

# BOOK REVIEW ESSAY

## READING THE SEATTLE MANIFESTO: IN SEARCH OF A THEORY

Larry Lee\*

*Lori Wallach & Michelle Sforza, Whose Trade Organization? Corporate Globalization and the Erosion of Democracy: An Assessment of the World Trade Organization. Washington, D.C.: Public Citizen (1999). Pp. xii, 229, index. \$15.*

### INTRODUCTION

The protests at the 1999 World Trade Organization Ministerial Round have been called the pinnacle of power for non-governmental organizations (NGOs).<sup>1</sup> A wide spectrum of NGOs, representing public interest groups from around the world, converged on Seattle. Lori Wallach, director of Global Trade Watch (a division of Ralph Nader's Public Citizen), masterminded the protests, personally organizing the NGO coalition.

Just before the Seattle protests in October 1999, Wallach and Public Citizen staffer Michelle Sforza<sup>2</sup> published and distributed *Whose Trade Organization?: Corporate Globalization and the Erosion of Democracy (WTO?)*.

---

\* Law Clerk, The Honorable Henry H. Kennedy, Jr., U.S. District Court for the District of Columbia; J.D., New York University School of Law, 2003. My deepest gratitude to Professor Joseph Weiler for his support and enthusiasm in guiding this work, produced for the Spring 2002 Jean Monnet Seminar on International Economic Law and Justice at NYU. My thanks to the staff of the *New York University Law Review*, and special thanks to Amelie Trahan, Steve Yuhan, and David John Ball for their editing and Vic Goldfeld and Ming Hsu Chen for helpful conversations. My love to Camila Viegas, who made me watch *Harry Potter and the Chamber of Secrets* immediately after two sleepless nights of finishing this piece—Cami, *te amo*.

<sup>1</sup> See, e.g., Debora Spar & James Dail, Of Measurement and Mission: Accounting for Performance in Non-Governmental Organizations, 3 Chi. J. Int'l L. 171, 172 (2002) ("In what may be seen as a watershed of non-governmental activity, the 1999 world trade talks in Seattle were effectively paralyzed by NGO protests, causing great embarrassment (and in some cases, significant financial loss) to the firms and states involved.").

<sup>2</sup> Throughout this review, I refer to "the authors" but often to Wallach alone as the author of *Whose Trade Organization? (WTO?)*. This is intentional, as Wallach is the prime author of most Public Citizen work on international trade law and because she is also the key activist.

The book—a wide-ranging criticism of the World Trade Organization (WTO) from its inception to 1999—is essential reading for students of the WTO and trade law because of who wrote it and who reads it. First, who wrote it: *WTO?* provides insights into the thoughts of Wallach and Public Citizen, which represents NGOs with a very real power to stymie the WTO. Second, who reads it: *WTO?* is for mass consumption and has succeeded in reaching a large audience.<sup>3</sup> As such, it is not an academic piece meant to engage lawyers in a lively intellectual debate. The book is propaganda, meant to move people to act. To criticize it, as a WTO official once criticized Wallach, for blending “legitimate concerns, deliberate or partly deliberate misinformation, and populist rhetoric”<sup>4</sup> is accurate but beside the point. As a result, one should read *WTO?* as one might read the *Communist Manifesto*,<sup>5</sup> as opposed to a more subtle, self-consciously academic work like *Das Kapital*<sup>6</sup> (to stay with the Marxist analogy).

Different questions are appropriate for works like this. Who is the book’s intended audience, and what are they supposed to believe? What arguments are meant to appeal to the audience’s preconceptions? What do the authors really believe? Do they subscribe fully to their own rhetoric? What was their intellectual inspiration for the book? When complications arise that seem to refute their assertions, how do they cope with them?

At first blush, the book seems disorganized, even incoherent. The authors attack *everything* the WTO has done. This, I argue, is intentional. The authors set out for themselves the difficult task of attracting the widest support possible. This is an attempt to gain democratic legitimacy, which some NGOs feel is essential to have because their major criticism of the WTO is precisely that it lacks such legitimacy.

---

<sup>3</sup> Perhaps because it is easy reading for a trade law book, *WTO?* has been relatively popular—not *Harry Potter* popular, but *WTO?* fares well compared to other books on the World Trade Organization (WTO). Search for “WTO” on Amazon.com (see <http://www.amazon.com> (searched 10/31/02)) and two of the top ten bestsellers in the WTO category are *WTO?* (seventh place) and a shorter, pamphlet version of the same book called *The WTO: Five Years of Reasons to Resist Corporate Globalization* (fourth place). First place went to George Soros, *George Soros on Globalization* (2002); second to Nicholas R. Lardy, *Integrating China into the World Economy* (2002); third to Supachai Panichpakdi & Mark L. Clifford, *China and the WTO: Changing China, Changing World Trade* (2002). Combine *WTO?*’s sales with its shorter cousin’s, and you likely have the bestselling WTO book online.

<sup>4</sup> Moises Naim, *Lori’s War: The FP Interview*, *Foreign Pol’y*, Spring 2000, at 28, 30 [hereinafter Naim, Wallach Interview].

<sup>5</sup> Karl Marx et al., *The Communist Manifesto* (Oxford Univ. Press 1998) (1848).

<sup>6</sup> Karl Marx, *Das Kapital* (Regnery Publishing 1999) (1867).

The problem with this strategy, to paraphrase W.C. Fields, is that you cannot please all of the people all of the time. There is no unitary public interest, contrary to what the authors imply. Many groups feel wronged by the WTO, but in many cases, this is the only common ground. Their common procedural interest in being heard aside, their substantive interests conflict. In the end, by reaching out to everyone, all the authors are able to muster is a common hatred for the WTO. This attempt to reach out to a wide audience explains, but does not necessarily excuse, Wallach's characterization of WTO cases, panels, et cetera.

Like the *Communist Manifesto*, *WTO?* presents a single, powerful intuition as an all-encompassing, Manichaeian theory: Corporate interests have captured the WTO, which, in turn, consistently rules against the wider public interest. In the authors' view, all problems originate from this basic conflict. But this approach leads to the book's major flaws.

The book mischaracterizes WTO players and doctrines when the realities do not comport with their "corporate interests = democratic deficit" theory. Some of this rhetoric may be appropriate and even necessary. A political book has a different function than an academic analysis. But in places, the rhetoric goes overboard and compromises the credibility of the book.

In addition, *WTO?* reflects a somewhat parochial, American view of the world and betrays the limits of the authors' imaginations. It does not grapple seriously with the priorities or values of Southern<sup>7</sup> NGOs and does not acknowledge the potential conflicts between Northern and Southern NGOs (e.g., that developing states may not be ready to incorporate the environmental and health standards of developed countries). Making some attempt to resolve these conflicts would help Public Citizen form more powerful coalitions.

Finally, the authors misconceive their project. They do not consider ways in which the WTO might help constrain the corporate powers that they oppose. The authors also do not see that it is not "democratic accountability" they are after per se, but rather a more general theory of fairness that has already been developed in some scholarly works. A recasting of their project can only help the authors in their advocacy.

This review analyzes *WTO?* in three parts.<sup>8</sup> Part I provides a history of Public Citizen and an overview of the book. Part II analyzes

---

<sup>7</sup> This review refers to developed countries as "Northern" and those from developing countries as "Southern."

<sup>8</sup> In Parts I and II, this review also deals with another book that Wallach coauthored. See Pub. Citizen & Friends of the Earth, NAFTA Chapter 11 Investor-to-State Cases:

the book's mischaracterizations of cases and events. Part III criticizes the authors' apparent lack of curiosity regarding academic debates on developing countries and the WTO, the use of the WTO to constrain corporate power, and theories of legitimacy versus theories of democracy.

This review criticizes *WTO?* on its own terms. I take seriously the values that the authors espouse and have no desire to write an apology for the status quo and corporate interests or to debunk the importance of the environment or human rights. Rather, I argue that the approach the authors take in *WTO?* may undermine their own project.

## I

### AN ECLECTIC BOOK FOR AN ECLECTIC COALITION

One factor that helps explain the way the book is written is the background of the authors and the group they run. Public Citizen is a domestic public interest organization that developed an international NGO branch, Global Trade Watch (GTW). One could even argue that GTW and the WTO have similar problems: As new institutions, both retained their previous, and possibly no longer relevant, worldviews. If the WTO is a legal body that still thinks like a diplomatic one, GTW is an international NGO that still thinks like a domestic public interest group.

#### A. *History of Public Citizen and Global Trade Watch*

Public Citizen seems an unlikely candidate to lead a global coalition of NGOs opposed to the expansion of the WTO. The biographies of Ralph Nader, Lori Wallach, and Public Citizen help shed light on their worldview and how (and why) they entered the world of international trade law.

Nader, Public Citizen's founder, became an activist in college, but his first major victory was the 1965 publication of *Unsafe At Any Speed*,<sup>9</sup> an exposé of the auto industry that later convinced Congress to make car seatbelts mandatory. Since then, Nader's lobbying and litigation efforts have resulted in the passage of landmark U.S. con-

---

Bankrupting Democracy, Lessons for Fast Track and the Free Trade Area of the Americas (2001) [hereinafter *Bankrupting Democracy*]. Wallach is credited with writing this book along with Mary Bottari of Public Citizen and David Waskow of Friends of the Earth. I review *Bankrupting Democracy* because it is a sort of sequel to *WTO?*. Wallach analyzes international investment claims and raises essentially the same objections as she does in *WTO?*.

<sup>9</sup> Ralph Nader, *Unsafe At Any Speed: The Designed-In Dangers of the American Automobile* (1965).

sumer protection laws ranging from airbags in cars to the Freedom of Information Act.<sup>10</sup> Nader was influential long before critics accused him of handing the U.S. presidency to George W. Bush.<sup>11</sup>

What does he believe, and what does he stand for? In *Unsafe at Any Speed*, Nader identified the problem that Public Citizen is still fighting: "A great problem of contemporary life is how to control the power of economic interests which ignore the harmful effects of their applied science and technology."<sup>12</sup> The group operates under the theory that corporations have captured the federal government, forcing it to pass legislation inimical to the more diffuse interests of average citizens. Because consumers are underrepresented and lack the privileged access to legislators that corporations possess, Public Citizen protects them by ostensibly providing citizens the access they've been denied. (p. 232).<sup>13</sup>

Unlike other NGOs involved with trade matters (e.g., the environmental group Friends of the Earth), Public Citizen is primarily dedicated to consumer protection,<sup>14</sup> though it does not focus on a single issue. Public Citizen often works with other NGOs.<sup>15</sup> Public Citizen divisions, such as Congress Watch, monitor governments and decisionmaking institutions, and Public Citizen has an active litigation group that focuses on "open government, union democracy, [and] separation of powers," among other things.<sup>16</sup>

---

<sup>10</sup> Nader also helped ensure reimbursement for being bumped off of airline flights, the banning of cancer-causing dyes, the Superfund law, and the release of the Nixon tapes. Pub. Citizen, Public Citizen: 30 Years, Pub. Citizen News, Jan. 2001, at <http://www.citizen.org/documents/pctimeline.pdf>; see also Karen Croft, Brilliant Careers: Citizen Nader, Salon.com, at <http://archive.salon.com/bc/1999/01/26bc.html>.

<sup>11</sup> Joan Walsh, The (Non-)confessions of St. Ralph, Salon.com, Jan. 17, 2000, at [http://www.salon.com/books/feature/2002/01/17/nader/index\\_np.html](http://www.salon.com/books/feature/2002/01/17/nader/index_np.html) ("It's official: Green Party spoiler Ralph Nader gave the presidency to George W. Bush in 2000 by stealing votes from Al Gore.").

<sup>12</sup> Nader, *supra* note 9, at ix (documenting carelessness of American auto industry, especially with regard to vehicle safety).

<sup>13</sup> "Most consumers don't have time to visit Washington D.C., roam the halls of government and ensure their voices are heard. Public Citizen, a national nonprofit organization with 150,000 members, has tackled the task for them." P. 232.

<sup>14</sup> In addition to Global Trade Watch (GTW), Public Citizen's other groups are dedicated to campaign finance reform, domestic health and safety, and nuclear safety. See Pub. Citizen, Want to Know About Public Citizen?, at <http://www.citizen.org/about/> (last visited Aug. 23, 2003).

<sup>15</sup> See, e.g., Pub. Citizen v. U.S. Trade Representative, 5 F.3d 549, 550 (D.C. Cir. 1993) (explaining that Friends of the Earth and Sierra Club joined Public Citizen as plaintiffs to compel U.S. Trade Representative to produce environmental impact statements on North American Free Trade Agreement (NAFTA) before United States ratified Agreement).

<sup>16</sup> Pub. Citizen, The Litigation Group, at <http://www.citizen.org/litigation> (last visited Aug. 23, 2003) ("Public Citizen's Litigation Group is a public interest law firm that specializes in federal health and safety regulation, consumer litigation, open government, union democracy, separation of powers and the First Amendment.").

Public Citizen focused on domestic issues until the mid-1980s, when it found that certain consumer protection bills it backed ran afoul of the General Agreement on Tariffs and Trade (GATT);<sup>17</sup> thus, for Public Citizen, international law became a domestic issue. In 1991, Public Citizen started GTW, run by Wallach, which campaigned against the WTO, the North American Free Trade Agreement (NAFTA), and other institutions constraining U.S. consumer protection laws.

Wallach is much like her famous mentor.<sup>18</sup> A year before Seattle, the *Wall Street Journal* dubbed her the “agitator-in-chief of the anti-free-trade opposition.”<sup>19</sup> At the time, Wallach was the single most influential and famous opponent of economic globalization. In 1998, GTW released online the secret draft of the Multilateral Agreement on Investment (MAI) written by the Organization for Economic Cooperation and Development (OECD); the resulting public furor killed it.<sup>20</sup> Just after Seattle, Wallach’s face made *Foreign Policy*’s cover, which read, “Why Is This Woman Smiling? Because she just beat up the WTO in Seattle, that’s why.”<sup>21</sup>

Wallach has articulated a philosophy much like Nader’s. A self-described progressive, Wallach places “a higher value on process issues that have to do with power and equality, and accountability, and is more suspicious about big everything . . . . Progressives are likely to criticize government for getting too big, a media entity for getting too big, a private company for getting too big.”<sup>22</sup> But in the

---

<sup>17</sup> Naim, Wallach Interview, *supra* note 4, at 29 (“While lobbying the U.S. Congress on consumer protection issues, [Wallach] realized that many of her legislative causes conflicted with the international commitments that the United States had undertaken as a member of the [GATT] . . .”). The General Agreement on Tariffs and Trade (GATT) was the predecessor to the WTO, and the provisions of GATT were incorporated into the WTO. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]; see also WTO, The WTO in Brief: The Multilateral Trading System—Past, Present and Future, at [http://www.wto.org/english/thewto\\_e/whatis\\_e/inbrief\\_e/inbr01\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm) (last visited Sept. 6, 2003). GATT’s substantive rules still form part of the WTO Agreements.

<sup>18</sup> “Imagine Ralph Nader with a sense of humor, and you have Lori Wallach.” Bob Davis, Free-Trade Foe, Stymied on IMF, Shifts to Other Fights, *Wall St. J.*, Apr. 6, 1998, at A26.

<sup>19</sup> *Id.*

<sup>20</sup> The Organization for Economic Cooperation and Development (OECD) prepared a draft of the Multilateral Agreement on Investment (MAI), which included substantive protections for investments similar to those offered by NAFTA. The intention of the drafters was to have the MAI become administered by the WTO. For a history of the MAI, including an account of its negotiation in secrecy and its ultimate demise, see generally Peter T. Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, 34 *Int’l Law.* 1033 (2000).

<sup>21</sup> See Naim, Wallach Interview, *supra* note 4, at cover.

<sup>22</sup> *Id.* at 31.

end, large institutions per se are not the problem to Wallach; public enemy number one is the large multinational corporation.<sup>23</sup> She does not oppose free trade.<sup>24</sup> Rather, Wallach opposes the current system of “corporate managed trade,” as she puts it (p. 3), that benefits large corporations without real free trade.

### B. *Writing for the Eclectic Coalition*

Given Wallach’s background, it is easier to understand *WTO?*. The authors start *WTO?* by announcing their project. First, they document “an insidious shift in decision-making away from democratic, accountable forums—where citizens have a chance to fight for the public interest—to distant, secretive and unaccountable international bodies, whose rules and operations are dominated by corporate interests.” (p. 2). Specifically, the authors blame multinationals: “*Whose trade organization is it?* It does not appear to belong to or benefit the majority of the world’s citizens. Rather . . . the emerging system favors huge multinational companies and the wealthiest few in developed and developing countries.” (p. 3). This shift in decisionmaking from local governments to Geneva has eroded “public interest policies designed to safeguard the environment, our families’ health and safety, human rights, and democracy” (p. 4), and has devastated the world economy. (pp. 3-4).

*WTO?* reads like a laundry list of grievances against the WTO. Most of the book documents the WTO’s unique contribution to problems associated with the environment (ch. 1), food safety policies (ch. 2), genetically modified organisms (GMOs) (ch. 3), intellectual property rights (ch. 4), developing countries’ economies (ch. 5), developed countries’ economies (ch. 6), and human and labor rights (ch. 7). Chapter 8 focuses on problems with the institutional design of the WTO. Chapter 9 recommends policy changes.

This is an ambitious project, and to a great degree, the authors succeed. Just over 200 pages, the book covers nearly every major case before the WTO, describes most of the various WTO agreements, and treats each issue with admirable brevity and clarity. Each chapter begins with a one-page capsule that summarizes key cases or laws and defines important terms. No issue gets more than two or three pages of coverage, and each summary includes a competent, jargon-free

---

<sup>23</sup> Id. at 53 (quoting Wallach as saying, “[W]hen it comes down to nuts and bolts, the real power pushing this particular system is a handful of big multinational corporations.”).

<sup>24</sup> See, e.g., id. at 38 (noting that in 1980s, Public Citizen pushed to allow import of Japanese cars that were then more fuel efficient and safe).

explanation of even the most complicated law, while showing how the law threatens a particular public interest. Here are several examples:

On *U.S.—Gasoline*<sup>25</sup> and GATT Article XX: “In 1996 the WTO Appellate Body ruled that air qualified . . . as an ‘exhaustible natural resource’ worthy of protection but that the U.S. government-set gasoline cleanliness requirements discriminated against foreign gasoline and thus failed to satisfy Article XX’s *chapeau*.” (p. 17).

On the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement:<sup>26</sup> “The addition of intellectual property rules to the [WTO] at U.S. insistence was highly controversial. First, an international regime . . . already existed with the World Intellectual Property Organization . . . . Second, while the purpose of the WTO is, ostensibly, to liberalize trade, [intellectual property] protections restrict trade by design.” (p. 102).

On Process Production Measures (PPMs):<sup>27</sup> “GATT dispute resolution panels have ruled that products cannot be treated differently on the basis of how they are produced or harvested. The ability to distinguish among production methods is essential to environmental protection and environmentally sensitive economic policies. A key component to setting sustainable policies is the ability to change the conditions and processes under which goods are produced . . . to more environmentally friendly ones.” (p. 23).

The way the authors crystallize relatively complicated law into clear prose is particularly important to raise public awareness of WTO

---

<sup>25</sup> See WTO Appellate Body Report on United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (Apr. 29, 1996), 35 I.L.M. 603 (May 20, 1996) [hereinafter *Standards for Reformulated and Conventional Gasoline*].

<sup>26</sup> For the text of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), see Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter *WTO Agreement*], Annex 1C, in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 321 (1999), 33 I.L.M. 81 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf) (last visited Aug. 27, 2003) [hereinafter *TRIPS Agreement*]. For an excellent introduction to TRIPS, see Robin J. Effron, Note, *Secrets and Spies: Extraterritorial Application of the Economic Espionage Act and the Trips Agreement*, 78 N.Y.U. L. Rev. 1475 (2003).

<sup>27</sup> Process Production Measures (PPMs) are trade measures that regulate how a product is produced (e.g., banning import of clothing made by child labor) rather than aspects of the products themselves (e.g., banning clothing that is not flame retardant). WTO panels have not yet recognized PPMs as a valid reason for not complying with obligations under GATT. This means that, currently, member states can not refuse to import goods that are made in violation of many states' labor and environmental laws. See generally Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. Small & Emerging Bus. L. 131 (1999).



issues, as the increasingly corpulent<sup>28</sup> and convoluted<sup>29</sup> WTO cases are hard enough for trade lawyers to parse.

Generally, the authors have a sophisticated understanding of the WTO. But some chapters are better than others. The least convincing chapters are those in which the authors stray from their analyses of WTO cases and make speculative macroeconomic arguments. Chapter 6 on developed countries is the least compelling chapter in the book. (pp. 150-71). The authors blame the merger boom of the late 1990s, and the accompanying layoffs, on Trade Related Investment Measures (TRIMs)<sup>30</sup> and General Agreement on Trade in Services (GATS).<sup>31</sup> Without citing a single WTO case, the authors assert that because mergers reached their peak after 1995, the boom must have resulted from the WTO's entry into force.<sup>32</sup> Given that the intended audience of this chapter is organized labor, why did the

---

<sup>28</sup> The length of GATT/WTO opinions has grown since GATT's inception. From 1948 to 1959, GATT panels published nine full decisions averaging seven pages. From 1995 to 1999, the WTO published 31 decisions averaging 184 pages—the largest at 579 pages! By comparison, landmark U.S. decisions are flimsy: e.g., *Marbury v. Madison* (19 pages), *Brown v. Board of Education* (9 pages), and *Roe v. Wade* (36 pages). John A. 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, 766 tbl. “Average Length of GATT/WTO Opinions” (2000).

<sup>29</sup> Not only are WTO opinions too long, but they also include everything and the kitchen sink. See *id.* at 765 n.101 (quoting Robert Hudec, who observed that GATT and WTO decisions are “burdened with everything a government has said, no matter how little sense it makes . . . or how much it may confuse the understanding of the panel decision”). Ragosta notes that the WTO has adopted the old GATT practice of summarizing “every point raised by a participant government, no matter how far-fetched, poorly made, duplicative, or tangential,” for diplomatic reasons—to avoid offending lawyers and to let them hide behind decisions to mollify losing domestic interests. *Id.* at 765.

<sup>30</sup> “The biggest effect of the TRIMs Agreement in developed countries has been to promote the frenzy of service sector mega-mergers.” *Id.* at 152. The Agreement on Trade Related Investment Measures (TRIMs) was negotiated during the Uruguay Round and went into force as part of the WTO Agreements in 1994. See Agreement on Trade-Related Investment Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 143 (1999), 33 I.L.M. 28 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/18-trims.pdf](http://www.wto.org/english/docs_e/legal_e/18-trims.pdf) [hereinafter TRIMs]; see also WTO, Trade and Investment, at [http://www.wto.org/english/tratop\\_e/invest\\_e/invest\\_e.htm](http://www.wto.org/english/tratop_e/invest_e/invest_e.htm) (last visited Aug. 23, 2003).

<sup>31</sup> “The primary trend that has accompanied the implementation of the GATS Agreement has been a tidal wave of global mergers between existing service providers.” P. 156. GATS is the General Agreement on Trade in Services, which was negotiated during the Uruguay Round and went into force as part of the WTO Agreements in 1994. See General Agreement on Trade in Services, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1B, in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 284 (1999), 33 I.L.M. 1167 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/26-gats.pdf](http://www.wto.org/english/docs_e/legal_e/26-gats.pdf) [hereinafter GATS]; see also WTO, Services Trade, [http://www.wto.org/english/tratop\\_e/serv\\_e/serv\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/serv_e.htm) (last visited Aug. 23, 2003).

<sup>32</sup> According to the authors:

authors make an attenuated argument (WTO = mergers = layoffs) rather than pointing to areas that directly harm labor, such as increased steel imports? Ironically, the authors, who criticize the invasiveness of WTO rules on the regulatory autonomy of states, lament the lack of WTO antitrust provisions “to regulate competition for the benefit of consumers and entrepreneurs.” (p. 161).

\* \* \*

The book is a tour de force of WTO case law. But why is such breadth necessary? The authors observe that WTO “tribunals systematically rule against domestic laws challenged as violating rules” because, when the authors wrote (mid-1999), only three of twenty-two cases had been resolved in favor of the defending country. (p. 5). WTO? would be considerably more coherent if the authors instead had analyzed several key cases to validate their thesis that the WTO is part of a system of corporate-managed trade that excludes affected citizens from participating.

WTO? is easy fodder for the legal academic. But the authors are activists, not academics. Their goal, to paraphrase Marx, is to change the WTO, not philosophize about it.<sup>33</sup>

One may, however, criticize the authors on their own terms: A book written to educate a mass audience does not require *WTO?*'s staggering breadth. But if action, not just mass education, is the primary goal, then the point of the book's breadth becomes clear: *WTO?* covers every issue that might conceivably resonate with a reader to motivate her into action.

Each chapter appeals to a different interest group—parts of the vast coalition that Wallach assembled in Seattle. For the U.S. environmentalists, Chapter 1 covers the *Shrimp/Turtles*,<sup>34</sup> *Dolphin/Tuna*,<sup>35</sup>

---

The new corporate right to a “commercial presence” in other WTO Member countries under the GATS Agreement fosters increased consolidation in numerous service sectors. Indeed, 1998 is considered the year of the “mega-merger,” witnessing more than 12,500 deals totaling more than \$1.6 trillion—an all-time record for mergers and acquisitions.

P. 156.

<sup>33</sup> The authors state:

The goal of this book is to shed light on the impacts of the current system for those who will be most affected . . . . We have written this book for people who know very little about the WTO's rules or its five-year track record and who have no idea what a threat the current agreement poses to their health, safety, livelihood, food, environment and future.

P. 3.

<sup>34</sup> WTO Appellate Body Report on United States—Import Prohibitions of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998), 41 I.L.M. 149 (2002) [hereinafter *Shrimp/Turtles*].

and *US-Gasoline* cases.<sup>36</sup> For European environmentalists and consumers, some chapters cover food safety (*Beef Hormones*)<sup>37</sup> and GMOs. (ch. 3). For human and labor rights activists, Chapter 7. For labor unions (the book mentions the Teamsters and United Steel workers as GTW supporters (p. 181)), Chapter 7 on labor rights and Chapter 6 on unemployment.

Wallach knew exactly for whom she was writing, and one can see the book as an attempt to validate the specific interests of her coalition partners. Her power comes from a Rolodex “the size of an automobile tire” which contains the names of literally hundreds of different, concerned NGOs and interest groups.<sup>38</sup> In Seattle, Wallach personally organized a coalition of assorted domestic groups (labor unions, environmentalists, etc.)<sup>39</sup> and international partners,<sup>40</sup> down to the details of finding everyone lodging.<sup>41</sup> Wallach estimates that over 40,000 people associated with the coalition attended the protest.<sup>42</sup>

Accordingly, *WTO?* contains something for everyone. Any coalition partner could pick up the book and find a short, clear articulation of her own grievance against the WTO. But common loathing is not an organizing principle, it is just plain politics—the enemy of my enemy is my friend. Politics makes strange bedfellows (Tibetan

---

<sup>35</sup> See GATT Dispute Settlement Panel Report on United States—Restrictions on Imports of Tuna, GATT B.I.S.D. (39th Supp.) (Sept. 3, 1991), 30 I.L.M. 1594 (1991) [hereinafter *Dolphin/Tuna I*]; GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, DS29/R (June 16, 1994), 33 I.L.M. 839 (1994) [hereinafter *Dolphin/Tuna II*].

<sup>36</sup> See Standards for Reformulated and Conventional Gasoline, *supra* note 25.

<sup>37</sup> WTO Appellate Body Report on EC—Measures Concerning Meat and Meat Products, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *Beef Hormones*].

<sup>38</sup> Davis, *supra* note 18, at A26 (“[Wallach’s] real power comes from a circular Rolodex the size of an automobile tire stuffed with the names and phone numbers of hundreds of environmentalists, labor organizers, church groups, animal-rights organizers, and Pat Buchanan-style conservatives around the world whom she can tap for trade campaigns.”).

<sup>39</sup> Global Trade Watch, About Trade Watch, at <http://www.citizen.org/trade/about> (last visited Aug. 23, 2003) (“We have been part of building a diverse, nationwide U.S. grass-roots coalition with labor, religious, family farm, environmental, and community groups . . . .”); see Naim, Wallach Interview, *supra* note 4, at 46 (noting that Wallach assembled odd coalition of “labor, Greens, environmentalists, Gray Panthers, progressives . . . [c]hurch groups, Tibetan monks, [and] small businesses”).

<sup>40</sup> See Global Trade Watch, *supra* note 39 (“Public Citizen is part of the broad-based Our World is not for Sale (OWINFs) network, which includes social movements and organizations from dozens of countries.”).

<sup>41</sup> Naim, Wallach Interview, *supra* note 4, at 50. For the Seattle protests, Wallach obtained 400 hotel rooms by “max[ing] out the personal credit cards of every individual staff member” in addition to keeping over 2000 people in families’ homes in the Seattle area. *Id.* at 49-50.

<sup>42</sup> *Id.* at 32.

monks and Teamsters?), but—at the risk of sounding facile—something more is needed to make Seattle more than a one-night stand.

Wallach believes there is a unifying principle—democracy. Beyond each coalition member being injured in some way by the WTO, her coalition bonds around the idea that “philosophically, . . . the democracy deficit in the global economy is neither necessary nor acceptable.”<sup>43</sup> If Wallach is right, then by her own criteria *WTO?* focuses too heavily on *substantive* interests of different groups without elucidating a *procedural* (democratic or fairness) theory of how to fix the WTO.

## II

### “. . . MISINFORMATION AND POPULIST RHETORIC”

The WTO’s criticism of Wallach—that she mixes “legitimate concerns, deliberate or partly deliberate misinformation, and populist rhetoric”<sup>44</sup>—is beside the point; the more interesting question is what purposes different mischaracterizations serve. I examine three issues that the authors have mischaracterized: the *Shrimp/Turtles* case and de facto trade discrimination, Panel and Appellate Body composition, and, more generally, attempts to discredit “enemies” through spinning trivial facts. It is acceptable and understandable to simplify or elide details for the sake of advocacy in complicated or ambiguous situations, such as Article XX and the composition of tribunals. It is unacceptable and counterproductive to attempt to spin unfavorable and ultimately unimportant facts.

#### A. *Shrimp/Turtles* and de facto discrimination

The coverage of *Shrimp/Turtles*<sup>45</sup> in *WTO?* is an excellent example of how the book mixes “legitimate criticism with misinformation.” The analysis is initially promising, ably summarizing essential differences between the Panel and Appellate Body decisions:<sup>46</sup> The Panel “eviscerate[d] the entire exceptions clause of GATT” by finding that the United States’s invocation of Article XX exceptions conflicted with the WTO Agreement’s object and purpose. The

---

<sup>43</sup> Id. at 47.

<sup>44</sup> Naim, Wallach Interview, *supra* note 4, at 30.

<sup>45</sup> For a basic summary of the facts and issues in the *Shrimp/Turtles* case, see John O. McGinnis & Mark L. Movsesian, The World Trade Constitution, 114 Harv. L. Rev. 511, 590-93 (2000).

<sup>46</sup> For the purposes of this review, it suffices to know that the Panel is the trial chamber, responsible for deciding facts and issues of law, while the Appellate Body reviews and may overturn legal findings (not facts) by various Panels. For more on the dispute settlement process at the WTO, see WTO, Settling Disputes, at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp0\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp0_e.htm) (last visited Aug. 27, 2003).

Appellate Body reversed the Panel on that issue, but found that the Endangered Species Act (ESA) failed the least restrictive measures (LRM) test. (p. 28).

The authors refuse to laud the Appellate Body for leaving room for environmental exceptions or for finding shrimp to be an “exhaustible resource” under Article XX(g).<sup>47</sup> Instead, they criticize the Appellate Body for reaching “impressive heights of legal sophistry” (p. 28) because it found only *in theory* that states could invoke Article XX to save environmental regulations. (p. 28). The Appellate Body decision is dismissed as lip service to “defuse the criticism of environmentalists while still advancing the GATT agenda of primacy of trade over all other policy goals.” (p. 28).

Because of *Shrimp/Turtles* and other arguably anti-environment cases, the authors recommend a “moratorium on WTO challenges and threats to facially nondiscriminatory environmental health and safety measures” because it “would restrict WTO challenges aimed at second-guessing value choices countries make, the level of public health or environmental protection they choose, or the rules they enforce equally on domestic and foreign companies.” (p. 218). In *Shrimp/Turtles*, the authors note that “the turtle policy was *exactly* the same for foreign and domestic fishers” (p. 27); as such, the WTO had no place in challenging a non-discriminatory law. Elsewhere, Wallach advocates the “facial invalidation” approach.<sup>48</sup> She implies that finding discrimination is always easy. But in disguised protection cases, finding discrimination *is* the hard part.

Why do the authors believe that, under ESA, the treatment of foreign and domestic fishers was “exactly the same”? They note that the turtle excluder devices (TEDs) required by the ESA cost \$50 to \$400, “a relatively inexpensive way to reduce sea turtle deaths.” (p. 27). Inexpensive for U.S. shrimpers, yes, but not for Indian or Malaysian shrimpers.

The Appellate Body grasped the *relative* difference in impact the ESA had on American and developing country shrimpers. Its opinion notes that while the United States gave complainants just four months to phase-in TEDs before excluding their shrimp from the U.S. market,

---

<sup>47</sup> See *Shrimp/Turtles*, supra note 34, at 154-57.

<sup>48</sup> See *Bankrupting Democracy*, supra note 8, at 42. The authors oppose “a special avenue for foreign investors to challenge democratically implemented nondiscriminatory domestic laws” and advocate a golden rule for trade challenges: “[I]s the regulation in question discriminatory? Does it treat foreign and domestic investors alike? If these questions are answered in the affirmative, no trade challenge should be brought.” *Id.*

it negotiated with fourteen other (mostly) developing states and gave them three years.<sup>49</sup>

The authors seem insensitive to the problems of developing countries.<sup>50</sup> Their analysis also suggests that they believe environmental regulations always to be the product of a *bona fide* deliberative, democratic process. To oppose such legislation is to support corporate interests, so the Appellate Body's pro-environmental dicta must not reflect genuine concern. Such beliefs suggest that the authors do not understand the purpose of LRM tests. Does "disguised protectionism" mean anything to them?

The authors, though, understand more than they let on. Three pieces of evidence suggest that they fully grasp the utility of the LRM test. First, U.S. law students (Wallach went to Harvard) study LRM and *de facto* discrimination in the context of equal protection and negative commerce clause jurisprudence in classes on U.S. constitutional law. Second, the authors hint that they know that states, influenced by corporate interests, can disingenuously invoke environmental exceptions.<sup>51</sup>

Finally, the authors propose policy changes that show that they understand the necessity of LRM perfectly well. If LRM is so bad, why just a moratorium? Why not kill it? Later in *WTO?*, the answer becomes clear. The authors await a more diverse, environmentally friendly pool of Panelists before lifting the moratorium (p. 221): Current Panelists will use the LRM test to strike down environmental measures, but better Panelists can use it more wisely—to preserve good faith environmental legislation and to strike down bad faith protectionism cloaked in the same. It is important not to give Panelists a subtle tool that is susceptible to abuse until they internalize values other than free trade.

Events after the publication of *WTO?* belie the authors' concerns. In 2001, the *Shrimp/Turtles* complainants alleged that the United States still had not complied with the 1998 decision. The

---

<sup>49</sup> See *Shrimp/Turtles*, supra note 34, at 171.

<sup>50</sup> See infra Part III.A (discussing divergent views of Northern and Southern NGOs).

<sup>51</sup> In a footnote on *Shrimp/Turtles*, the authors acknowledge indirectly the role of the U.S. shrimp lobby in the passage of the ESA. See p. 28 n.82 (citing Louisiana Shrimpers Threatened By Ruling On Turtle Excluder, States News Service, Apr. 14, 1998). In a U.S. case on *Shrimp/Turtles*, unavailable to Wallach and Sforza when they wrote *WTO?*, the Federal Circuit analyzed the legislative history of the Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act Section 609 and found "Congress with remarkable unanimity was focused on protecting the domestic shrimp industry, not the sea turtle . . . . Many of the comments made on the Senate floor reflected deep skepticism about the effectiveness of TED requirements, and about the wisdom of placing sea turtle conservation above the economic well-being of domestic shrimpers." *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282, 1294-95 (Fed. Cir. 2002).

Appellate Body found that the ESA, altered by the United States, complied with the 1998 decision and was therefore a valid exception under Article XX.<sup>52</sup> Perhaps more surprisingly, in finding the new ESA to be valid, the Appellate Body simply upheld the Panel.<sup>53</sup>

### *B. Panel and Appellate Body Composition*

The authors believe that WTO Tribunals must be composed of different people—those with expertise outside of trade law and sympathies aside from helping corporations. Here again, they mix legitimate criticism with misinformation. They observe, correctly, that the criteria used to select Panelists “winnow out potential panelists who do not share an institutionally derived philosophy about interaction commerce and the role of the GATT system that supports the status quo,” and that a “very basic safeguard for minimally ensuring accurate legal analysis would be the selection of panelists with broader competencies.” (pp. 198-99).

This criticism is quite fair. Scholars<sup>54</sup> and trade lawyers<sup>55</sup> who are sympathetic toward the WTO have lodged similar complaints against WTO Panelist selection criteria. But the authors also try to paint Appellate Body members with the same brush. They do not provide separate criticisms of Appellate Body members, but rather try to make the Appellate Body guilty by way of disingenuous wordplay. When criticizing members of Panels, the authors refer to “Panelists.” In later passages, they criticize “panelists” when they clearly mean both Panel and Appellate Body members. (pp. 198-99). While the authors analyze Dispute Settlement Understanding (DSU) Article 8.1 on Panelist selection, they never even mention Article 17.3, which lists different, less trade-specific criteria for Appellate Body members.<sup>56</sup>

---

<sup>52</sup> WTO Appellate Body Report on the United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW (Oct. 22, 2001), 41 I.L.M. 149, 177 (2002).

<sup>53</sup> *Id.*

<sup>54</sup> See, e.g., J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement 12* (Harvard Jean Monnet Working Paper 9/00, 2000), at [www.jeanmonnetprogram.org/papers/00/0090.html](http://www.jeanmonnetprogram.org/papers/00/0090.html) (noting that profiles of current Panelists do not reflect “new reality of WTO dispute resolution” and that “life experience, professional backgrounds of the Panelists have to be commensurate with the evident gravity and profundity of the issues decided in a globalized world”).

<sup>55</sup> See, e.g., Ragosta, *supra* note 28, at 761 (discussing conflicts of interest).

<sup>56</sup> Panelist selection criteria value those already involved in the trade law machinery, namely

well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a . . . Member . . . to the GATT 1947 or as a representative to a council or committee of any covered agreement or its predecessor agreement,

Furthermore, *WTO?* never provides specifics on Appellate Body members. A cursory glance at the biographies of Appellate Body members (available on the WTO website) paints a complicated picture. Of the seven Appellate Body members in 1999, only one had worked with GATT during the pre-WTO years, though many more had experience with their respective foreign or trade ministries.<sup>57</sup> All but two (James Bacchus of the United States and Christopher Beeby of New Zealand) of the seven were or had been academics, and one (Said El-Naggar of Egypt) headed an NGO dedicated to “economic, political and social liberalization.”<sup>58</sup> These characters have trade experience but, as a group, hardly constitute a pro-trade cabal.

Since the publication of *WTO?* in 1999, the Appellate Body membership has changed and become even more varied—perhaps, to Wallach’s credit, as a result of NGO pressure. It is now even harder to dismiss the Appellate Body as a bunch of free trade absolutists. The Appellate Body currently includes a former judge for the U.N.’s International Criminal Tribunals for the former Yugoslavia and Rwanda (Georges Abi-Saab),<sup>59</sup> a former Executive Director of the Asian Development Bank, and a long-time Australian federal judge,<sup>60</sup> in addition to two professors of international economic law. Abi-Saab, in particular, has been a fierce, lifelong critic of the global economic order and of developed countries that use international law to maintain their dominance.<sup>61</sup>

---

or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, WTO Agreement, Annex 2, 33 I.L.M. 112, 118, art. 8.1 (1994) [hereinafter DSU]. By contrast, Dispute Settlement Understanding (DSU) Article 17.3, governing the selection of Appellate Body members, sets out more general criteria for Appellate Body members: “The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government.” DSU art. 17.3.

<sup>57</sup> Press Release, WTO Dispute Settlement Body, WTO Announces Appointments to Appellate Body (Nov. 29, 1995), at [http://www.wto.org/wto/english/news\\_e/pres95\\_e/pr032\\_e.htm](http://www.wto.org/wto/english/news_e/pres95_e/pr032_e.htm) (announcing new members and giving biographical notes).

<sup>58</sup> *Id.*

<sup>59</sup> Press Release, WTO Dispute Settlement Body, WTO Completes Appointment of Appellate Body Members (May 25, 2000), at [http://www.wto.org/wto/english/news\\_e/pres00\\_e/pr179\\_e.htm](http://www.wto.org/wto/english/news_e/pres00_e/pr179_e.htm) (listing qualifications and previous experience of Abi-Saab).

<sup>60</sup> Press Release, WTO Dispute Settlement Body, WTO Appoints New Appellate Body Members (Sept. 25, 2001), at [http://www.wto.org/wto/english/news\\_e/pres01\\_e/pr246\\_e.htm](http://www.wto.org/wto/english/news_e/pres01_e/pr246_e.htm) (listing qualifications of John S. Lockhart of Australia).

<sup>61</sup> See generally Georges Abi-Saab, *The International Law of Multinational Corporations: A Critique of American Legal Doctrines*, in *Third World Attitudes Toward International Law: An Introduction* 549 (Frederick E. Snyder & Surakiart Sathirathai eds., 1987) (criticizing American doctrines used to “protect” foreign investments of multinational corporations based in United States); Georges M. Abi-Saab, *The Newly Independent States*



Nothing in *WTO?* indicates that the authors knew who the Appellate Body members were or their respective qualifications. It may not have mattered, given how they characterize judges whom they do know. Wallach, in *Bankrupting Democracy*, describes members of the *Loewen*<sup>62</sup> International Centre for Settlement of Investment Disputes (ICSID) tribunal,<sup>63</sup> varyingly, as “international investment experts,” “trade and investment experts,” and “professional arbitrators.”<sup>64</sup>

Basic research on the tribunalists in *Loewen* exposes Wallach’s assertions as half-truths at best. The panel included Abner Mikva, an eminent, and fairly liberal, former U.S. federal appeals court judge;<sup>65</sup> Anthony Mason, a former Chief Justice of the Australian High Court<sup>66</sup>; and Michael Mustill, now a Law Lord.<sup>67</sup> Mustill alone qualifies as a “trade and investment expert,” with a long career in commercial arbitration. Mikva and Mason are simply retired appellate judges. They are literally “professional arbitrators” (they are professionals and they are *ad hoc* arbitrators). But they are not full-time arbitrators or “trade and investment experts.” Characterizing Mikva (a liberal who has favored labor rights over free trade)<sup>68</sup> in this way seems par-

---

and the Rules of International Law: An Outline, 8 Howard L.J. 95 (1962) (examining effects of change in status on newly emancipated states).

<sup>62</sup> *Loewen Group & Loewen v. United States*, ICSID Case No. ARB (AF)/98/3 (2003) (Awards), available at <http://www.state.gov/documents/organization/22094.pdf> [hereinafter *Loewen*].

<sup>63</sup> See ICSID, List of Pending Cases, at <http://www.worldbank.org/icsid/cases/pending.htm> (last visited Sept. 6, 2003) (listing name and nationality of all panelists for ICSID arbitrations, including *Loewen* case).

<sup>64</sup> *Bankrupting Democracy*, supra note 8, at 3.

<sup>65</sup> Abner Mikva was a long-time judge, and former Chief Judge, on the D.C. Circuit Court of Appeals (1979-94) and White House Counsel to President Clinton from 1994 to 1995. Before his judicial appointment, Mikva was a five-term member of the House of Representatives. See Univ. of Chi. Law School, Abner Mikva: Lecturer and Senior Director of the Mandel Legal Aid Clinic, at <http://www.law.uchicago.edu/faculty/mikva/> (last visited Aug. 23, 2003). Mikva does do work for JAMS, an arbitration and alternative dispute resolution firm, but JAMS seems merely to be a clearing house for neutral *ad hoc* judges or mediators. See JAMS, Who We Are, at [http://www.jamsadr.com/who\\_we\\_are.asp](http://www.jamsadr.com/who_we_are.asp) (last visited Sept. 6, 2003).

<sup>66</sup> Anthony Mason was a Justice of the Australian High Court from 1972 to 1987 and Chief Justice from 1987 to 1995. High Court of Australia, Justices: Former Members of the High Court, at [http://www.hcourt.gov.au/justices\\_02.html](http://www.hcourt.gov.au/justices_02.html) (last visited Aug. 23, 2003).

<sup>67</sup> Lord Michael Mustill was a founding barrister in Essex Court chambers and currently member of the House of Lords (Cross Bench). See Essex Court Chambers, History, at <http://www.essexcourt-chambers.law.co.uk> (last visited Aug. 23, 2003). He has written extensively on and has experience in commercial arbitration and is a member of the International Chamber of Commerce. Mustill replaced panelist L. Yves Fortier, a Senior Partner of the Canadian firm Ogilvy Renault, former Ambassador and Permanent Representative to the United Nations, and *ad hoc* International Court of Justice judge.

<sup>68</sup> For instance, Judge Mikva wrote a lengthy dissenting opinion in favor of labor unions and labor rights activists’ attempting to enforce the provisions of the (pre-WTO) Genera-

ticularly unfair. Perhaps the authors never read his other cases and do not care, given that he once ruled against Public Citizen in its suit to enjoin the passage of NAFTA in Congress.<sup>69</sup>

Even if the authors knew better about Appellate Body members or ICSID tribunalists, why try to discredit the Appellate Body when there is already a strong case against the Panels? There are several explanations: The authors forgot to do their homework; or they did but did not like what they found; or they did not because they were afraid of what they might learn (i.e., what if Appellate Body members, or ICSID arbitrators, aren't so bad?). The first and third explanations seem unlikely, as the authors apparently did do their homework. They have statistics on the nationality and gender of all Panelists and Appellate Body members,<sup>70</sup> though this is not in *WTO?*. This suggests that the authors must have had enough information to find out more (and they are sufficiently resourceful to do so). In any case, the authors seem guilty of intellectual dishonesty—if you don't like the facts you uncover, just ignore or mischaracterize them.

There is another, more generous (though speculative and complicated) explanation: The authors knew the Appellate Body members, found them acceptable, but did not want to send WTO novices a mixed message (“The Appellate Body is fine, but the Panels must go”) because they would not have been able to rally enough support against the WTO.

One might respond that however unabashedly pro-trade the Panel might be, the Appellate Body still can reverse it. The problem is that Panelists move first: By finding facts, they frame the cases that the Appellate Body reviews on appeal. Conceivably, then, the Appellate Body might not be able to uphold environmental or food regulations, even if they wanted to, because the Panel's findings of fact (colored by their pro-trade biases) would make it impossible. This problem is exacerbated by the fact that the Appellate Body cannot remand cases to Panels, although presumably if enough political will

---

lized System of Preferences, 19 U.S.C. §§ 2461-2466 (2003), which allows the President to deny trade benefits to countries that violate internationally recognized labor rights. See *Int'l Labor Rights Educ. & Research Fund v. Bush*, 954 F.2d 745, 752-59 (D.C. Cir. 1992) (Mikva, J., dissenting).

<sup>69</sup> See *Pub. Citizen v. U.S. Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993). Mikva, writing for the majority, found that NAFTA was not a “final agency action” under the Administrative Procedure Act and reversed the District Court, which had granted Public Citizen's summary judgment motion to compel an environmental impact statement. *Id.* at 553.

<sup>70</sup> See *Pub. Citizen, Unbalanced WTO Dispute System—Women Need Not Apply: Gender Analysis of WTO Dispute Panelists*, at <http://www.citizen.org/trade/wto/Dispute/articles.cfm?ID=5571> (last visited Sept. 6, 2003) (noting that, up to mid-1998, of 159 Panelists, 147 were men and 12 were women, and all 7 Appellate Body members were men).

can be generated to change the Panelist roster, giving the Appellate Body the power to remand would be easy. So the Panels must change, and if a mixed message prevents that change, then miscast the Appellate Body and say they're all bad. This may seem unsavory but, remembering the political function of the book, understandable.

### C. *Needless Fact-Spinning*

While the oversimplified or misleading treatment of *Shrimp/Turtles* and the Appellate Body composition are understandable, the authors sometimes go too far and discredit themselves by raising unimportant issues and mischaracterizing them. Two examples are illustrative: *WTO?*'s treatment of the payment of Appellate Body members, and Wallach's treatment of the *Loewen* case.

PAYING THE AB. In trying to discredit the AB, the authors go one step too far. They note that "appeal panelists are . . . on the permanent WTO payroll. This is a startling conflict in its own right, given that every case requires a determination of whether domestic law or the Appellate Body tribunalists' employer's rules take precedence." (p. 204).

Why, exactly, is this so "startling"? Similar reasoning in another context would sound more patently absurd: Does anyone think that U.S. Supreme Court justices decide differently in cases involving the federal government, their paymasters? The authors have identified worse problems (e.g., Panelists with conflicts of interest sitting on cases), conceded as such by trade lawyers.<sup>71</sup> When they raise non-issues like this, the authors seem like conspiracy nuts. Such passages may not faze ardent allies, but they may reduce the authors' credibility in the eyes of (potentially sympathetic, but skeptical) readers on the fence about the WTO.

DEALING WITH *Loewen*. Wallach's analysis of *Loewen* in *Bankrupting Democracy* is another good example of how she can make a good argument and damage it by taking it too far.

*Loewen*, a Canadian business owner, lost a \$500 million jury verdict in Mississippi, and then filed claims against the United States under NAFTA. He argued that the state court judge let the plaintiff's lawyer appeal to the "anti-Canadian, racial and class biases" of the largely black jury, violating NAFTA's Article 1102 on national treatment,<sup>72</sup> and that the award—100 times greater than the value of the

---

<sup>71</sup> Ragosta, *supra* note 28, at 760-62.

<sup>72</sup> See *Bankrupting Democracy*, *supra* note 8, at 19.

\$3.5 million contract in dispute—was tantamount to expropriation under Article 1110.<sup>73</sup>

Loewen's state court case seems like a blatant miscarriage of justice. Will Gary, the plaintiff's attorney, was a wealthy trial lawyer who attributed his success to "simplify[ing]" complex legal doctrines for "juries uninterested in legal niceties."<sup>74</sup> During the case Gary argued little law and constantly referred to Loewen's nationality and race (white).<sup>75</sup> Loewen's lawyers objected over fifty times and, each time, were overruled by the trial judge.<sup>76</sup> The jury entirely bought Gary's story.<sup>77</sup>

Wallach claims that NAFTA "benefit[s] foreign investors to the detriment of the public interest,"<sup>78</sup> and uses *Loewen* to show that there are "no limits on what types of court decisions could be open to challenge."<sup>79</sup> She argues that foreign corporations that lose in U.S. courts have a second bite at the apple when they "use NAFTA to attempt to evade liability by shifting the cost of their court damages to U.S. taxpayers."<sup>80</sup>

This is a powerful critique of NAFTA's Chapter 11. Indeed, the idea that an international arbitral tribunal should not act as an appellate court to domestic courts is one that the *Loewen* arbitrators ultimately accepted.<sup>81</sup> But Wallach goes on and asserts that a "jury trial is broadly viewed as an important safeguard for equalizing the imbalance between citizens and more powerful or wealthy interests."<sup>82</sup> This

---

<sup>73</sup> *Id.* at 19-20; Loewen, *supra* note 62, at 9-10, ¶ 39.

<sup>74</sup> Michael I. Krauss, NAFTA Meets the American Torts Process: *O'Keefe v. Loewen*, 9 Geo. Mason L. Rev. 69, 76 (2000).

<sup>75</sup> Gary's presentation to the jury was "devoid of legal arguments regarding contract law" and instead was "structured . . . as a populist confrontation pitting a Mississippi business owner and family man against a tricky, racist, and greedy foreign firm that was taking money out of the state." *Id.* at 77. Gary also used similar strategies outside of the courtroom during the trial, placing full-page advertisements in local newspapers that "juxtaposed the Mississippi and American flags on the one side of the page and the Japanese and Canadian flags on the other. Under the two foreign flags was written 'NO' and 'Loewen/Riemann;' under the domestic flags, 'YES' and 'O'Keefe.'" *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> After the trial, the jury foreman proclaimed that Loewen "was a rich, dumb Canadian politician [sic] who thought he could come down and pull the wool over the eyes of a good ole Mississippi boy. It didn't work." *Id.* at 84.

<sup>78</sup> Bankrupting Democracy, *supra* note 8, at 7.

<sup>79</sup> *Id.* at v.

<sup>80</sup> *Id.* at 20.

<sup>81</sup> See Loewen, *supra* note 62, at 70 ("[W]e find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of the host nation."). This comment, however, seems like dicta, as the ICSID tribunal dismissed Loewen's case for lack of jurisdiction. *Id.* at 69.

<sup>82</sup> Bankrupting Democracy, *supra* note 8, at 20.

may be reasonable to Wallach's American readers but may seem like bunk to civil lawyers who view juries as lynch mobs.

Wallach still isn't satisfied: She then attacks Loewen. She accepts, wholly, Gary's description of Loewen as predatory and greedy<sup>83</sup> and quotes, uncritically, a juror who said that "Loewen . . . clearly violated every contract [he] ever had . . . . If there was ever an indefensible case, I believe this was it."<sup>84</sup> Wallach dismisses Gary's race-baiting and xenophobic rhetoric by claiming that "Loewen never objected to these comments at trial,"<sup>85</sup> a patently false assertion.

Here, less is more. Jose Alvarez characterizes Public Citizen's statements on Loewen as "hyperbolic rhetoric," but notes that that they contain "grains of truth."<sup>86</sup> Wallach's general criticism of Article 11 is sound. Why then defend Gary and the Mississippi judge? The details don't matter. By drudging them up, Wallach can only alienate readers who know better or confuse those forced to dig for "grains of truth."

### III

#### "THE EROSION OF DEMOCRACY"

Some of *WTO?*'s flaws are not due to the authors' attempts at coalition building or defending the indefensible. Rather, they result from the authors' failure to learn from others. The authors do not seem to engage in dialogues with their NGO partners or academics who write on trade. They overlook or misunderstand issues that might be old hat to academics.<sup>87</sup> As a result, they are insensitive to the needs of developing countries and have no clearly articulated theory of democratic accountability.

---

<sup>83</sup> Id. at 18 (stating that Loewen "aggressively acquired more than 1100 funeral homes across Canada and the U.S.," which led to the demise of small, independent firms and, according to authors, drew "public attention because of subsequent consumer abuses and several high profile investigations of anti-competitive business practices").

<sup>84</sup> Id. at 19.

<sup>85</sup> Id. (relying on U.S. Government argument made in response to those allegations).

<sup>86</sup> Jose E. Alvarez, *How Not to Link: Institutional Conundrums of an Expanded Trade Regime*, 7 *Widener L. Symp. J.* 1, 16-18 (2001). Alvarez further observes that cases like *Loewen* risk

becoming a forum for: discrediting the use of juries . . . ; testing the legality of particular appellate bond requirements under state law; and examining the propriety of punitive damages. One need not be a friend of Public Citizen to be alarmed by the prospect of what an incautious panel of arbitrators could do with such claims . . . .

Id. at 18.

<sup>87</sup> See, e.g., Daniel C. Esty, *Linkages and Governance: NGOs at the World Trade Organization*, 19 *U. Pa. J. Int'l Econ. L.* 709, 725 (1998) (noting concern that permitting NGO participation might allow developed-country NGOs to overwhelm those from developing countries).

The authors could profit by taking seriously academic theories and critiques of democratic accountability. First, they might develop a better understanding of the interests of developing countries and how NGOs from developed countries might be imperfect agents of democratic accountability. Second, by engaging in debate and understanding and grappling with other theories of WTO legitimacy, the authors might better develop their own theory of how to make the WTO more democratic and responsive. A refusal to engage others in debate puts Public Citizen in danger of losing its influence.

#### A. *Developing Countries and Democratic Accountability*

GTW and other NGOs view themselves as forms of “representation reinforcement,” correctives to democratic defects within political institutions.<sup>88</sup> The authors propose to cure the WTO’s ills by way of “an open process with access to documents and a meaningful opportunity for NGO and citizen input at the national and international levels.” (p. 218). GTW is part of an NGO that exists to reinforce the interests of the *American* public. However, the authors purport to speak on behalf of a *global* public interest. They are ill-equipped to do so. *WTO?* reflects a parochial, Northern (specifically American) worldview and suggests its authors do not fully understand or take seriously the interests and values of developing countries and Southern NGOs. The book devotes most of its space to issues affecting developed countries. Just two chapters are devoted to the interests of developing states: Chapter 4 (on TRIPS) and Chapter 5 (on the economic impact of the WTO on developing countries). These make up the middle fifty pages of a 228-page book. The rest of the book is devoted to developed countries’ interests, and the first half of the book—about eighty pages—covers issues (environment, food safety, and GMOs) primarily of interest to Northern NGOs.

What *WTO?* does say about the interests of developing countries is a bit bizarre. The authors rightly criticize the use of TRIPS to deprive developing countries of life-saving medicines, such as AIDS drugs in South Africa (pp. 119-21, 123), or the right to engage in “bio-piracy,” i.e., patenting organisms native to developing countries (pp. 108-12). The authors also assert that the WTO threatens the “food security” of developing countries (pp. 106-08, 138-39) and that their share of trade has dropped since 1995 (pp. 132-33).

---

<sup>88</sup> See Spar & Dail, *supra* note 1, at 179 (“According to a small but influential band of NGO theorists, the action of most development NGOs leads inherently to democracy . . . [because] they inevitably draw members of the local community into their sphere and expose them to participatory practices.”).

The concern with food security<sup>89</sup>—specifically the malnutrition that millions suffer from in sub-Saharan Africa—is the most sympathy-inducing argument on behalf of developing countries the authors could raise. Never mind, for a moment, the speciousness of the argument (the link between TRIPS and world hunger is attenuated at best), or the well-established idea that hunger has other, largely political, causes<sup>90</sup> (weren't people starving before TRIPS?). The problem is that the authors take it upon themselves to determine what threatens citizens in developing countries without asking them. *WTO?* cites not one developing country NGO concerned with TRIPS as a threat to food security (while they do cite Thai and Indian NGO statements on TRIPS, medicines, and bio-piracy). Instead, the authors engage in plausible but unnecessary conjecture. Why not just ask Southern NGOs what concerns them?

The authors also, in their conjectures, miss the key, ongoing problem for developing countries: They get few benefits from the WTO, not because they have liberalized, but because, in areas critical to them (e.g., agricultural and textile tariffs), developed countries have not. The United States, European Union, Canada, and Japan, in relation to developing countries, maintain high agricultural tariffs, greatly subsidize their farmers, initiate many anti-dumping cases, and have kept most import quotas on textiles in contravention of the Textiles and Clothing Agreement.<sup>91</sup>

Nowhere, however, is the authors' disregard for developing countries as apparent as in their discussion of the environment. Environmental regulation is simply harder to implement and achieve for poor countries than for wealthy ones. Even the term "environment" is loaded with different meanings to Northern and Southern NGOs.<sup>92</sup> The costs of environmental protection may range from annoying to

---

<sup>89</sup> The authors observe that the introduction of "terminator seeds," which sprout into edible food but produce infertile seeds, force farmers repeatedly to buy seeds from the multinationals, like Monsanto, that make them. P. 106-07.

<sup>90</sup> See generally Jean Dreze & Amartya Sen, *Hunger and Public Action* (1989).

<sup>91</sup> See *Make Trade Fair*, Oxfam Int'l, *Rigged Rules and Double Standards: Trade, Globalisation, and the Fight Against Poverty* 98-100 (2002), at <http://www.maketradefair.org/stylesheet.asp?file=26032002105549> [hereinafter *Rigged Rules*]. Agricultural tariffs in Canada and the United States are around 10%, and 20% in the European Union and Japan, while subsidies make up 25% of farm output in the United States, 40% in the European Union, and 60% in Japan. The United States and European Union eliminated only 25% of import quotas on textiles and clothing. Finally, the United States and European Union, combined, launched 234 anti-dumping cases against developing states.

<sup>92</sup> See Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environmental Matters*, 25 *Harv. Envtl. L. Rev.* 1, 65-66 (2001).

expensive for developed countries. For developing states, a given environmental regime is often prohibitively expensive,<sup>93</sup> and even may force a direct trade-off between the livelihood of their people and the protection of the environment (e.g., deciding whether to harvest a natural resource).<sup>94</sup>

This difference in approaches to the environment matters in an Article XX case like *Shrimp/Turtles*. In that case, no outcome would have been satisfactory to each party to the dispute. Either the United States may not block the import of turtle-unsafe shrimp or the Indonesian and other shrimpers are excluded from an important export market because of environmental laws they could not protest in the United States.

Wallach, in *WTO?* and elsewhere,<sup>95</sup> dismisses the Appellate Body decision as lip-service to environmentalists. She focuses only on the infringement on U.S. regulatory autonomy, not on the burden the ESA regime placed on poor, foreign shrimpers. This is insensitive to the dilemma faced by Southern shrimpers. Developing states face a much starker institutional choice: Cede sovereignty to the WTO and live with a democratic deficit, or leave the WTO (as Wallach suggests they do if it is not fixed) and lose sovereignty by living by the whims of powerful states.<sup>96</sup>

Little wonder that Southern NGOs are wary of Northern NGOs. On environmental matters, Southern NGOs have supported their governments before the WTO.<sup>97</sup> And some commentators from devel-

---

<sup>93</sup> See *id.* at 74. In the WTO's Committee on Trade and the Environment, a Danish NGO representative observed that "as trade barriers went down, environmental standards rose." *Id.* An Argentine NGO representative countered "larger companies with newer equipment seem to do well with trade liberalization and demands for environmental performance while small and medium-sized enterprises are often so vulnerable they cannot implement even local regulations." *Id.* Another developing NGO from Thailand agreed with the Argentine. *Id.*

<sup>94</sup> See *id.* at 65-66 (citing various scholars, Shaffer reports that in countries where "people's [lives and] livelihoods are more intimately connected . . . with the environment," there is less adherence to "a preservationist perspective of environmental protection").

<sup>95</sup> Lori Wallach, *Transparency in WTO Dispute Resolution*, 31 L. & Pol'y Int'l Bus. 773, 776 (2000) ("In a dramatic display of politics . . . the Appellate Body wrote a remarkably soothing-toned opinion, which, while spouting lots of nice, non-binding and green platitudes, ruled that the U.S. law requiring [turtle-safe nets] violated WTO rules and had to be changed.").

<sup>96</sup> See McGinnis & Movsesian, *supra* note 45, at 553 ("Forcing underdeveloped countries to achieve the standards of the industrialized world would only . . . undermine domestic sovereignty.").

<sup>97</sup> Shaffer, *supra* note 92, at 47 (noting that Southern NGOs support their respective countries against Northern governments, especially when environmental regulation is involved, because "[c]onstituencies in developing countries continue to hold different social priorities reflective of their different interests" and "[t]heir state representatives continue to represent these interests and priorities before the WTO").



oping states were truly upset that protests frustrated the Seattle Round.<sup>98</sup> But what is baffling, at first, is that many Southern NGOs oppose even ostensibly value-neutral, procedural changes (e.g., more transparency, amicus briefs) suggested by Northern NGOs. How could they oppose having a greater voice?

Southern NGOs fear even procedural changes because given that Northern NGOs are more powerful and influential,<sup>99</sup> and given that they have different interests, a WTO more open to NGOs generally would be more likely to adopt Northern NGO policies against their interests. "Transparency" to Southern NGOs is, therefore, a proxy for the advancement of Northern ends.<sup>100</sup> The problem is acute for Southern NGOs that cannot even afford to travel to Geneva.<sup>101</sup> This procedural issue creates a direct conflict between Northern and Southern NGOs.<sup>102</sup> As long as Southern NGOs view Northern NGOs as insensitive to their interests (e.g., by advocating environmental protection over development and poverty reduction), many Southern NGOs will not trust Northern NGOs like GTW.

One gets the impression that the authors are aware of the problem but would rather not think about it. *WTO?* often refers to "the public interest" as if a unitary, global interest exists.<sup>103</sup> Further, while GTW interacts with many NGOs, there seems to be little room

---

<sup>98</sup> See Barun S. Mitra, *WTO Protesters vs. the Poor*, Wall St. J., Dec. 9, 1999, at A26 ("Because of the lobbying efforts of green, consumer, labor, and other groups that claim to care about developing countries, the talks failed. As a result, developing economies will grow less quickly, the environment will suffer, and more children throughout the developing world . . . will remain impoverished.").

<sup>99</sup> See Shaffer, *supra* note 92, at 64-65 (stating that Northern NGOs "can more effectively work the media, not only because of their greater resources, but also because of the media's determination of what is worthy for print, [reflecting the fact that their] primary audiences are located in developed countries").

<sup>100</sup> *Id.* at 67 (claiming that Southern NGOs "distrust demands for greater WTO transparency when 'transparency' means greater access for private groups to WTO decision-making" because they fear that "this form of transparency will merely permit northern NGOs to better exploit the media to pressure state delegates [and the WTO to] advance northern ends"). See *id.* at 63 ("[N]orthern NGOs are much better positioned than southern NGOs and southern trading interests to have their views heard at the international level.").

<sup>101</sup> *Id.* at 63 ("Given scarce resources, southern states even question the appropriateness of the WTO sending NGO delegates to Geneva for symposia when those resources could be spent on water purification, nutrition, education, and disease control projects in developing countries.").

<sup>102</sup> *Id.* at 62 (finding that Southern NGOs "are short on resources and typically localist in orientation [and] recognize the northern NGOs' advantage in international fora" while "Northern NGOs have more funding, are located closer to WTO offices in Geneva, are more likely to finance international networks, and have greater indirect access to information from their state representatives").

<sup>103</sup> See, e.g., p. 217 ("There is a growing consensus among [NGOs] worldwide that the WTO must be pruned back . . .").

for dissent in the coalition. The cover of *WTO?*, an abstract drawing of a globe, suggests a fully international movement. It is deceptive: The coalition is international but not representative. Most NGOs in the coalition are Northern. After Seattle, GTW started the "Our World is not for Sale" campaign, in which NGOs signed a list of demands sent to the WTO.<sup>104</sup> Hundreds have signed on, but almost all are Northern and half are from the United States. Many Southern NGO signatories are local branches of Northern NGOs.<sup>105</sup>

More troubling, the online campaign only allows NGOs to add their names to a list. They cannot make comments, add demands, or dissent from different parts of the letter.<sup>106</sup> The letter itself does not seem like the product of collaboration between NGOs: It simply reproduces the demands listed in *WTO?*. There is some irony in using an interactive medium without allowing interaction.

Why don't Southern NGOs join the coalition? There are plenty of Southern NGOs out there, though they are proliferating at a slower rate than Northern NGOs.<sup>107</sup> Perhaps few Southern NGOs joined the campaign because they disagree with the letter or do not have the technology to join the online campaign.

There is another way. An interesting contrast to *WTO?* is Oxfam's *Rigged Rules and Double Standards*. Released online, *Rigged Rules* includes websites containing short reactions to the report, positive and negative, as well as lengthier debates about the report's contents.<sup>108</sup> These websites list criticisms by other NGOs, the

---

<sup>104</sup> See Pub. Citizen, "WTO—Shrink or Sink!" The Turnaround Agenda International Civil Society Sign-On Letter, at [http://www.citizen.org/trade/wto/shrink\\_sink/articles.cfm?ID=1569](http://www.citizen.org/trade/wto/shrink_sink/articles.cfm?ID=1569) (last visited Sept. 6, 2003).

<sup>105</sup> Id.

<sup>106</sup> The instructions to sign on to the Shrink-or-Sink Campaign are as follows:  
How an organization can sign the letter:

- 1) This is an organizational sign-on letter only. We will not be adding individuals to it.
- 2) Send an e-mail to [mstrand@citizen.org](mailto:mstrand@citizen.org).
- 3) In the subject line type in "Shrink or Sink signatory"
- 4) In the body of the e-mail list the organization and country (contact information such as address, phone & fax is also appreciated) that you are signing on. Those who wish should also mention how many people the organization represents.

Id.

<sup>107</sup> See Spar & Dail, *supra* note 1, at 171-72. While NGOs have proliferated in developed countries (*The Economist* estimates there are 2 million in the United States), they are also growing in places like Nepal (1210 NGOs in 1993) and Kenya (240 NGOs created every year). Id.

<sup>108</sup> See Make Trade Fair, Oxfam Int'l, Reactions to the Report, at <http://www.maketrade.org/stylesheet.asp?file=28052002092914> (last visited Aug. 23, 2003); Make Trade Fair, Oxfam Int'l, General Debates on Trade, at <http://www.maketrade.org/stylesheet.asp?file=18072002164042> (last visited Aug. 23, 2003).

European Commission, and the WTO. Impressively, the report is available in Arabic, Russian, Thai, and Bangla, among other languages;<sup>109</sup> *WTO?* is available only in English. *Rigged Rules* is a more academic study and, as such, less reader-friendly than *WTO?*. But on nearly every page, woven into its turgid text, are narratives by everyday people hurt by the WTO.<sup>110</sup> Whatever the report's drawbacks, Oxfam takes seriously what people in developing countries have to say about the WTO.

To be fair, Oxfam has a different history than Public Citizen: It has long worked on poverty reduction and humanitarian relief in developing countries.<sup>111</sup> But one need not work in developing countries to understand their concerns with the WTO: One simply must make a real attempt to listen.

This is not to say that GTW should abandon its advocacy, either substantive (e.g., on behalf of the environment) or procedural (e.g., greater transparency). This analysis does suggest that GTW should ask itself hard questions: What issues "belonging" to Southern NGOs do Northern NGOs really understand? Could more WTO openness to NGOs result in a zero-sum game between Northern and Southern NGOs (i.e., more democracy for the former and less for the latter)? Should Northern NGOs therefore refrain from making some arguments on behalf of Southern NGOs and let them speak for themselves? How can Northern and Southern NGOs work to resolve their differences?

### B. In Search of a Democracy Theory

This review began by stating that *WTO?* should not be read as an academic work, but rather for what it is, a political instrument. But one still is left wondering what the authors *really* believe beyond the rhetoric in *WTO?* and what theories they follow. I looked in vain for any writings by GTW or Wallach that are more like *Das Kapital* than the *Communist Manifesto*. Wallach and GTW have testified before Congress,<sup>112</sup> given interviews,<sup>113</sup> written law review articles,<sup>114</sup> sent

---

<sup>109</sup> See Make Trade Fair, Oxfam Int'l, Trade Report in Other Languages, at <http://www.maketradefair.org/stylesheet.asp?file=09042002222029> (last visited Aug. 23, 2003).

<sup>110</sup> See generally *Rigged Rules*, *supra* note 91.

<sup>111</sup> Oxfam Int'l, About Us, at <http://www.oxfam.org/eng/about.htm> (last visited Aug. 23, 2003).

<sup>112</sup> See Dispute Settlements in the WTO: Hearing Before the Subcomm. on Int'l Trade of the Senate Comm. on Fin., 106th Cong. 62 (2000) (statement of Lori Wallach), available at <http://www.citizen.org/trade/wto/Dispute/articles.cfm?ID=5581> (noting that *WTO?* revealed that "not one environmental, health, food safety or environmental law challenged at the WTO has ever been upheld").

<sup>113</sup> See generally Naim, Wallach Interview, *supra* note 4.

comments to the U.S. Trade Representative,<sup>115</sup> and submitted amicus briefs to the WTO.<sup>116</sup> In all of these writings, the authors use substantially the same arguments and language as they do in *WTO?*, citing almost entirely to cases, news articles, and reports by governments, scientists, and NGOs, and mostly avoiding academics' works.<sup>117</sup>

*WTO?* is decidedly wonkish, full of policy but no theory. This may not be a problem for single-issue NGOs (e.g., Friends of the Earth) that do not need to reconcile conflicting policies. But the lack of theory poses great problems for a group purporting to champion an inherently abstract ideal like democratic accountability. Wallach confesses she has no clear conception of global democratic accountability.<sup>118</sup> She notes how hard it is to come up with an internally consistent democratic model for the WTO. Anyway, very little in Wallach's writings suggests she devotes much time to reflecting on a theory. But a theory is what GTW and *WTO?* promise to deliver. Such reflection can only help GTW.<sup>119</sup> I make two suggestions, based on academic literature. First, the authors should not advocate

---

<sup>114</sup> See generally Wallach, *supra* note 95; Lori M. Wallach, Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards, 50 U. Kan. L. Rev. 823 (2002).

<sup>115</sup> Pub. Citizen, The Triennial Review of the World Trade Organization on the Application of Sanitary and Phytosanitary Measures (The "SPS Agreement") Comments of Public Citizen, Inc. (Jan. 9, 1998), at <http://www.citizen.org/trade/wto/ENVIRONMENT/articles.cfm?ID=5583> (last visited Sept. 6, 2003) (indicating in comments to USTR that "the SPS Agreement does not adequately safeguard a country's right to adopt and implement regulations to protect human, animal and plant life or health, and to establish the level of protection of life and health that it deems to be appropriate").

<sup>116</sup> See Earthjustice Legal Defense Fund, Pub. Citizen et al., WTO Dispute Settlement Proceeding European Communities—Measures Concerning Meat and Meat Products (Hormones), at <http://www.citizen.org/trade/wto/Dispute/articles.cfm?ID=5516> (last visited Sept. 6, 2003).

<sup>117</sup> The authors seem uninterested in what academics say about trade law—out of 1049 footnotes, they cite ten "mainstream" academic journals or books. Pp. 97 n.43; 146-47 nn.21, 26, 49; 169 n.49; 190 n.23; 210 nn.11, 16. Only once do they refer to a so-called "trade expert" (Petros Mavroidis). P. 210 n.16 (citing David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 Am. J. Int'l L. 398 (1998)).

<sup>118</sup> In her own words:

I don't have a plan of how to get from A to B, because there are a lot of foibles that have to do with accountability and democracy. . . . An inherent systematic problem is how to have international standards that are of a scope that is appropriate to international corporations and international capital, and yet still have democratic accountability for those decisions, particularly when they're not objective decisions, but rather subjective. And that is a really hard question.

Naim, Wallach Interview, *supra* note 4, at 54.

<sup>119</sup> Spar & Dail, *supra* note 1, at 173, 181 (arguing that accountability is critical to NGOs as NGO sector grows in power and scope, and suggesting that NGOs can achieve this accountability by engaging in comprehensive self-scrutiny—by publicly articulating their goals in "clear and open fashion," by analyzing and reporting on the "output, outcome, and

“nixing” the WTO because to do so would be against the interests they advocate. Second, I argue that they should abandon spurious domestic analogies and, instead, advocate a model of adjudication focused more on legitimacy than strict notions of democratic accountability.

NIX “FIX IT OR NIX IT.” The authors do not make clear why the WTO is worth keeping at all. Why propose reforms if, as the authors suggest, the institution is rotten to the core? Slogans like “Fix It or Nix It” suggest that the WTO itself is the problem. Threatening to snuff out the WTO by way of paralyzing protests is the coalition’s source of power, but the authors cannot be serious about this as a solution. “No WTO” means a world where large corporations operate without constraints.<sup>120</sup>

Getting rid of the WTO might hurt multinational corporations and benefit the public interest, depending on where you are. Without the WTO, powerful, developed states may have somewhat more regulatory freedom.<sup>121</sup> However, even within such states, multinationals often have enough clout to block public interest legislation, as Public Citizen well knows.<sup>122</sup>

In any case, developing countries are likely to fare worse without the WTO. Without open markets, they have little chance at economic development or poverty reduction.<sup>123</sup> And they are likely to have less regulatory freedom without the WTO. Without restraints like the WTO, developed states (pressured or supported by large multinationals) can more easily bully developing countries into abandoning public interest regulations to allow imports. More than big states,

---

impact” of their work and findings, and by being willing to “suspend their own beliefs in favor of a more rigorous process”).

<sup>120</sup> See Daniel C. Esty, *The World Trade Organization’s Legitimacy Crisis*, 1 *World Trade Rev.* 7, 8 (2002) (“Those chanting ‘no WTO’ really do not want an international marketplace without structure or rules in which multinational corporations operate without constraints.”).

<sup>121</sup> Developed countries would be most successful maintaining regulations that impose trade burdens mainly on developing countries. For instance, in a situation like *Shrimp/Turtles*, without the WTO, the United States would be free to exclude “turtle-unsafe” shrimp on any terms from Indonesia, the Philippines, etc., with few consequences. These states cannot make credible threats to retaliate. Trade and environment or trade and food safety conflicts between two developed countries, especially roughly equal powers (e.g., the United States and the European Union in *Beef Hormones*), are more likely to lead to impasses. In such situations, one state cannot simply browbeat the other.

<sup>122</sup> Public Citizen seems far from sanguine about the legitimacy of even domestic political processes. See *supra* Part I.A.

<sup>123</sup> See *Rigged Rules*, *supra* note 91, at 258 (“At present, trade is badly managed . . . . Continuing on the current path is not an option. But a retreat into isolationism would deprive the poor of the opportunities offered by trade. It would counteract a powerful force for poverty reduction.”).

developing states need rules and institutions to protect their regulatory autonomy.

To the authors, corporations are the problem, and they do not go away just because the WTO is dismantled. They will just return to abusing the domestic political process. *WTO?* displays some glimmers of understanding: The authors observe that the United States “cannot have it both ways: In signing the [WTO] Agreements . . . it gained international backing for trade sanctions but lost the ability to choose when to impose them.” (p. 207).

Public Citizen is fighting a two-front war against corporations, in Geneva and Washington. But the authors sometimes seem to forget whom they are fighting. Destroying the WTO is not necessarily a victory against large corporations; it just shifts the battlefield. So if corporations are the primary evil, not the WTO, why not co-opt the WTO to constrain corporations? Obsessed with attacking the WTO, the authors never seem to entertain the idea that the WTO might help them with their goals of restraining corporations and improving democratic decisionmaking in WTO member states. The authors profitably might consider, or grapple with, theories arguing that the WTO can reinforce democracy and cabin corporate interests.

For instance, McGinnis and Movsesian defend the WTO as a “constitutive structure” that, far from depriving governments of sovereignty, liberates them from protectionist interest groups and thereby enhances both free trade and domestic democracy.<sup>124</sup> With adjustments, the WTO can “promote the power of national democratic majorities by constraining the influence of protectionist interest groups.”<sup>125</sup> McGinnis and Movsesian agree with most of the procedural reforms proposed by Wallach and others:<sup>126</sup> policing conflicts of interest, disseminating documents used in cases, and conducting public proceedings.<sup>127</sup> Like the authors, they recognize large corporations as a particular threat to democracy,<sup>128</sup> and they wish to “raise hurdles only for protectionists,” but not for value-driven legislation, such as the environment or human health.<sup>129</sup>

---

<sup>124</sup> See McGinnis & Movsesian, *supra* note 45, at 514-15.

<sup>125</sup> *Id.* at 514.

<sup>126</sup> See, e.g., Ragosta, *supra* note 28, at 749-54 (arguing for increased transparency), 760-62 (arguing for stronger conflict of interest rules); Weiler, *supra* note 54, at 12-13 (criticizing secrecy in panel proceedings).

<sup>127</sup> McGinnis & Movsesian, *supra* note 45, at 602-03.

<sup>128</sup> *Id.* at 527 (noting that Madison deemed international trade to be a highly divisive issue that would “incite the formation of factions; and protectionist interests groups are, in fact, a particular bane of democracy”).

<sup>129</sup> *Id.* at 529-30.

The constitutive theory, to be sure, has problems.<sup>130</sup> But the constitutive theory shows what the authors ignore at their peril: “Nixing” the WTO will not lead to improved democratic accountability. “No WTO” is not a viable alternative.

Furthermore, while Wallach might laugh at the idea that the WTO will democratize authoritarian regimes like China’s,<sup>131</sup> other scholars take seriously the idea that even contentious WTO mechanisms may enhance domestic democratic institutions. Take, for example, risk assessments under the Sanitary and Phytosanitary Measures Agreement (SPS). *WTO?* opposes them outright because they burden states enacting such measures, are unduly expensive even for developed countries, and invite illegitimate scrutiny of states’ value choices. (p. 63). Robert Howse counters that procedural requirements of SPS may enhance democracy within states.<sup>132</sup> Thorough risk assessments required by SPS Article 5 are good because comprehensive risk information lets citizens make informed, as opposed to alarmist, choices.<sup>133</sup> Once states complete a risk assessment, however, Howse argues that popular choices should be respected.

**DEMOCRATS WITHOUT DEMOCRACY.** The authors’ difficulty in articulating a theory of democratic accountability comes from the fact that they are too attached to a comparison to domestic systems. *WTO?* fixates on the fact that the WTO tribunalists are not “accountable” in that they cannot be removed in an election by their constituents.<sup>134</sup> The authors hold up the United States as a paragon of “open and accountable government.” (p. 2). “Accountability” and democracy, to the authors, are synonymous.

---

<sup>130</sup> Three problems stand out. First, McGinnis and Movsesian seem too sanguine about how well the WTO comports with the “democracy-reinforcing jurisprudence” that they posit. *Id.* at 590. Second, they expect majorities to favor free trade because it “creates wealth for each nation,” completely missing the point *WTO?* makes about the pathology of export-driven (not protectionist) special interests. *Id.* at 515. Third, a “constitutive” WTO, by its nature, freezes regulatory choices (embedded in SPS, Technical Barriers to Trade, etc.) as a higher law, making it too hard for states to revise or revisit them. See Robert Howse, *How to Begin to Think About the “Democratic Deficit” at the WTO 16* (2003), available at [http://faculty.law.umich.edu/rhowse/Drafts\\_and\\_Publications/howse7.pdf](http://faculty.law.umich.edu/rhowse/Drafts_and_Publications/howse7.pdf).

<sup>131</sup> McGinnis & Movsesian, *supra* note 45, at 588.

<sup>132</sup> Robert Howse, *Democracy, Science and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98 Mich. L. Rev. 2329, 2330 (2000) (“[SPS] should be[ ] understood not as usurping legitimate democratic choices for stricter regulations, but as enhancing the quality of rational democratic deliberation about risk and its control. There is more to democracy than visceral response to popular prejudice and alarm . . .”).

<sup>133</sup> *Id.*

<sup>134</sup> The authors argue that a “democratic, accountable forum[ ]” is one where “citizens have a chance to fight for the public interest.” P. 2.

Yet *WTO?* proposes no radical changes—no people's WTO parliament or town hall meeting, nothing that seems to involve citizens directly.<sup>135</sup> In a section on policy recommendations titled "Transparency and Accountability," the authors argue for more openness (open tribunals, disclosure of documents) but suggest nothing that provides more accountability to citizens, as they seem to understand it. (p. 221).

The authors cannot really propose a theory of democracy-as-accountability. Domestic analogies are impractical and unhelpful. Domestic institutions are dysfunctional enough that they are not the best examples of democracy for international institutions,<sup>136</sup> which the authors might concede.<sup>137</sup>

The authors would be better served by recasting their project—not, "What can make the WTO more democratic?" but, more generally, "What can make it more fair?" *WTO?* seems not so much a plea for a more *democratic* WTO as for a more *legitimate* WTO. If democracy, narrowly understood, means that citizens participate in the WTO, legitimacy, by contrast, means that citizens accept WTO decisions as fair, whether or not they participate directly.<sup>138</sup> Representativeness is more important than representation per se. Citizens must feel that their views have been heard, not just that their votes have been perfunctorily counted.<sup>139</sup> A more transparent WTO, as Daniel Esty argues, one more open to including and debating NGOs, will lead to "intellectual competition" that can only enhance faith in the fairness of WTO decisions.<sup>140</sup>

GTW and other NGOs should shift their focus from mechanisms to "democratize" the WTO to those that will widen the "political ethics that reflect[ ] democratic values in existing institutions."<sup>141</sup> This means, as Robert Howse argues, having "Democrats without

---

<sup>135</sup> "The idea of global-scale participatory democracy is often dismissed as a utopian dream. Clearly, with six billion people on the planet, international trade policy decisions cannot be made in a 'town meeting' format." Esty, *supra* note 120, at 16 (footnote omitted).

<sup>136</sup> See Howse, *supra* note 130, at 2-3 (noting that because perception of "democratic deficit . . . occurs at a time when there is significant disillusionment with *domestic* democratic institutions," it is inappropriate to frame issue "from a static perspective, merely asking to what extent outcomes in the WTO are *less* democratically legitimate than policy outcomes within domestic polities").

<sup>137</sup> See *supra* Part I.A.

<sup>138</sup> See Esty, *supra* note 120, at 16 (noting that institutions can derive democratic legitimacy and authority not only directly, from democratic elections and popular sovereignty, but also indirectly, from established ties to democratically accountable institutions and ability to deliver good results).

<sup>139</sup> *Id.* at 15.

<sup>140</sup> *Id.* at 16.

<sup>141</sup> Howse, *supra* note 130, at 20.



Democracy” in that “those who decide within or influence the system have the political ethics of democrats.”<sup>142</sup> Specifically, this means adopting key values of democracy, like “inclusiveness, transparency, and value pluralism,” which are sorely lacking in the still prevailing “club” atmosphere of the WTO.<sup>143</sup>

*WTO?* proposes many policy changes embodying these values, in one fashion or another. But it is confusing, and incoherent, to imply that their proposals will make the WTO more democratic in the strict sense of accountability via popular sovereignty. Not only is such an approach impractical,<sup>144</sup> but it is not necessary for the authors’ objective—fairer WTO proceedings that will result in sufficiently fair outcomes.

#### CONCLUSION: BEYOND SEATTLE

GTW is a David-sized Goliath. Leanly staffed,<sup>145</sup> the group has tremendous leverage and has shown its skill at political organizing and its ability to grab the WTO’s attention. Now that people are listening, Wallach must propose better ideas for the regulation of international trade.

Wallach and GTW would be better off arguing for fair proceedings embodying democratic values, not a more “democratic” WTO, whatever that can mean. This is a manageable, though subtle, change. But GTW also might profit from internalizing these values itself. It should stick to what it does best—namely checking the power of developed states and large corporate interests. It should not purport to speak for constituencies that it does not represent or fully understand, such as developing countries and Southern NGOs, especially in the furtherance of its own agenda (i.e., gathering support for the interests of citizens in developed states). At best, this will alienate such groups; at worst, GTW might unwittingly collude with the WTO in damaging or ignoring Southern interests.

Esty argues that the fear that NGOs are unaccountable is “fundamentally overblown” because those making “inaccurate, irresponsible, or foolish statements will find their credibility rapidly eroded.”<sup>146</sup> But NGOs offering “thoughtful perspectives will enhance their reputa-

---

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 19.

<sup>144</sup> See *supra* note 135 and accompanying text.

<sup>145</sup> In 1998, GTW had six employees and a \$435,000 annual budget. Davis, *supra* note 18, at A26.

<sup>146</sup> Esty, *supra* note 87, at 724.

tions and be looked to more regularly and with greater seriousness through time.”<sup>147</sup>

Esty is right: The key question is not whether GTW will be accountable, but if it will remain relevant. *WTO?* is often strident and wrong, but not, on the whole, irresponsible or foolish. But Wallach must present clearer ideas about how to make the WTO more fair, generally, not just “democratic.” Otherwise, concerned citizens, NGOs, and the WTO will look elsewhere for guidance, and Seattle—which Wallach described as “the time of all times”<sup>148</sup>—will be but a dim memory.

---

<sup>147</sup> Id. at 725.

<sup>148</sup> Naim, Wallach Interview, *supra* note 4, at 32 (“The time of all times was to see so many Americans educated enough to take time off and come to Seattle on their own dollar . . .”).