *supra* note 3, at 442. Others maintained that Third World claims did not stem from some newfound power lodged in these nations or to moderation in the negotiating posture of industrialized nations. *See* Panagariya, *supra* note 78, at 1205. Launching the Round may have been due to U.S. determination to launch negotiations after the events of September 11, 2001, which made them more willing to make concessions. *Id.* However, this rationale may be a specific instance of the greater dynamic of vast disparities in bargaining power within the WTO, and increasingly divergent and splintering interests. *Cf.* Gerhart, *supra* note 161, at 1045 (arguing that the WTO has begun to consider global distribution issues).

and have little bargaining power. Whether their interests will be realized is almost entirely at the whim and mercy of industrialized nations, a category that may soon embrace the large emerging economies of India, China, and Brazil.

The very poorest nations have different concerns than other Third World economies, both large and small. As a result, the economic interests and agendas of a once quite united Third World appear to be diverging, even as their differences with the affluent, and generally unified, industrialized nations remain.<sup>164</sup> For example, dispute settlement cases brought by Third World countries against industrialized countries sometimes sacrifice the interests of small impoverished nations.<sup>165</sup> Both this nascent disconnect within the Southern Tier and the divide between the West and the South's most impoverished parts is significant, and may portend a future where large Southern Tier countries begin to dominate fields that were once established sectors elsewhere.<sup>166</sup> For the nations of SSA, it may be almost impossible to compete, and, as the Doha Round is demonstrating, the WTO may not be of much assistance.

### *B. Issues, Players and Stances*

At the top of the Third World's Doha agenda are the usual concerns of agricultural tariffs, quotas and subsidies; implementation concerns; tariff peaks and tariff escalation; and the TRIPS agreement and its impact on access to vital medicines.<sup>167</sup> In addition, Sub-Saharan African nations want to retain certain longstanding preferences from the European Union,<sup>168</sup> and obtain some relief from U.S. cotton subsidies. Wide disparities in power, and thus in the

164. The perception prevalent in the 1970s and early 1980s that Third World nations shared common interests has faded as it becomes increasingly difficult to discern what a developing country is. See Subedi, *supra* note 3, at 444-45.

165. The most prominent case is the petition by Australia, Brazil and Thailand regarding European Union sugar subsidies, which may harm sugar preferences to ACP nations. Panel Report, *European Communities – Export Subsidies on Sugar*, WT/DS283/R (Oct. 15, 2004); Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (Apr. 28, 2005).

166. See generally James C. Hsiung, *The Aftermath of China's Accession to the World Trade Organization*, 8 THE INDEP. REV. 87 (2003) (discussing the aftermath of China's entry to the WTO). For a discussion of China and India's growing economic power and influence, see National Intelligence Council, *supra* note 8, at 47-51.

167. See Subedi, *supra* note 3, at 431-34. The Doha Declaration excluded labor issues from its mandates, which was one of the demands made by Third World nations and many of these nations also thought it excluded the contentious Singapore issues from the negotiations. *Id.* While many Third World nations would have preferred to exclude trade and the environment from the negotiating agenda altogether, it was incorporated with a limited mandate. *Id.*

168. See 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, June 23, 2000, which is the successor to the Lome agreements. See also Udombana, *supra* note 83 (providing an extended discussion of the Cotonou and Lome Agreements).



negotiations, were apparent from the outset. For example, the negotiating agenda required numerous concessions and contributions from industrialized nations,<sup>169</sup> meaning these nations had a lopsided influence over the eventual outcome. The Declaration also proposed ambitious technical assistance programs for poor countries, but there was no suggestion as to how they would be funded.<sup>170</sup> This means that to the extent these programs might be helpful, the speed and degree of so called least developed country integration into the global economy may be dependent on the inclinations of rich countries.<sup>171</sup>

The outlook at the beginning of the Fifth Ministerial Conference was not promising.<sup>172</sup> At the halfway point, the negotiations over agriculture, along with TRIPS and the Singapore issues, demonstrated both the power of the West and the developing fissures within the South.<sup>173</sup> Indeed, the negotiations and power struggles regarding the concerns that Southern Tier countries thought were important, may be key to understanding how the brave new world of the WTO is unfolding, and how SSA fits into this increasingly multifaceted mosaic.

### *C. Traveling to Singapore, Whilst Leaving the Homestead Behind*

With respect to agriculture,<sup>174</sup> WTO members committed to

169. Cho, *supra* note 143, at 225-26.

170. Ministerial Declaration, *supra* note 147, at arts. 38-41. Article 40 only suggested that the Committee on Budget, Finance and Administration develop a plan for funding that might later be adopted. *Id.* at art. 40.

171. Cho, *supra* note 143, at 220-21; *see also* Richard Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002) (discussing how the United States and European Union have dominated bargaining and outcomes in the WTO system despite consensus decision-making). *See* Oyejide, *supra* note 136, at 68-93 (discussing in part the impact policies of high income countries have on development).

172. On the eve of the Fifth WTO Ministerial Conference in Cancun, there was a pervasive sense that little progress had been made in narrowing differences on various proposals and that negotiations had yet to begin. UNITED STATES GENERAL ACCOUNTING OFFICE, *supra* note 144, at 7. Nor had there been progress in national trade liberalization commitments. The Cancun Ministerial Conference was held at the midway point of the three-year Doha negotiations. *Id.* at 6. For most Member Nations, negotiating issues were linked, trade-offs were expected, and thus progress on individual issues had to be made in tandem, making it difficult to move forward on individual concerns. *Id.* at 8. For example, developing countries placed agriculture at the top of their list of priorities and were unwilling to make offers to open up their services markets until there was more progress on agricultural reform. *Id.* The EU and Japan, were expected to make concessions on agriculture, but wanted a commitment to begin negotiations on the new "trade" issues of investment, competition (antitrust), government procurement and trade facilitation which were collectively known as the Singapore issues, (these issues were highlighted as a priority in the Singapore Declaration that emanated from the 1996 ministerial conference in Singapore). *Id.* The gap between nations on agricultural concerns and the Singapore issues were imminent and quite divisive. Cho, *supra* note 143, at 222.

173. *Id.* at 227.

174. Agriculture was considered by many Third World WTO members to be the linchpin in achieving progress in all other areas of the Doha negotiating agenda, and this was born out as the negotiations unfolded. *See id.* at 227; UNITED STATES GENERAL ACCOUNTING OFFICE, *supra*

comprehensive negotiations to improve market access, reduce and eventually phase out export subsidies, and substantially reduce trade-distorting domestic agricultural support programs.<sup>175</sup> Several negotiating groups emerged with varied and overlapping interests. Not surprisingly, net agricultural exporters wanted to rapidly eliminate subsidies, and they formed the Cairns Group, which included a diverse group of Northern and Southern tier nations.<sup>176</sup> Other nations, including some industrialized nations, wanted to proceed more gradually.<sup>177</sup> Generally, developing nations wanted industrialized nations to reduce agricultural subsidies and eliminate barriers to market access, without being required to liberalize their particular market barriers.<sup>178</sup> Beyond these general objectives, however, the goals of specific nations greatly diverged. For example, key Third World nations, such as India, Brazil and China devised a common position against industrialized nations on major topics such as agriculture even before they arrived in Cancun.<sup>179</sup> These initial dissenters to the U.S. and EU's position on agricultural subsidies<sup>180</sup> persuaded other Third

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note 144, at 7. From the U.S. perspective, a key factor hindering progress was the pace and extent of EU reform of its Common Agricultural Policy (CAP). *Id.* at 7. The EU agreed to CAP reform on June 26, 2003, which would, *inter alia*, reform the subsidies paid to farmers. Nonetheless other members wanted to see the EU's internal reform proposals turned into a significantly more ambitious WTO negotiating proposal, which the WTO resisted making. *Id.*

175. The majority of the wrangling was over eradicating EU subsidies, and the chief quarrel was between the United States and European Union. *See* Panagariya, *supra* note 78, at 1210. At EU insistence, all types of export subsidies were included in the negotiations, conceivably opening the door to including export credits, food aid and state-trading enterprises. *See id.*; *see also* Haque, *supra* note 18, at 1118-19.

176. UNITED STATES GENERAL ACCOUNTING OFFICE, *supra* note 144, at 15. The Cairns Group was comprised of net agriculture exporting nations, including Argentina, Australia, Bolivia, Brazil, Canada, Chile, Columbia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Paraguay, the Philippines, South Africa, Thailand and Uruguay. *Id.* The Cairns Group, along with the United States, envisioned an ambitious agricultural liberalization agenda that would eliminate export subsidies and reduce and harmonize tariff and trade distorting domestic support levels over a five-year period. *Id.*

177. *Id.* The industrialized nations favoring a more measured agenda included the EU, Japan, Korea and Norway. These nations and several small industrialized nations were in favor of having the flexibility to maintain higher tariffs to protect domestic agricultural production. *Id.*

178. UNITED STATES GENERAL ACCOUNTING OFFICE, *supra* note 144, at 11. These nations contended that subsidies and other trade barriers led to lower world prices and displaced their producers in global markets. *Id.* The United States, the Cairns Group, and many developing countries pressed for eliminating export subsidies for agricultural products. *Id.* The EU, which heavily subsidizes their agricultural producers, anticipated reductions but not the abolition of these subsidies. *Id.*

179. Cho, *supra* note 143, at 235. Thus, when the United States and European Union announced their joint position on farm subsidies, these nations immediately denounced it and issued their own negotiating text. *Id.* With the addition of the economic powerhouse, China, this coalition was significantly strengthened.

180. It should be noted that the United States and European Union actually had divergent positions on agriculture. *See* Cho, *supra* note 143, at 228. Since American farmers export up to a quarter of their production, the United States has an interest in opening up export markets. *Id.* With its Common Agricultural Policy, the EU was more defensive. *Id.* at 229. Thus, their joining forces has been attributed to the 2002 U.S. Farm Bill that was to provide \$180 billion in farm

World countries to form a coalition christened the “G-21” that pressed for abolishing all agricultural export subsidies.<sup>181</sup> NGOs rallied behind Third World positions and criticized industrialized nations on their dealings with poor nations.<sup>182</sup>

The relative weakness of Sub-Saharan African nations crystallized during the dispute over U.S. cotton subsidies, and it proved to be a turning point in the negotiations. Simply put, U.S. subsidies to American cotton farmers make African cotton production unprofitable.<sup>183</sup> Agriculture dominates the economies of almost all African nations and one of their most important crops is cotton.<sup>184</sup> In the West and Central African (WCA) nations of Benin, Burkina Faso, Chad, Mali and Togo, cotton production accounts for five-to-ten percent of the gross national product, and cotton is the predominate export.<sup>185</sup> Thus, cotton production is an integral part of their trade regimes and accordingly their development agendas. Moreover, they are among the lowest cost and highest quality producers in the world.<sup>186</sup> Regrettably, cotton prices have been kept artificially low on world markets because cotton has been heavily subsidized by

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subsidies over the coming decade, meaning the U.S. position was converging to some extent with the EU protectionist stance. *Id.*

181. The G-21 alliance included the large agricultural exporters such as Brazil, India and China. Their main goal was to level the playing field by requiring rich countries to reduce or eliminate their subsidies; however, they also sought differential market access commitments, with rich countries opening their markets more broadly than would be required by developing nations. *See Poorest Nations*, *supra* note 11, at “Market Access.”

182. The influential NGOs included, *inter alia*, Greenpeace, Oxfam, and Public Citizen. Cho, *supra* note 143, at 235.

183. *See id.* at 230 (noting that cotton subsidies have pernicious effects on WCA nations highly dependent on cotton exports, even where they have a comparative advantage, because they cannot compete with heavily subsidized and thus artificially low-priced cotton from rich nations).

184. *See generally*, Kevin Kennedy, *The Incoherence of Agricultural, Trade and Development Policy for Sub-Saharan Africa: Sowing the Seeds of False Hope for Sub-Saharan Africa's Cotton Farmers?*, 14 KAN. J. L. & PUB. POL'Y 307 (2005) [hereinafter Kennedy, *Incoherence*]. Additionally, agricultural production accounts for more than fifty-percent of the labor force in almost all SSA nations designated as least developed, and in many, it employs more than sixty- to-seventy percent. *Id.* at 309-14. *See also* ‘White Gold’ Turns to Dust Which Way Forward for Cotton in West Africa?, Oxfam Briefing Paper, Mar. 2004, 4-6 [hereinafter Oxfam Briefing Paper]; CHARLES E. HANRAHAN, THE AFRICAN COTTON INITIATIVE AND WTO AGRICULTURAL NEGOTIATIONS 1-2 (CRS Report for Congress, 2004), available at <http://www.nationalaglawcenter.org/assets/crs/RS21712.pdf>.

185. Kennedy, *Incoherence*, *supra* note 184, at 309-15. Cotton exports represent approximately thirty-to-forty percent of total export earnings and over sixty percent of earnings from agricultural exports. *Id.* With over ten million people depending on cotton commerce, it has been key in achieving development goals such as building roads, schools, health centers and the necessary infrastructure to support it. *Id.* Since 1980, production has increased from 200,000 to almost one million tons and provides work for ten million people. *Id.* Combined, these nations are the seventh largest producer in the world. *Id.*

186. *See id.* at 309-15. WCA nations produce high quality cotton and have high average crop yields by international standards. They achieve this result by using labor-intensive farming techniques on small 1-3 acre farms and are among the lowest cost producers in the world. *Id.* *See* HANRAHAN, *supra* note 184, at 2 (providing statistics on cotton production in West African nations).

industrialized nations and especially the United States.<sup>187</sup> In industrialized nations, cotton production is important to a discrete, albeit powerful, constituency but it has a negligible impact on the overall economy.<sup>188</sup> Given the clear comparative advantage of WCA nations, their inability to capitalize on it due to U.S. subsidies is particularly problematic and vexing.<sup>189</sup>

In response to this state of affairs, WCA nations proposed the Sectoral Initiative in Favour of Cotton (hereinafter Cotton Initiative) at the 2003 WTO Ministerial Conference in Cancun.<sup>190</sup> The initiative called for recognizing the “strategic nature of cotton for development and poverty reduction,” and completely phasing out “support measures for the production and export of cotton.”<sup>191</sup> More particularly, these nations sought a specific date for phasing out cotton subsidies, and financial compensation to offset the lost income of WCA cotton producers.<sup>192</sup> They insisted that if subsidies were eliminated,

187. Professor Kennedy opines:

Cotton subsidies, especially those bestowed by the United States upon its cotton farmers, have had at the least a price suppressing effect on world prices for cotton, [] to the detriment of cotton farmers in sub-Saharan Africa. Some estimates put the amount of subsidies that U.S. cotton growers received in 2001-2002 at \$3.9 billion in combined domestic and export subsidies [] and \$3.7 billion in 2002-2003. [] The impact of those subsidies on world cotton prices has been palpable. (internal citations omitted)

Kennedy, *Incoherence*, *supra* note 184, at 315. For an account of the role played by the European Union in this saga, see Oxfam Briefing Paper, *supra* note 184, at 6-10.

188. HANRAHAN, *supra* note 184, at 2 (noting that cotton production does not occupy a “dominant role” in the total U.S. economy). Hanrahan explains that cotton production accounted for 0.034% of U.S. GDP in 2002, represents 1.4% of total merchandise exports and 4% of agricultural exports, and employs 173, 447 people on 31,433 farms. The cotton sector generated total revenues of 40.1 billion in 2002, and employed 200,000 people in such areas as cotton gins, transportation, cottonseed oil mills and textile mills. *Id.*

189. Industrialized nations have admitted that their subsidies distort trade. See HANRAHAN, *supra* note 184, at 3-4. Nonetheless, they have refused to change their policies and instead urged poor nations to take steps to deal with the problem. For example, the United States has proposed that poor nations diversify their farm production away from cotton. Oxfam Briefing Paper, *supra* note 184, at 8.

190. WTO, Committee on Agriculture, Special Session, WTO Negotiations on Agriculture, Poverty Reduction: Sectoral Initiative in Favour of Cotton, *Joint Proposal by Benin, Burkina Faso, Chad and Mali*, TN/AG/GEN/4 (May 16, 2003) [hereinafter Sectoral Initiative]; Oxfam Briefing Paper, *supra* note 184, at 6-7 (discussing the confluence of forces and events leading to the introduction of the Initiative and the overwhelming public support behind it).

191. Sectoral Initiative, *supra* note 190, at I para. 6.

192. In order to take into account the urgent need to restore a global market that functions according to the WTO's principles, and thus combat poverty in WCA cotton-producing countries, the signatory nations call for the following:

Establishment at Cancun of a mechanism for phasing out support for cotton production with a view to its total elimination (early harvest): at the Ministerial Conference in Cancun, there should be a decision on immediate implementation, providing for substantial and accelerated reductions in each of the boxes of support for cotton production. This decision should set a specific date for the complete phase-out of cotton production support measures.

Transitional measures for LDCs: until cotton production support measures have been completely eliminated, cotton producers in LDCs should be offered financial

“cotton production in WCA countries would be highly profitable and could act as an important catalyst for poverty reduction.”<sup>193</sup>

Differences immediately developed over how discussions of the Cotton Initiative should proceed,<sup>194</sup> and with the collapse of the Cancun Ministerial, there was no decision on the Initiative.<sup>195</sup> As the negotiations proceeded, however, there were strong indications that the WTO was not prepared to address the problem in favor of WCA nations. Indeed, the draft Declaration not only failed to adopt the WCA proposal, but espoused the U.S. position, which was predictably uncompromising.<sup>196</sup> This obvious rigging of free trade rules to benefit rich nations at the expense of poor nations has, however, made the issue quite potent. Because of the efforts of Third World nations, including its most impoverished constituents, and with the support of NGOs, it has remained a key question on the WTO agenda.

Disagreement over where and how the Initiative should be incorporated in WTO discussions on agriculture continued in post-Cancun discussions.<sup>197</sup> Eventually, on August 1, 2004, WTO members agreed to what has become known as the “July Package,” in which a commitment was made to address cotton “ambitiously, expeditiously, and specifically, within the agricultural negotiations.”<sup>198</sup> The July Package also mandated the establishment of the sub-

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compensation to offset the income they are losing, as an integral part of the rights and obligations resulting from the Doha Round.

*Id.* at I para 7.

193. *Id.* at I para. 4.

194. The United States proposed that cotton be included within larger discussions to eliminate tariffs and subsidies on farm products. *See* HANRAHAN, *supra* note 184, at 4-5. According to the USTR the problems plaguing cotton go beyond subsidies and include “competition by synthetic fibers, the slowdown of world economic growth, and higher yields due to favorable weather conditions[,]” and other factors that might “limit market opportunities and distort trade of cotton[.]” *Id.*

195. *See* The Cotton Initiative, [www.wto.org/english/tratop\\_e/agric\\_e/negs\\_bkgnd20\\_cotton\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/negs_bkgnd20_cotton_e.htm) (providing background information on Sectoral Initiative negotiations) (last visited Apr. 4, 2006). Although the Cotton Initiative was eventually included in the Cancun Ministerial Agenda, there were disagreements over whether it should be integrated into the broader negotiations on agricultural issues (market access, domestic support and export subsidies) or discussed as a separate question. *Id.* There was also discord over compensation, including how it should be paid and by whom, given the lack of development funding in the WTO. *Id.*

196. Oxfam Briefing Paper, *supra* note 184, at 8 (noting that the United States suggested diversification by poor nations).

197. The WTO sponsored a workshop in Cotonou, Benin in March 2004, where the Initiative was comprehensively discussed, although the development dimension of cotton modalities predominated at this particular workshop. *See* Kennedy, *Incoherence*, *supra* note 184, at 322.

198. *See* WTO, Decision Adopted by the General Council on 1 August 2004, Annex A, para 4, Doha Work Programme, WT/L/579 (Aug. 2, 2004), *available at* [http://www.wto.org/english/tratop\\_e/dda\\_e/draft\\_text\\_gc\\_dg\\_31july04\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm) (last visited Apr. 4, 2006).

committee on Cotton under the auspices of the Agricultural Committee.<sup>199</sup> Its task is to address “all trade distorting policies affecting the sector,” and the need for “[c]oherence between trade and development aspects of the cotton issue[.]”<sup>200</sup> Moreover, the WTO Director General has been directed to work with international institutions, such as the World Bank, to target resources towards countries where cotton is a crucial element of development. Thus, WCA nations, with the backing of other Third World nations, were able to succeed in bringing cotton subsidies to the fore and having them discussed apart from the extensive agricultural agenda. They have been unable to force a large powerful nation to play by the very rules they created. Instead, the development edifice might be employed to direct aid and “technical assistance” to nations who are perfectly able to compete on a level playing field, if the field were truly level.<sup>201</sup>

It might be noted that when the committee met in July 2005, WCA members were still protesting the lack of progress in addressing their concerns,<sup>202</sup> and these complaints continued as the WTO Ministerial approached.<sup>203</sup> As the 6<sup>th</sup> WTO Ministerial opened in Hong Kong on December 13, 2005, WCA demands persisted. In the end, WTO Members agreed to phase out agricultural export subsidies by 2013 and cotton export subsidies by the end of 2006. Moreover, members agreed to accord duty-free treatment to cotton imports from least developed countries.<sup>204</sup> Whether these promises will be acted upon or will actually address the needs of WCA nations, remains to be seen.<sup>205</sup> Most commentators believe it is highly doubtful.

199. *Id.*

200. *Id.*

201. See Oxfam Briefing Paper, *supra* note 184, at 2 (summarizing the harmful effects of U.S. and EU trade policy on developing nations’ abilities to compete in the cotton trade).

202. For example, the representative from Benin complained: “We have not made any progress. There has been no advance[.] At the same time, prices are falling and the situation among farmers is deteriorating[.]” He also noted that Benin “disagrees with the view that progress in cotton has to wait for progress in the agriculture negotiations as a whole.” *Africans Keep Up Pressure For Progress By The End Of July*, WTO NEWS, July 18, 2005, [http://www.wto.org/English/news\\_e/news05\\_e/cotton\\_18july05\\_e.htm](http://www.wto.org/English/news_e/news05_e/cotton_18july05_e.htm).

203. *Chair Calls for Cotton Consultations as Hong Kong Meeting Looms*, WTO NEWS, Sept. 28, 2005, [http://www.wto.org/english/news\\_e/news05\\_e/cotton\\_28sep05\\_e.htm](http://www.wto.org/english/news_e/news05_e/cotton_28sep05_e.htm) (last visited Apr. 4, 2006).

204. See Summary of Hong Kong Ministerial Conference, [http://www.wto.org/english/thewto\\_e/minist\\_e/min05\\_e/min05\\_18dec\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_18dec_e.htm) (last visited Apr. 4, 2006). The declaration makes clear that the agreed dates are conditional. Furthermore, loopholes must be closed, so that export subsidies are not hidden in “credit, food aid and the sales of exporting state enterprises.” *Id.* Besides the elimination of cotton export subsidies by 2006, cotton exports from least-developed countries are to be duty and quota free in developed countries as of the period for implementing the new agriculture agreement. *Id.* There was also agreement that efforts would be made to cut trade-distorting domestic subsidies on cotton by more than would normally apply under the new agreement, and to do so more quickly. *Id.*

205. For example, eliminating export subsidies will be of limited assistance because the vast majority of U.S. subsidies are for internal support. Oxfam Briefing Paper, *supra* note 184, at 12. “This internal support is set so high that vast surpluses are...dumped on world markets[.]”

While Third World nations supported WCA nations in their pursuit of eradicating cotton subsidies, this support has yet to translate into concrete results. In addition, from a broader perspective, it appears that industrialized nations face a fragmenting mosaic where Third World support of other Third World nations cannot be assumed and where coalitions are increasingly based on shared economic interests. In the Third World, such economic interests appear to be more fragmented than they are in the West, and thus while the North–South divide persists, the portrait of a unified postcolonial South is rapidly becoming more complex.

#### *D. A Unified West Confronts a Fracturing Third World*

##### *1. Asymmetrical Capacities and Sources of Power*

Unindustrialized poor nations have been trying to become part of the international trade regime because they have been promised it will assist their communities.<sup>206</sup> They are at a marked disadvantage within the regime in countless respects, however, including a lack of access to resources necessary to influence the international trade debate. In terms of research, strategic thinking and preparation, there is simply no match between the North and South. Industrialized nations have think tanks and academics methodically researching relevant topics and furnishing this research to government negotiators.<sup>207</sup> Additionally, governments in industrialized countries have droves of lawyers and other permanent staff to study and analyze the impact of negotiations.<sup>208</sup> In contrast, most Third World nations are too small to assemble resources for studies, research or strategic assessments, and even larger, richer industrializing countries may not have sufficient means to engage in these activities on the level found in industrialized nations.<sup>209</sup> Certainly, the nations of SSA are at a huge disadvantage and must rely on NGOs, the WTO Secretariat or other multilateral bodies for assistance. This assistance may or may not be sufficient and it certainly does not emerge solely from the interests of their nationals.

There are also broad inequalities in power. Industrialized nations account for the bulk of world trade, and can divide and rule by offering inducements

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leading to lower cotton prices. *Id.*

206. See LEROY TROTMAN, *The WTO: the Institutional Contradictions*, in DOHA AND BEYOND THE FUTURE OF THE MULTILATERAL TRADING SYSTEM 21 (Mike Moore ed. 2004).

207. They can also simulate discussions in an effort to predict the likely responses of their rivals. See Panagariya, *supra* note 78, at 1230.

208. See Trotman, *supra* note 206, at 21; see also Panagariya, *supra* note 78, at 1230. In addition, interest groups provide additional information and lobby these bodies.

209. As a consequence, it is much more difficult to define negotiating positions or develop responsive strategies with the intensity found in industrialized nations. Panagariya, *supra* note 78, at 1229. UNITED STATES GENERAL ACCOUNTING OFFICE, *supra* note 144, at 16-17.

during negotiations. Because they are few in number, industrialized countries can internalize the benefits of negotiations and avoid free rider problems, thus permitting more effective use of their bargaining power. They are also at comparable per capita income levels, and their rules and strategies are thus more similar and consistent in areas such as intellectual property rights and the environment, issues that generally divide along North-South lines. Finally, consensus regarding contentious issues is reached more easily within their ranks even when international viewpoints diverge.

Conversely, Third World nations have a smaller share of world markets and more limited bargaining power. They are numerous, lack economic Goliaths<sup>210</sup> and have diverse income levels, making it more difficult to develop common negotiating positions and sustain successful coalitions. Individual nations can free ride on common causes, while expending individual negotiating capital on more narrowly defined objectives. They can then be persuaded to yield on common objectives in return for realizing individual, narrowly defined goals; individual aspirations may diverge significantly. Add to this scenario the unfolding dynamic that larger and more influential Southern Tier countries, such as Brazil and India, are moving to the forefront of the international trade construct to serve as the purported voice of the Third World. With China's accession to the WTO, the size and impact of this coalition is unparalleled within the annals of the Organization.<sup>211</sup>

Thus, large industrialized nations present a generally unified front, while the priorities and interests of Third World states may often vary and diverge.<sup>212</sup> Larger and more industrialized Third World countries that may be realizing greater benefits from the WTO system than poorer nations may no longer share some of the goals and positions of ACP or the most impoverished states, even though fundamental similarities remain.<sup>213</sup> Many of the smallest and poorest nations are economically and technologically weak, and exhibit comparatively weak infrastructures, meager manufacturing bases, insubstantial services sectors and generally dim future economic prospects.<sup>214</sup> Meanwhile, other

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210. See, e.g., KOICHI HAMADA, *China's Entry into the WTO and its Impact on the Global Economic System*, in DOHA AND BEYOND THE FUTURE OF THE MULTILATERAL TRADING SYSTEM 27-28 (Mike Moore ed. 2004) (discussing China's relative economic position within the developing and developed world); Ramesh Adhikari & Yongzheng Yang, *What Will WTO Membership Mean for China and Its Trading Partners?*, FIN. & DEV., Sept. 2002, <http://www.imf.org/external/pubs/ft/fandd/2002/09/adhikari.htm>.

211. See Cho, *supra* note 143, at 235; see generally Hsiung, *supra* note 166, at 97-100 (discussing China's role in the WTO since accession).

212. For example, Southern nations have joined alliances that include industrialized nations, such as the Cairns Group of agricultural exporters. See Haque, *supra* note 18, at 1109-11 (discussing the diverging objectives of developing countries at Doha).

213. Subedi, *supra* note 3, at 445 (discussing the fluid nature of what defines and what is of interest to a developing country).

214. Haque, *supra* note 18, at 1110 (discussing the varying characteristics of developing nations, including those with "intrinsic economic weaknesses").



Southern Tier (and some Northern) nations are increasingly concerned about competing with China. This increasing complexity was apparent as the Fifth WTO Ministerial meeting in Cancun dealt with a core Third World issue, agriculture.

## 2. *A Unified North Faces a Fracturing and Diverse South*

Although there was Third World unity at Cancun, it may prove to be ephemeral because Third World interests are no longer entirely homogeneous or necessarily congruous. India, for example, wanted to protect agriculture, while Brazil was a member of the Cairns Group of agricultural exporters who were pushing to liberalize agricultural trade. Other Third World nations, such as the Group of 33,<sup>215</sup> wanted to include strategic products and a special safeguard mechanism regarding agricultural products. On yet a third front, a coalition of the African Union, the African, Caribbean, and Pacific countries and the Least Developed Countries (AU/ACP/LDCs) sought to continue the preferential treatment accorded to them under various preferential agreements, in addition to achieving G-33 demands.<sup>216</sup> Finally, a group of West African countries presented the "Sectoral Initiative on Cotton," the goal of which was the cessation of U.S. cotton subsidies, an initiative that, as previously discussed, ultimately failed.<sup>217</sup> It is possible that the dynamics between these groups are axiomatic of the evolving dynamics of the international trade regime and will prove decisive in future negotiations.<sup>218</sup>

While the Third World fragments, industrialized nations are able and willing to act as a cohesive front. They remain adamant in their bargaining stances regarding Third World demands, which often succeed only when accompanied by support from one or more major industrialized western nations, such as the Declaration on TRIPS.<sup>219</sup> Indeed, as negotiations on the

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215. See Cho, *supra* note 143, at 236. The G-33 nations include Antigua and Barbuda, Barbados, Belize, Benin, Botswana, China, Congo, Cote d'Ivoire, Cuba, Dominican Republic, Grenada, Guyana, Haiti, Honduras, India, Indonesia, Jamaica, Kenya, Korea, Mauritius, Madagascar, Mongolia, Mozambique, Nicaragua, Nigeria, Pakistan, Panama, Peru, Philippines, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Senegal, Sri Lanka, Suriname, Tanzania, Trinidad and Tobago, Turkey, Uganda, Venezuela, Zambia, and Zimbabwe. See <http://www.twinside.org.sg/title2/twninfo273.htm> (last visited Apr. 3, 2006).

216. Cho, *supra* note 143, at 236.

217. See text and notes *supra* Part III.C.

218. As Professor Subedi surmises:

A fragmented numerical majority of the poor would be like a rag-tag army facing the challenge of the better equipped. The poor among the developing countries may keep on adopting resolutions full of political and economic rhetoric, yet the developed countries will continue carrying out the real business of the WTO.

Subedi, *supra* note 3, at 445.

219. UNITED STATES GENERAL ACCOUNTING OFFICE, *supra* note 144, at 9. The Declaration on TRIPs was realized mostly because of pressure from civil society groups in the North and South, and front-page stories about the AIDS epidemic and limited access to drugs in Africa. As the public in industrialized nations became more aware and concerned, inaction

Singapore issues unfolded, all of these forces became evident.<sup>220</sup> A significant number of nations opposed opening negotiations on these issues, but the opposition by Third World nations was not unanimous or uniform. Given their generally open capital markets, higher levels of incomes, and their preoccupation with agricultural liberalization, many South American nations were not opposed to negotiating these matters. The real opposition came from African and Asian nations concerned about implementation. Once they were granted an Article I waiver on the EC-ACP (Cotonou) Partnership Agreement,<sup>221</sup> however, African nations basically capitulated; having exhausted their negotiating capital on the waiver and then became free-riders on India's persistence in negotiating the Singapore issues.<sup>222</sup> One might be tempted to believe that all is well enough if African nations obtained their desired waiver and larger nations can pursue the Singapore issues on their behalf.<sup>223</sup> Coalition partners who capitulate too often, however, will cease to be meaningful partners. Moreover, the real dilemma is diverging Southern Tier interests, for it may be that no one bothers to help the poorest and smallest nations as Third World unity dissipates. These negotiations and the general direction of dispute settlement cases illustrate that the fractures may be deepening and multiplying.

#### CONCLUSION

It is at this point that most law review articles posit a solution or happy ending of sorts. As the problem solvers of the world, hope perpetually springs eternal for us lawyers, and hence we must find some silver lining, some ray of hope, and some way to solve the problem at hand. This essay will resist that temptation, for it is uncertain whether such optimism is warranted in this case. We may be left to ponder what happens if one is always between a proverbial rock and a hard place, which is where Sub-Saharan African nations seem to be. The answer is illusive.

One could argue that the West can and should give more aid. However, it

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became politically untenable. *See id.*

220. *See* Cho, *supra* note 143, at 230-31 (discussing the negotiation of Singapore issues at Cancun).

221. African, Caribbean and Pacific States-European Economic Community: Final Act, Minutes and Fourth ACP-EEC Convention of Lome, 15 Dec. 1989, 29 I.L.M. 783 (1990); GATT 1947, *supra* note 12, at art. I (referring to the requirement to grant most favored nation treatment to like products with respect to tariffs or any other rules or formalities imposed in connection with imports).

222. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, *supra* note 144, at 30. The countries of Southeast Asia, Indonesia, Malaysia, the Philippines and Thailand also did not press these issues, presumably because they decided it was unproductive to dedicate resources to a clash India had already decided to wage, which had partial success, but at a significant cost. *See* Cho, *supra* note 143, at 230-32.

223. Of course, the ACP nations viewed the waiver as crucial to their national interests, and thus probably count this as a victory, which of course it is in the short term.

is highly doubtful that such aid will be forthcoming, and moreover, it might come at too high a price due to the immense control donors wield in poor nations. In some respects, aid has been at the heart of development and few would say development has been successful.<sup>224</sup> Looking beyond aid, one could argue that economic prospects would improve if Sub-Saharan African nations diligently followed World Bank, IMF and now WTO prescriptions, and the West meaningfully followed through with its promised preferences and dismantled its subsidy programs. Whether either scenario is viable and realistic is a very open question, because it is impossible to force large, wealthy nations to act, especially where they do not perceive it to be in their national interest, which is often defined by the political influence of industries seeking protection. It would indeed be astonishing if industrialized nations decided to assist the nations of SSA in a significant manner,<sup>225</sup> but this author believes this is highly unlikely.

The WTO operates by consensus and it is tempting to imagine that numerous small states could conceivably obtain concessions in areas of importance to them.<sup>226</sup> With regard to low cost discrete issues that might benefit large industrialized nations, this may be true. It is doubtful, however, that concessions will be obtained in the areas most important to small poor nations because they conflict with industrialized nation interests. In the most important areas, the WTO has yet to go beyond rhetoric vis-à-vis the needs of these nations. Economic strength means power and control in the international trade system, which was built by large industrial nations to carry out their goals and fulfill their economic needs.<sup>227</sup> In its current form, the system enables dominant countries to effortlessly buy off the weak.<sup>228</sup>

Nevertheless, the poorest of poor nations are part of an increasingly powerful post-colonial world, which could be a positive when viewed through the lens of Third World solidarity. It is possible that as new centers of power rise in the Third World, they will maintain a more sympathetic view of the

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224. See *supra* text and note 4 (discussing in detail the meaning and construct of development).

225. However, "significant manner" can mean many things. See Gordon & Sylvester, *supra* note 2, at 71-86.

226. Even if consensus rules enable the numerical majority to block initiatives in the WTO, or if industrialized nations come to believe they cannot achieve their goals within its confines, bilateral agreements, such as Contounu and AGOA are likely to proliferate. Within these regimes, bargaining power is even more diluted as these nations beg and plead for access, even as the agreements are structured to wring concessions, control and resources from poor nations while simultaneously catering to the needs of the industrialized countries that conclude these agreements.

227. See Trotman, *supra* note 206, at 21.

228. See Cho, *supra* note 143, at 237 (discussing the use of bilateral and regional trade agreements when multilateralism loses steam and its benefits to certain U.S. interests). As of 2004, the United States had entered into bilateral free trade agreements (FTA) with Jordan (2000), Singapore (2003), Chile (2003) and Australia (2004), and is negotiating with the Southern African Customs Union (SACU) and pursuing the Free Trade Agreement of the Americas. *Id.*

nations with whom they share a common history of domination and colonization by the West. Nevertheless, Third World solidarity seems to be withering under the unrelenting march of globalization and unbridled capitalism. While Sub-Saharan African nations continue to identify and work with other Southern Tier nations, they are of limited assistance to their larger Southern Tier counterparts in the WTO because of their economic weakness. As large nations such as China continue to occupy the trade arena in areas such as textiles, smaller Third World countries are reeling because they are unable to compete, and the worst off in SSA remain outside the global economic community.

Yet if Sub-Saharan African nations remain determined to become viable actors in the global economy, one possible approach may be regional integration. While not a new idea for Africa, in the context of the contemporary international economic system regional integration could prove fruitful. If it is impossible to compete within the global economy, it may make sense to compete regionally, especially given the improbability of infusions of adequate aid and investment from the West.<sup>229</sup> It may now be more feasible given the rising sources of Third World economic strength and capital.<sup>230</sup> When viewed as a means for intra-regional growth, rather than a tool to attract western investment or to satisfy World Bank or other international development objectives, regional integration becomes an idea worth pursuing. Of course, such a path would demand an entirely different perspective, especially by the nations and peoples of Sub-Saharan Africa. It would entail a belief in African prospects and possibilities, where capabilities can be nurtured and encouraged. Looking inward is an almost heretical thought in the current climate of allegedly unstoppable globalization. Nevertheless, perhaps the unorthodox is a possibility worth exploring.

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229. For a critical appraisal of a recent attempt at African integration, see James Gathii, *A Critical Appraisal of the NEPAD Agenda in Light of Africa's Place in the World Trade Regime in an Era of Market Centered Development*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 17 (2003).

230. This may be taking place on some level already, with Chinese investment in oil-producing African countries.



## COMMENT