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## The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime

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# The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime

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## ABSTRACT

*The World Trade Organization (WTO) has been a significant force in the liberalization of trade across international borders since its inception in 1995. Commentators suggest that its reforms have converted the focus of international trade policy from removal of barriers to positive policy-making—a field historically occupied by domestic authorities. And although largely successful in the promotion of international trade, the Authors suggest that the binding provisions of the WTO ignore non-trade concerns such as environmental protection, consumer rights, labor rights, and state sovereignty. The Agreement's inattention to these related concerns is the primary locus of criticism of the WTO, culminating in the breakdown of the 1999 Ministerial Meeting in Seattle, Washington. The Article examines the relationship between the Agreement and environmental, consumer protection, and labor policy, as well as the implications of WTO membership on state sovereignty. The Authors conclude that to improve the WTO's treatment of non-trade concerns, the WTO must increase participation to include non-trade stakeholders, develop and support expertise within the WTO to address non-trade concerns, and follow the "blueprint" articulated in the Ministerial Declaration at the Fourth Ministerial Conference in*

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*Doha. The Declaration recognizes the importance of non-trade concerns and suggests a course of action that is likely to require the WTO to more squarely address the relationship between trade and non-trade policy.*

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## I. INTRODUCTION

The World Trade Organization (WTO) was established on January 1, 1995. It was the capstone achievement to the extensive negotiations<sup>1</sup> culminating the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). The WTO Agreements<sup>2</sup> principal aim is to establish a free trading system in which one state's products and services are allowed to gain free access to the domestic markets of all other WTO member countries. The primary objectives of the WTO as recognized in the U.S.'s enactment of the WTO Agreements are "to obtain open, equitable, and reciprocal market access, eliminate barriers and other trade-distorting policies and practices, and [create] a more effective system of international trading disciplines and procedures."<sup>3</sup> The WTO Agreements fundamentally shifted the focus of the multilateral trading system from the mere reduction in trade barriers, mainly in the area of tariff

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1. The Uruguay Round negotiations extended from 1987 to 1994. The birth of GATT is traced to the signing of a tariff reduction agreement in 1947 in Geneva. The next five Rounds of GATT were primarily focused upon additional tariff concessions: Annecy (1949), Torquay (1951), Geneva (1956), Dillon Round, (1960-61), and Kennedy Round (1964-67). The Tokyo Round (1973-79) was the first Round to actively pursue agreements beyond simple tariff reduction. It reached agreement on subsidies and countervailing duties, technical barriers, import licensing, government procurement, customs valuation, and an anti-dumping code.

2. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1 (1994) [hereinafter Final Act]. The Uruguay Round included the participation of 123 countries and resulted in agreements on trade in services (GATS), intellectual property rights (TRIPS), sanitary and phytosanitary measures (SPS), trade-related investment measures (TRIMS), technical barriers (TBT), customs valuation, import licensing, subsidies, agriculture, and anti-dumping measures. It also strengthened the dispute resolution system (Dispute Settlement Understanding) and established a permanent body—the World Trade Organization.

3. 19 U.S.C. § 2901(a) (2000).

reduction, to one of "positive rule-making."<sup>4</sup> The domain of positive rule-making had been previously regarded as the sole province of domestic economic regulation. The WTO Agreements, in essence, require "countries to adopt measures which hitherto fell within the universe of domestic economic regulation and thus reach deeply into the traditions and practices of domestic governance."<sup>5</sup> It is this intrusion into domestic governance that has become a linchpin in the anti-globalization movement.<sup>6</sup>

The WTO's binding provisions that define its scope and purpose largely ignore non-trade concerns (NTCs). Its monolithic mandate of liberalizing international trade generally does not allow the consideration of legal or ethical factors involving the environment, animal rights, consumer rights, labor rights, or sovereignty. The Agreement Establishing the World Trade Organization (WTO Agreement)<sup>7</sup> requires all member countries to "ensure the conformity of its laws, regulations and administrative procedures with its [WTO] obligations."<sup>8</sup> For example, the WTO settlement procedures allow Dispute Resolution Panels to declare municipal laws and regulations as illegal trade barriers.<sup>9</sup> The member country accused of "impairment" of its WTO obligations must either amend the non-complying law or face WTO-authorized sanctions. This enforcement of its supranational powers, through WTO-appointed Dispute Resolution Panels,<sup>10</sup> has resulted in growing criticism that the WTO

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4. William A. Dymond & Michael M. Hart, *Post-Modern Trade Policy—Reflections on the Challenges to Multilateral Trade Negotiations After Seattle*, J. WORLD TRADE, June 2000, at 21, 25.

5. *Id.* at 26.

6. The anti-globalization forces have staged large-scale protests at the 1999 WTO Ministerial Conference in Seattle, the mid-April 2000 meeting of the International Monetary Fund (IMF) and International Bank for Reconstruction and Development (IBRD or World Bank) in Washington, D.C., and most recently at the July 2001 Group 8 Summit in Genoa, Italy. See generally *Messages for the W.T.O.*, N.Y. TIMES, Dec. 2, 1999, at A34; Elizabeth Olson, *With Seattle a Vivid Memory, W.T.O Seeks a New Host City*, N.Y. TIMES, Jan. 23, 2001, at W1; Aaron Bernstein et al., *Time to Regroup*, BUS. WK., Aug. 6, 2001. See also Michael Elliott, *Death in Genoa*, TIME, July 30, 2001, at 22; Laura King, *Battered and Bitter, Genoa Picks up Pieces*, LANSING ST. J., July 23, 2001, at 3A; Alessandra Stanley & David E. Sanger, *Italian Protester is Killed by Police at Genoa Meeting*, N.Y. TIMES, July 21, 2001, at A1.

7. The Agreement that established the WTO and concluded the Uruguay Round is referred to as the Marrakesh Agreement.

8. Final Act, *supra* note 2, art. XVI, para. 4.

9. Municipal or "local" law pertains to the laws and regulations of an individual nation and its component parts including state and local government laws.

10. The Dispute Settlement System is the most controversial product of the Uruguay Round because of the binding authority it grants to the Dispute Settlement Body (DSB) in its supervision of WTO Dispute Panels and the Appellate Body. The DSB consists of representatives of the WTO member countries. It is responsible for administering the Dispute Settlement System. It has the power to appoint dispute settlement panels, adopt the panel reports and reports of the Appellate Body, and

is a fundamentally undemocratic institution. Another feature imposed by the Uruguay Round that has worked to increase tensions between different interests is the "single undertaking requirement."<sup>11</sup> It mandated as a condition of membership to the WTO that a state comply and implement *all* of the Uruguay Round agreements.<sup>12</sup>

The impingement on national sovereignty through the operation of the WTO's Dispute Resolution Panels often coalesces around one of the previously mentioned substantive areas of controversy. For example, despite the existence of environmental exceptions in the WTO agreements,<sup>13</sup> national environmental protection laws have been challenged as unfair trade barriers. The protection of marine animals has been a favored target of legislation in the United States. The Marine Mammal Protection Act was enacted to protect marine animals such as dolphins, seals, and sea turtles.<sup>14</sup> A major emphasis of such laws is prohibiting practices that led to the slaughter of these animals. One prohibited practice is the fishing for tuna by placing fishing nets over schools of dolphin.<sup>15</sup> By using the dolphins as signals, millions have been killed in the tuna nettings.<sup>16</sup> In response, the United States passed a law requiring tuna manufacturers to label their cans as being "dolphin-safe."<sup>17</sup> The labeling requirement is intended to enable the environmentally conscious consumer to purchase accordingly. Similarly, turtles have been the unintentional

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authorize the payment of penalties and suspension of concessions and other obligations under the WTO agreements. See General Agreement on Tariffs and Trade-Multilateral Trade Negotiations (The Uruguay Round): Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 112, 114 (1994) [hereinafter DSU]. See also Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275 (1997).

11. See generally Final Act, *supra* note 2.

12. See generally *id.*

13. GATT's Article XX provides environmental exceptions to the general GATT disciplines, such as the national treatment principle (principle of non-discrimination). Article XX provides that "adoption or enforcement" of environmental measures listed in XX(b) and (g) are permitted. Article XX(b) authorizes the enactment of environmentally-protective trade measures "necessary to protect human, animal or plant life or health." Article XX(g) allows for restrictive trade measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." However, these environmental exceptions are "subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839, 890, 895 (1999). It is this non-discriminatory principle that has been successfully used to challenge national laws and regulations aimed at protecting marine animals.

14. Marine Mammal Protection Act, 16 U.S.C.A. §§ 1361-1421 (2002).

15. *Id.* § 1371(a)(B).

16. *Id.* § 1385 (b).

17. *Id.* § 1385 (d)(1).

victims of shrimp fishermen. In 1987, the U.S. National Marine Fisheries Service enacted rules requiring shrimp boats to be equipped with Turtle Excluder Devices (TED) that allow turtles to escape the shrimp nets.<sup>18</sup> Both the tuna labeling and TED measures have been challenged under WTO principles as discriminating against foreign fish and shrimp producers.<sup>19</sup>

The fair trade principles of the WTO dictate that a state can only ban a product for safety or health concerns, but it cannot ban the process used to manufacture a product.<sup>20</sup> A state cannot ban the importation of a product simply because it was manufactured in a way that was harmful to the environment or wild animals. Thus, the U.S. dolphin consumer labeling program was held to be an illegal attempt to regulate natural resources outside the jurisdiction of the United States.<sup>21</sup> This was also the case for the Turtle Excluder Device. On a complaint filed by the countries of India, Pakistan, Malaysia, and Thailand, the WTO ruled that the law was a violation of U.S. WTO obligations.<sup>22</sup>

As mentioned in the above paragraph, the WTO Agreements recognize the individual countries' rights to set health and safety standards on imported goods. The WTO's position on such standards is in the Agreement on Sanitary and Phytosanitary Measures (SPS).<sup>23</sup> Although the SPS Agreement recognizes the rights of states to set health and safety standards, it admonishes that national standards aimed at consumer protection may not act as "disguised trade barriers."<sup>24</sup> This provision provides an avenue of attack against the denial of importation on the grounds that the standards of the

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18. 50 C.F.R. §§ 223.206-207 (2002).

19. WTO Appellate Body Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp/Turtle Dispute*]; GATT Dispute Settlement Panel Report on U.S. Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994) [hereinafter *Tuna/Dolphin Dispute*]. See also WTO, Report of the Appellate Body Report on Australia—Measures Affecting Importation of Salmon, WT/DS18/AB/R (Oct. 20, 1998). See generally Carol J. Miller & Jennifer L. Croston, *WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Conservation Program Act*, 37 AM. BUS. L.J. 73 (1999); Steve Charnovitz, *Dolphins and Tuna: An Analysis of the Second GATT Report*, 24 ENVTL. L. REP. 1056, 1057 (1994).

20. See, e.g., Steve Charnovitz, *The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT'L L. 59, 77 (2002).

21. See generally Miller & Croston, *supra* note 19.

22. *Id.* at 92.

23. Agreement on the Application of Sanitary and Phytosanitary Measures, Dec. 15, 1993, 33 I.L.M. 1144 (1994) [hereinafter SPS]. An associated WTO Agreement is the Technical Barriers to Trade Agreement, April 15, 1994. See Final Act, *supra* note 2. The TBT agreement concerns the development of product standards. In contrast, the SPS agreement focuses mainly on food safety. See Final Act, *supra* note 2, Annex 1A.

24. Final Act, *supra* note 2, art. 2, para. 3.

country of import do not meet the requirements of the SPS. First, the state denying an importation must provide proof that the standard is based on scientific principles and is supported by sufficient scientific evidence.<sup>25</sup> Second, Article 5 of the SPS requires that a standard must not be “more trade-restrictive than required” to meet an appropriate level of protection.<sup>26</sup> Article 5 also provides that the determination of whether a standard is overly restrictive or not must take into account “technical and economic feasibility.”<sup>27</sup> This requirement, more than any other, shows that the SPS is an agreement primarily aimed at reducing barriers to trade and not one aimed at enhancing consumer protection. It has been criticized as encouraging “downward harmonization.”<sup>28</sup> This contention is supported by the fact that the burden is placed upon the country maintaining the health or safety standard and not the country challenging the standard.<sup>29</sup> For the future, it is vital that the WTO and the World Health Organization coordinate their activities to ensure that downward harmonization is prevented. The best way to do this is the development of minimal international health and safety standards that would be included in future trade agreements or incorporated into the existing WTO framework.

The need to incorporate NTCs in the next round of trade negotiations has been noted by some of the world’s major trading countries. The European Union, for example, has stated that the next round will need to address the “complex relationships between trade, competition and the environment.”<sup>30</sup> The criticisms leveled at the WTO reverberate in the EU’s statement that “we must ensure that the interests of civil society are adequately reflected in our present and future work.”<sup>31</sup> The sovereignty issue is alluded to in the assertion “that one of the strategic challenges is winning the support of ordinary citizens, in an increasingly democratic world, for

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25. *Id.* art. 5, para. 2.

26. “[M]embers shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.” *Id.* art. 5.

27. *Id.*

28. One commentator simply explained that the SPS allows “a nation [to] challenge another nation’s food safety standards only for being too high—there is nothing in the agreement that permits a nation to challenge another nation’s standards as being too low.” Bruce A. Silverglade, *The WTO Agreement on Sanitary and Phytosanitary Measures: Weakening Food Safety Regulations to Facilitate Trade?*, 55 *FOOD & DRUG L.J.* 517, 520 (2000).

29. *Id.* at 518 (because the country maintaining the standard must do a “scientific assessment of the risk to human, animal, plant, life or health” which the WTO will then examine).

30. European Comm’n, *The European Union and World Trade*, at 4, 1999, at <http://europa.eu.int/comm>.

31. *Id.*

the open trading system.”<sup>32</sup> Labor issues are noted in the statement that there needs to be “continued cooperation between the WTO and the International Labor Organization.”<sup>33</sup>

The breakdown of the 1999 Ministerial Meeting<sup>34</sup> of the WTO in Seattle and the failure to begin a new round of trade negotiations provides an opportunity to review the alleged shortcomings of the current WTO framework.<sup>35</sup> This Article will review the major criticisms of the WTO, both at the level of its substantive agreements and at the level of implementation. Criticisms of the WTO are generally grouped among the following categories of concerns: environment, labor, consumer protection, and sovereignty. Part II will examine the intersection of environmental concerns with the liberalization of trade under the WTO accords. Part III reviews international labor issues and their relationship with the WTO. Next, Part IV studies concerns over health and safety, or what is generally referred to as consumer protection. Part V then examines the issues relating to national sovereignty and the enforcement mechanisms of the WTO. Finally, Part VI undertakes to provide some insight as to how the WTO can better accommodate the NTCs raised in Parts II through V. A number of these criticisms were reflected in the Doha Declaration.<sup>36</sup> This document will be reviewed to gain additional insight into the likely response within the WTO to the criticisms discussed in this Article.

Despite the benefits of categorization, it is important to note that issues often cut across the different groupings. For example, sovereignty issues play a role in the resolution of concerns pertaining to labor, consumer protection, and the environment. It has been argued that one method of granting the public a voice in WTO

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32. *Id.*

33. *Id.*

34. The Ministerial Conference is composed of the trade ministers of all member countries and represents the highest governing body of the WTO. It is at the Ministerial Conference that new rounds of multilateral trade regulations are authorized. The Fourth Ministerial Conference was held November 9-13, 2001 in Qatar. See generally *WTO Watch*, June 29, 2001, available at <http://www.wtowatch.org>.

35. See James L. Kenworthy, *US Trade Policy and the World Trade Organization: The Unraveling of the Seattle Conference and the Future of the WTO*, 5 *GEO. PUB. POL'Y REV.* 103 (2000); Dilip K. Das, *Debate at Seattle: The Way the Cookie Crumbled*, *J. WORLD TRADE*, Oct. 2000, at 181. The need to review the WTO framework has been recognized both internally and externally. There have been numerous outside reviews and symposia directed at the WTO and the multilateral trading system. See, e.g., Symposium, *The First Five Years of the WTO*, 31 *LAW & POL'Y INT'L BUS.* 551 (2000). The WTO internally prepared a report on world trade and the environment. WTO SECRETARIAT, SPECIAL STUDIES 4, TRADE AND ENVIRONMENT (1999). See Steve Charnovitz, *World Trade and the Environment: A Review of the New WTO Report*, 12 *GEO. INT'L ENVTL. L. REV.* 523 (2000).

36. Ministerial Declaration, WT/MIN(01)/DEC/W/1 (Nov. 14, 2001) [hereinafter Doha Declaration].

decision-making is to allow for the greater participation of non-governmental organizations (NGOs).<sup>37</sup> The expertise of a number of NGOs<sup>38</sup> in the area of the environment would make their input valuable to dispute settlement panel decisions in disputes having environmental consequences. The input of such organizations would make for better-informed decisions and increase the public legitimacy of panel decisions.<sup>39</sup> Such input would help counteract the appearance of illegitimacy of panel hearings held under a cloak of secrecy and in which only national governments have the right to submit information. The institutionalization of procedural mechanisms to allow for the input by NGOs would help both to ensure greater environmental awareness and to alleviate concerns over sovereignty and accountability issues.<sup>40</sup> Transparency in decision-making and dispute resolution, something sorely lacking in the WTO dispute resolution system, would likely uncouple the rhetorical power created by linking the emotional issues found in the areas of labor, environment, and consumer protection with a process shrouded in a seemingly undemocratic veil of secrecy.<sup>41</sup>

## II. ENVIRONMENTAL CONCERNS FACED BY THE WTO

It may be helpful to couch any discussion of the WTO and the environment against the background of some empirical facts. On the one hand, "over the past 50 years, the volume of world trade has grown an average of 6% every year," so that at present it is 18-times the level it was in 1948.<sup>42</sup> Global economic prosperity has

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37. See generally Dan Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, and Exclusion*, 1 J. INT'L ECON. L. 123 (1998); Steve Charnovitz, *Participation of Non Governmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331 (1996).

38. One example of an environmental NGO is Greenpeace International.

39. See generally Jacqueline Peel, *Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organization*, 12 COLO. INT'L J. ENVTL. L. & POL'Y 47 (2001).

40. One such procedural mechanism was instituted in the Shrimp/Turtle Dispute ruling when the Appellate Body allowed for the submission and consideration of amicus curie briefs by NGOs. *Id.* at 75.

41. See, e.g., Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333 (1999); Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043 (1994). See also PHILLIP R. TRIMBLE, *GLOBALIZATION, INTERNATIONAL INSTITUTIONS, AND THE EROSION OF NATIONAL SOVEREIGNTY AND DEMOCRACY* (1995). The need for and debate over transparency in decision making were also presented by Professor Paulette L. Stenzel. See Stenzel, *infra* note 417.

42. See Claude Martin, *The Relationship Between Trade and Environmental Regimes: What Needs to Change?*, in *THE ROLE OF THE WORLD TRADE ORGANIZATION IN GLOBAL GOVERNANCE* 137 (Gary P. Sampson ed., 2001).

accompanied this trade expansion.<sup>43</sup> However, “the benefits [of expanded trade] have not been equally shared. Income disparities between the rich and the poor continue to widen, biodiversity has declined, pollution has increased, and the world’s natural resources have been seriously depleted.”<sup>44</sup> The WTO is situated at the intersection of the observations that “governments have done a good job in creating a global marketplace, but not one that is yet producing sustainable outcomes for the world’s environment or for many of its poorest communities.”<sup>45</sup>

The protests that marred the Seattle Ministerial vividly manifested the difficulties the WTO faces in reconciling globalization and environmental aspects of trade. Part of the difficulty lies in the very different structures which have come to characterize the regulation of trade on the one hand and the environment on the other. The rules that have evolved to govern the world trading system have as their foundation the principles of most favored state, national treatment, nondiscrimination, and reciprocity.<sup>46</sup> While there are many complexities across the totality of trade rules, the validity of any specific rule can always be tested by the degree of its adherence to these core principles. And all its members look to one organization, the WTO, as the authoritative source of rules and guidance to which national rules and regulations must conform.

Although “environmental regulation by states has a long, if limited, history . . . its globalization is recent.”<sup>47</sup> And “most . . . pre-1970 international [environmental] initiatives were not about protecting the environment for its own sake but about instrumental human concerns . . . and narrowly economic . . . motivation to protect a valuable economic resource from extinction.”<sup>48</sup> The transition “from primarily economic to conservationist motivation for environmental regulation” can be traced to the global impact of Rachel Carson’s *Silent Spring* in 1962.<sup>49</sup> However, “the principles of international environmental ethics have not been spelled out clearly, refined through repeated applications to concrete situations, and

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43. *Id.*

44. “It has been estimated that, since 1970 30 percent of the earth’s natural wealth has been destroyed as the result of alarming trends such as increasing green house gas emissions, deforestation, soil erosion, and overfishing.” *Id.*

45. *Id.*

46. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 30, 133, 189 (1989).

47. JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 256 (2000).

48. *Id.*

49. *Id.* at 257.

identified in a single authoritative text.”<sup>50</sup> As a result, “there is no universal declaration or charter of environmental ethics that all or virtually all the actors in international society acknowledge as authoritative.”<sup>51</sup> Moreover, the concepts of environmental protection and sustainable development, while overlapping, “suggest distinct approaches to human/environment relations.”<sup>52</sup>

Some international environmental principals have emerged nonetheless. For example, key environmental declarations endorse

the proposition that States have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limit of national jurisdiction.<sup>53</sup>

And, “despite the absence of a single authoritative statement of . . . ethical principles” governing international environmental regulation, “it is possible to identify a small core of ethical guidelines or standards that have achieved widespread acceptance at the international level.”<sup>54</sup>

These standards include the “polluter pays” principle,<sup>55</sup> the

50. See Oran R. Young, *Environmental Ethics in International Society*, in *ETHICS AND INTERNATIONAL AFFAIRS: EXTENT AND LIMITS* 161, 162 (Jean-Marc Coicaud & Daniel Warner eds., 2001).

51. *Id.*

52. *Id.* at 163.

53. This proposition is articulated in nearly identical language in both Paragraph 21 of the Stockholm Declaration adopted at the close of the 1972 U.N. Conference on the Human Environment and Paragraph 2 of the Rio Declaration emanating from the 1992 U.N. Conference on Environment and Development. *Id.*

54. *Id.* at 164.

55. This principle acknowledges, “that those whose actions cause harm to the welfare of others are responsible for the consequences of their actions.” *Id.* at 164-65.

As phrased in Principle 21 of the Stockholm Declaration, the emphasis is on damage to the environment of “other States or of areas beyond the limits of national jurisdiction.” The basic idea of this principle is clear enough. It features an extension of what is commonly known as the nuisance doctrine in municipal settings to international society and introduces, at least implicitly, the concept of liability as a normative construct applicable to international affairs. That said, however, the polluter pays principle raises a host of subsidiary issues which require attention but have not been addressed fully at the international level. Although Principle 21 refers explicitly to states, it seems reasonable to conclude that the doctrine applies also to the actions of non-state actors, such as corporations, whose actions may affect the welfare of those residing in other jurisdictions. What is less clear, however, is whether states are ultimately responsible for the damages caused by the actions of their nationals, including non-governmental organizations and multinational corporations incorporated within their jurisdictions. Unclear as well are the standards of liability associated with the polluter pays principle. Does the principle presuppose a standard of strict liability, in the sense that actors are responsible for the consequences of their actions regardless of knowledge or intent? Is it sufficient to compensate victims after the fact, in contrast to

precautionary principle and the corollary of reverse onus,<sup>56</sup> the principles of environmental equity,<sup>57</sup> and common but differential

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making a concerted effort to avoid causing harm in the first place? Are there workable guidelines concerning the calculation of damages in transboundary settings? Who represents interests that lie "beyond the limits of national jurisdiction"? The polluter pays principle does not offer any simple or straightforward answers to these and a variety of similar questions. Nor does international practice carry us very far in understanding the operational content of this ethical principle.

*Id.* at 165.

56. The precautionary principle results from the fact that

in dealing with large atmospheric, marine, and terrestrial ecosystems, it is often impossible to pin down causal connections in a clear and generally accepted fashion. . . . In situations of this sort, the precautionary principle asserts that definitive proof regarding the relevant causal links is not required as a basis for taking steps needed to prevent serious disruption of important ecosystems.

*Id.* at 166. The corollary of reverse onus

asserts that in cases involving significant uncertainties regarding the environmental effects of proposed actions, the burden of proof rests with proponents to show that their actions will not cause serious harm to important ecosystems rather than with the opponents to show that these actions will prove injurious. Proving beyond a reasonable doubt that a given action will be environmentally benign is typically difficult and often impossible.

*Id.* at 167.

Thus, while the precautionary principle has become widely accepted, the corollary of reverse onus has proved much more contentious. *Id.* at 166. *See also* Martin, *supra* note 42, at 141-43.

57. "Environmental equity is, first and foremost, a matter of taking steps to ensure that the rich and the powerful do not insulate themselves from environmental harm largely by displacing problems on the poor and weak." *Id.* at 167. Three distinct concerns are identified with the issue of international environmental equity:

- (a) "opposition to the exploitation of developing countries as sites for the disposal or reprocessing of hazardous wastes;"
- (b) "questions about the appropriateness or propriety of investing scarce resources in combating problems like climate change when many of the world's poorest countries lack safe drinking water, adequate sanitation facilities, and even secure food supplies;"
- (c) "provision of assistance to poor countries to allow them to participate effectively in global environmental regimes."

*Id.* at 167-68.

A key source of conflict between developed and developing countries around issues of equity results from the fact that

most developing countries have taken the view that the problem of climate change is a consequence of the actions of advanced industrial countries, so that it is unfair to expect developing countries to join any effort to protect the earth's climate system unless and until the wealthy countries take effective steps to come to terms with this problem.

responsibility,<sup>58</sup> along with broader notions of obligation to future generations, stewardship, and caring for the earth.<sup>59</sup>

Mechanisms and approaches to achieving environmental goals on a global level, however, often conflict with one another.<sup>60</sup> "The most important contest of principles with the globalization of environmental regulation is the contest within [transnational corporations] between the principle of lowest-cost location . . . and the principle of world's best practice."<sup>61</sup> Other contests include rule compliance versus continuous improvement,<sup>62</sup> and sustainable development versus economic growth.<sup>63</sup>

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*Id.* at 168.

58. In some ways, [this principle] . . . is an outgrowth of the principle of environmental equity. The essential idea . . . involves joining a general acceptance of the proposition that we are all in the same boat with respect to many large-scale environmental problems, on the one hand, with an acknowledgement that the circumstances of individual countries differ markedly, on the other. There are at least two types of circumstantial differences that are worthy of consideration in this discussion. One type involves variations among states regarding actions that are causes of major environmental problems. . . . The other type of difference centers on various measures of ability to pay or capacity to contribute to solving major environmental problems.

*Id.* at 168-69.

59. *Id.* at 170-73.

60. BRAITHWAITE & DRAHOS, *supra* note 47, at 279.

61. This is the most important contest, because whereas the principle of lowest-cost location leads to a race-to-the-bottom for regulatory standards globally . . . the principles of world's best practices can lead to a race-to-the-top in strategic cases. . . . Adding to these two competing principles of corporate action are two competing principles of state action. Where [transnational corporations] adopt the principle of lowest-cost location, realist states will adopt the principle of deregulation so they can attract the investment of cost-cutters. Where [transnational corporations] adopt the principle of world's best practice, states can reject deregulation.

*Id.*

62. This is . . . a particularly important contest because the principle of rule compliance means that a company subscribing to it accepts an obligation to meet a formal legal standard, but no more. In a world where the principle of lowest-cost location is dominant, the effect of corporate adherence to the principle of rule compliance is pressure toward a race-to-the-bottom. . . . [I]n contrast, to the extent that [transnational corporations] voluntarily adopt the principle of continuous improvement in product stewardship and environmental protection, standards will be raised globally. National environmental standards have always been set in response to corporate practice; when spontaneous ordering by a principle such as continuous improvement leads corporate practices up, environmental standards follow them up.

*Id.* at 279-80.

63. Sustainable development is one of a set of cognate principles about reconciling the environment and economic development, including the polluter-

While the WTO is the dominant player in the regulation of trade, the “sheer number of specialist international organizations and treaty secretariats dealing with environmental matters has fueled repeated calls . . . for an International Environmental Organization that could adopt a more holistic approach to the challenges and better exploit opportunities for linking issues.”<sup>64</sup> A comparable organization simply does not exist to facilitate harmonization and enforcement of environmental principles. The fact that the WTO has been perceived as a threat to environmental protection has led to the debate over whether it should emerge as a key environmental player.<sup>65</sup>

#### A. *The Impact of Environmental Regulation on Trade*

In view of the basic differences of approach underlying trade and environmental regulation outlined above, it may be instructive to examine how the two came to be intertwined. When the GATT was established in the aftermath of World War II, environmental protection was not regarded as a major trade-related issue. Article XX of the GATT was essentially its only provision relating to environmental issues. Article XX allowed a contracting party to deviate from GATT principles when taking actions “necessary to protect human, animal, or plant life or health,”<sup>66</sup> or relating “to the conservation of exhaustible natural resources if . . . made effective in conjunction with restrictions on domestic production or consumption.”<sup>67</sup> The GATT, however, did not articulate the methods or measures by which the necessity for protection should be balanced against the adverse impact of deviation from GATT principles.

Discussion in the GATT on the impact of environmental regulation on trade can be traced to the late 1960s. As the developed countries began responding to fears about the limits of growth and depletion of natural resources by pursuing more vigorous policies of environmental protection, affected industries began to complain about the adverse effect the cost of compliance had on their trade competitiveness. These complaints led the GATT contracting parties to establish a Working Group on Environmental Measures and

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pays principle and eco-efficiency. . . . Although this is the key rhetorical divide, it is hard to see when clear victories for sustainable development over growth have been given a concrete institutional form.

*Id.* at 284.

64. *Id.* at 259.

65. *Id.* See also Martin, *supra* note 42, at 157.

66. Final Act, *supra* note 2, art. XX(b)

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

International Trade (Working Group) in 1971.<sup>68</sup> The oil crisis occurred soon thereafter, delaying any immediate action by the Working Group.<sup>69</sup> It was not until 1991 “when environmental issues had again attained a high profile on the international policy agenda,” that the Working Group was reactivated.<sup>70</sup> “In the WTO it was transformed into the Committee on Trade and the Environment (CTE), with the mandate to investigate the relationship between environmental and trade policies.”<sup>71</sup> Formation of the CTE “was a reaction by GATT contracting parties to the controversy caused by the tuna-dolphin dispute . . . [which] had caused NGOs to consider the GATT anti-environment, and developing countries to worry that environmental norms were being used to restrict trade.”<sup>72</sup>

Shortly after the tuna-dolphin dispute,<sup>73</sup> governments made some progress toward reconciling trade and environmental concerns at the 1992 Rio Conference of the United Nations on Environment and Development (UNCED). The Rio Summit produced Agenda 21, a major non-binding policy document, the implementation of which is overseen by the U.N. Commission on Sustainable Development.<sup>74</sup> Principle 12 of the Rio Declaration advanced three key elements: (1) environmental measures dealing with transboundary or global problems should be based on international agreements, (2) unilateral action to deal with such problems “should be avoided,” and (3) trade measures should not be arbitrarily or unjustifiably discriminatory or a disguised restriction on trade.<sup>75</sup>

The CTE has focused on “translating Principle 12 into operational guidance for the WTO system.”<sup>76</sup> In doing so, it has also received policy guidance from a set of basic principles promulgated by the Organization for Economic Cooperation and Development (OECD),<sup>77</sup> as well as the language of the Preamble to the Marrakesh

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68. BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM* 441 (2001).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 445.

73. *See supra* notes 13-19 and accompanying text.

74. *See Report of the United Nations Conference on Environment and Development*, U.N. GAOR, 47th Sess., Supp. No. 49, Vol. 1, Annex I, Rio de Janeiro, at 141, U.N. Doc. A/47/49 (1992) [hereinafter *Declaration on Environment and Development*].

75. Robert J. Morris, *Trade and the Environment*, in *TRADE STRATEGIES FOR A NEW ERA* 285 (Geza Feketekuty & Bruce Stokes eds., 1998).

76. *Id.*

77. *Id.*; Report on Trade and Environment to the OECD Council at Ministerial Level, OECD/GD/(95) 63 (Paris: OECD, 1995). The OECD has consistently opposed unilateral trade measures imposed on the basis of the process or production method used to make a product:

Agreement establishing the WTO. The Preamble "allow[s] for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so."<sup>78</sup> The CTE's work on trade and trade-policy aspects of environmental policy has included "the trade effects of eco-labeling, provisions in multilateral environmental agreements (MEAs) to use trade sanctions or bans as enforcement or implementation instruments, the environmental effects of agricultural support policies, and trade in domestically prohibited goods."<sup>79</sup>

Prior to the first WTO Ministerial meeting in Singapore in December 1996, NGOs lobbied the CTE "for specific recommendations to make WTO rules more 'environmentally friendly.'"<sup>80</sup> However, "the most that governments could agree upon was that the mandate of the CTE and its work program should be continued."<sup>81</sup> The report "emphasized the importance of multilateral approaches to shared environmental problems, as well as the preference for WTO members in a particular MEA dispute to seek recourse within the dispute settlement provision of the MEA."<sup>82</sup> The report's conclusions did acknowledge "environmental measures and requirements could adversely affect the competitiveness and market access opportunities of small and medium-sized enterprises, especially in developing countries."<sup>83</sup> Developing countries opposed the injection of language

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Such measures assume that importing countries have the right to pass judgments on the domestic policies of their trading partners, and to impose their judgment through trade instruments. There is no limit to the extent to which such unilateral measures could be used because no two countries have (nor should they necessarily be expected to have) equivalent environmental policies and standards in all areas. The use of trade measures in such circumstances would tend to lead to their imposition for any difference between national environmental policies and standards (not to mention policies in the areas of labour, tax competition law, etc.) and to rapid decline in international law.

Business and Industry Advisory Committee of the OECD, BIAC Statement to the Special Session of the OECD Environmental Policy Committee, Paris, Dec. 7-8, 1993, at 3. Rene Vossenaar, *Process and Production Methods*, in TRADE, INVESTMENT AND THE ENVIRONMENT 160 (Halina Ward & Duncan Brack eds., 2000).

78. Duncan Brack, *Multilateral Environmental Agreements: An Overview*, in TRADE, INVESTMENT AND THE ENVIRONMENT, *supra* note 77, at 127.

79. HOEKMAN & KOSTECKI, *supra* note 68, at 445-46.

80. *Id.* at 446.

81. Morris, *supra* note 75, at 285.

82. Michel Potier, *An OECD Perspective*, in TRADE, INVESTMENT AND THE ENVIRONMENT, *supra* note 77, at 138.

83. Magda Shahin, *A View from the South*, in TRADE, INVESTMENT AND THE ENVIRONMENT, *supra* note 77, at 116.

that would mandate "the use of trade measures for environmental objectives."<sup>84</sup>

### B. WTO Disputes Involving the United States

GATT panels preceding establishment of the WTO attacked the application of U.S. law extraterritorially to regulate the process being used rather than the product itself as in the tuna-dolphin dispute.<sup>85</sup> The first major environmental dispute brought after creation of the WTO was the challenge by Venezuela and Brazil to the U.S. Clean Air Act.<sup>86</sup> As part of a program requiring reduction of smog-producing contaminants in gasoline, the U.S. Environmental Protection Agency (EPA) required domestic producers to meet standards based on the emissions of gasoline they produced in 1990.<sup>87</sup> Foreign producers, not keeping equivalent records, were held to a different standard.<sup>88</sup> They could only ship gasoline that met the average quality standard in the United States.<sup>89</sup> These foreign producers argued that this "effectively required them to meet higher standards than some American concerns."<sup>90</sup> A WTO panel agreed, dismissing U.S. refiners' arguments that "they had been forced to invest billions of dollars in their refineries to comply with the Clean Air Act rules and that importers should not be able to undercut them with gasoline that did not meet the same standards."<sup>91</sup> Following concurrence by the WTO Appellate Body, the EPA reopened its rule-making process, resulting in modifications that some claimed weakened the rules.<sup>92</sup>

The United States' position fared better in its ongoing dispute with the European Union over export of beef from cattle treated with growth hormones. This case was decided under the SPS Agreement that "encourages harmonization of health standards worldwide by providing preferential procedures to Members with a view to ensuring that their domestic health procedures can withstand WTO scrutiny even if they discriminate among products on the basis of their country

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84. *Id.* at 112.

85. *See* Tuna/Dolphin Dispute, *supra* note 19, at 839.

86. Maury D. Shenk, *United States—Standards for Reformulated & Conventional Gasoline*, 90 AM. J. INT'L L. 669, 669 (1996).

87. *Id.* at 670; *see also* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 219, 104 Stat. 2399, 2492-2500 (1990); 40 C.F.R. §§ 80.40-80.130 (1995).

88. Shenk, *supra* note 86, at 670.

89. *Id.*

90. David E. Sanger, *Trade Group Orders US to Alter Law for First Time*, N.Y. TIMES, Jan. 18, 1996, at D6.

91. *Id.*

92. DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE 270 (1994).

of origin.”<sup>93</sup> The SPS Agreement “requires members to ensure that ‘any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles, and is not maintained without scientific evidence.’”<sup>94</sup> The EU’s risk assessment procedure fell short, and its ban failed,<sup>95</sup> but similar issues involving efforts to trade genetically modified organisms persist.

In the shrimp-turtle dispute, the United States argued that its statutory requirements fell within the exception under Article XX(g) of the GATT that permits trade-restrictive measures if necessary for the “conservation of exhaustible natural resources.”<sup>96</sup> In April 1998, a panel ruled against the United States; the panel did not discuss whether and how the U.S. protection related to the environmental sections of Article XX, but focused on the general provision of Article XX stating that measures may not “constitute . . . arbitrary or unjustifiable discrimination’ nor be a ‘disguised restriction on international trade.’”<sup>97</sup> In October 1998, the Appellate Body agreed that the U.S. statutory protections were covered by Article XX(g), but found that the law had been implemented in a way that resulted in unfair discrimination between exporting states.<sup>98</sup> While emphasizing that such situations “are best addressed through international agreements and negotiation,” the Appellate Body’s decisions in the shrimp-turtle dispute signaled “that the extraterritorial application of national norms can be legal under . . . Article XX and that there is some leeway for countries to use trade policy to enforce norms relating to production process methods that do not have implications for the characteristics of traded products.”<sup>99</sup>

### C. Current Issues and Proposals

The institutional developments and dispute proceedings discussed above suggest five key factors to driving environmental

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93. Thomas Cottier & Krista N. Schefer, *Assessing the Story So Far: Hope on the Horizon?*, in TRADE, INVESTMENT AND THE ENVIRONMENT, *supra* note 77, at 199.

94. Damian Geradin, *A Lawyer’s View*, in TRADE, INVESTMENT AND THE ENVIRONMENT, *supra* note 77, at 95.

95. Cottier & Schefer, *supra* note 93, at 200.

96. HOEKMAN & KOSTECKI, *supra* note 68, at 446.

97. *Id.* at 447. The panel also addressed the issue of process and production methods. “[O]n the basis of information provided by scientific experts, it considered . . . TEDs to be ‘one of the recommended means of protection within an integrated conservation strategy.’” Shahin, *supra* note 83, at 109. However, the panel did not seem to have been convinced that TEDs “were the only, or even a key, component of marine turtle protection.” *Id.*

98. *Id.*

99. HOEKMAN & KOSTECKI, *supra* note 68, at 447.

issues onto the trade agenda: (1) increasing recognition of the existence of cross-border environmental spillovers;<sup>100</sup> (2) perceived inadequacy of national environmental policies;<sup>101</sup> (3) concerns that

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100. Production and consumption activities in one country may have detrimental impacts on other countries. Such negative spillovers or externalities may be physical (air and water pollution, acid rain) or intangible (animal rights, consumption of ivory). In such cases there is a basis for cooperation and negotiation. However, (unilateral) trade policy will not be the appropriate instrument to deal with the externality. Standard economic theory requires that externalities be addressed at their source. This requires that either the production or the consumption activity be curtailed directly by confronting the producer or consumer with the real costs of the activity, or that property rights be assigned that give owners an incentive to manage and price resources appropriately. For an externality to arise there must be a market failure that results in prices of the resources used being too low – marginal private costs of an activity are lower than the true marginal social costs. Trade sanctions cannot offset an environmental externality efficiently, because they affect both consumers and producers of a good, and usually impact on only a part of total production or consumption.

While this is often recognized, trade policy is attractive to environmentalists because it can be used to induce countries to apply environmental policies that are in principle targeted at the source of the problem. The issue here is to determine the appropriate standard of protection and the feasibility of enforcing it. Countries may have very different preferences regarding environmental protection, reflecting differences in the absorptive capacity of their ecosystems, differences in income levels (wealth), and the differences in culture. Insofar as there are cross-country spillovers—physical or psychological—the appropriate policies will need to be negotiated. What matters from a trading system point of view is that the choice of environmental policy in cases where there are spillovers is not an issue that is appropriately dealt with in the WTO forum. International agreements on the matter are required, to be negotiated by the competent authorities (not trade officials). Trade policy might be agreed to be the instrument that may be used to enforce internationally agreed obligations. As long as there is consensus on this between WTO members, no legal problem arises. There may well be economic problems, however. The effectiveness of trade sanctions will be limited if the targeted nation does not have the resources to enforce appropriate environmental regulations. In such cases the sanction may make it harder for the country to achieve environmental improvements because the trade barriers reduce income.

*Id.* at 441-42.

101. The same conclusion with respect to trade policy applies if there are no cross border spillovers. In that case each country must determine for itself what are appropriate environmental policies. The WTO does not impose any constraints on a government regarding pursuit of environmental policies on its territory. If it seeks to prevent the consumption of particular products, it may restrict imports, as long as the ban, tax or product standard is also imposed on domestic goods. However, the GATT does prevent the extraterritorial enforcement of national standards. Thus, a WTO member cannot use trade policies to force another member to enforce different (stronger) environmental standards on its territory. Attempts to do so have taken the form of attempts to require foreign firms to use specific production processes. In such instances there is a clear-cut case for compensation if a trading partner seeks to impose

trade is bad for the environment;<sup>102</sup> (4) fears that national environmental policy will reduce domestic firm competitiveness;<sup>103</sup> and (5) perceived use of environmental policies for protectionist purposes.<sup>104</sup>

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standards that are higher and more costly than what is optimal for a country to implement. Using coercive trade sanctions is inappropriate.

*Id.* at 442-43.

102. A perception that trade is bad for the environment also played a role in bringing environmental issues to the WTO. It has been argued that freeing trade will lead to expansion of production and thus pollution, that liberalization will facilitate relocation of firms to countries with lax regulatory environments, that greater trade implies the need for greater transport, leading to more degradation, and so forth. All of these arguments are weak at best. While trade and liberalization may give rise to such effects, this is negative from a social welfare viewpoint only if appropriate environmental policies are not pursued. If such policies are in place, producers and consumers will take into account the cost to the environment, and this will be reflected in the price of goods and services. As greater trade and specialization subsequent to liberalization will lead to greater wealth, the capacity and willingness of voters to devote more resources to the environment will also increase. Using trade policy to restrict trade so as to reduce environmental degradation is inappropriate. Indeed, often protection will have adverse consequences on the environment. Thus, agricultural support programs have led to the use of production methods that are excessively polluting. Coal subsidies in the EU encourage the use of inputs that are much more detrimental to the environment than imports would be. By restricting imports and subsidizing consumption of local output, consumers are prevented from switching towards less polluting types of energy that originate in other parts of the world—areas where the environmental costs of extraction are often lower as well.

*Id.* at 443.

Of course, there is also evidence that trade has positive environmental effects because global ties increase self-regulation pressures on firms in low-regulation countries. A recent study relying on survey data from firms in China found that “multinational ownership, multinational customers, and exports to developed countries increase[d] self-regulation of environmental performance.” Petra Christmann & Glen Taylor, *Globalization and the Environment: Determinants of Firm Self-Regulation in China*, 32 J. INT’L BUS. STUD. 439 (2001).

103. Environmental policies may reduce the ability of enterprises located in countries with high standards to compete with those that operate in nations with low standards. This is exactly what the policy aims at. If high standards are what a society wants, then the result should be that the affected activities contract. Restricting imports makes no sense, as it promotes the activities that the environmental policy is attempting to constrain. This, of course, is one reason why domestic industries may seek to “level the playing field” through trade policy—it is one way to avoiding part of the impact of environmental regulation. More generally, if there is a preference for more environmentally-friendly goods on the part of consumers, there should be a willingness to pay for them.

HOEKMAN & KOSTECKI, *supra* note 68, at 443.

104. Environmental policies may unnecessarily (or deliberately) be used to restrict trade. This has been a major concern of many WTO members, and has

Does the Doha Declaration adequately address these factors? After reaffirming the Marrakesh Agreement Preamble's "commitment to the objective of sustainable development," the Ministerial Declaration of November 14, 2001 continues,

We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive. . . . We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements. We welcome the WTO's continued cooperation with UNEP [United Nations Environment Programme] and other inter-governmental environmental organizations. We encourage efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations, especially in the lead-up to the World Summit on Sustainable Development to be held in Johannesburg, South Africa, in September 2002.<sup>105</sup>

The Declaration thus acknowledges and touches in one way or another on all five factors. "With a view to enhancing the mutual supportiveness of trade and environment," the Work Programme agrees to negotiations on

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been an important factor for considering environmental policy in the WTO. Environmental policies have often been of the command and control type rather than more efficient price-based instruments such as taxes. The reason is that such instruments may create rents that can be captured by the industries that are affected by the environmental regulations. Industry then has an incentive to push for inefficient policies in situations where environmental groups are sufficiently powerful to get environmental standards adopted. Environmental policies that are based on regulation rather than taxation may easily have trade restricting effects because the trade equivalent may be a ban on imports.

The challenge is to determine whether the market-access effect of a domestic measure is necessary to achieve underlying policy objectives. Mechanisms to decide what is legitimate are therefore vital. There is great danger in acceding to pressure for import barriers that are ostensibly justified on level playing field grounds. The prospect of protection may induce import-competing firms to support environmental groups in their pursuit of regulation. This increases the likelihood of inefficient instruments being chosen, as these generate greater rents.

As in other areas, greater transparency and more objective analysis of the impact of environmental policies on trade, and vice versa, is required. This is the mandate that was given to the Committee on Trade and the Environment (CTE) at the end of the Uruguay Round.

*Id.* at 443-45.

105. Doha Declaration, *supra* note 36, art. 6.

- (i) the relationship between existing WTO rules and specific trade obligations set out in Multilateral Environmental Agreements (MEAs). The negotiations shall be limited in the scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;
- (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;
- (iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.<sup>106</sup>

The Committee on Trade and Environment is further instructed to give particular attention to

- (i) the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, and the environment and development;
- (ii) the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights; and
- (iii) labeling requirements for environmental purposes.<sup>107</sup>

Finally, the Work Programme recognizes “the importance of technical assistance and capacity building in the field of trade and environment to developing countries, in particular the least developed.”<sup>108</sup>

#### D. Trade Measures in Multilateral Environmental Agreements

The U.S. Trade Representative (USTR) characterized the negotiations launched on November 14, 2001 as “a special opportunity to simultaneously advance free trade and environmental protection.”<sup>109</sup> Senator Baucus described the commitment to explore the linkages between MEAs and trade agreements as “a particularly significant step into the 21st century for the WTO.”<sup>110</sup> The dispute-settlement cases that have examined potential conflicts between commitments countries have made under MEAs and the WTO have been “a particular source of concern in the United States, where the perception that the WTO is undermining domestic environmental

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106. *Id.* art. 31.

107. *Id.* art. 32.

108. *Id.*

109. Dep’t of State, *USTR Fact Sheet: A Timetable for Global Trade Negotiations*, Dec. 3, 2001, at 2, available at <http://usembassy-australia.state.gov>.

110. Max Baucus, *Doha and Beyond: The Role of Congress in a New Trade Round*, ECON. PERSP., Jan. 2002, available at <http://usinfo.state.gov/journals/ites/0102/ijee/baucus.htm>.

standards has gained greater currency over the past several years.”<sup>111</sup> Specifically, trade policymakers have advocated “the development of an arrangement within the WTO whereby trade measures included in an MEA that meet certain criteria would be exempt from other international rules.”<sup>112</sup> In addition, “future MEAs should contain provisions for disputes between MEA parties,” with the WTO’s role, if any, “limited strictly to the question of whether a specific implementing action is consistent with GATT rules.”<sup>113</sup>

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111. *Id.*

112. These criteria would have to address the two main exemption requirements set forth in current trade rules. In order to be exempted from GATT rules, a measure (1) must qualify as necessary to protect life or health, or relate to the conservation of natural resources, and (2) must not be applied in an arbitrary or unjustifiably discriminatory manner, or act as a disguised restriction on trade. The WTO Committee on Trade and Environment currently has before it several proposals for meeting these requirements. . . . The crucial recommendations are:

- The MEA must define precisely what trade measures are authorized or required,
- The measures must be directly related to the achievement of the environmental objective identified in the MEA,
- Trade measures should not be used simply to punish or “sanction” another country for failure to meet the MEA’s obligations or for actions considered inconsistent with those set forth in the MEA,
- The trade measures should not be unnecessarily restrictive of trade. To make that determination, a form of proportionality test should be used (as, for example, is now required by U.S. courts when determining whether a state environmental regulation is consistent with the interstate commerce clause of the U.S. Constitution).

A proposal along these lines involves minimal interference in the sovereign right of nations to negotiate any kind of MEA they wish and to include in their MEAs any kind of trade measure they deem necessary. However, the proposal also does two things that are very important for the integrity of a trade system based on the mutual exchange of contractual commitments among nations: It protects the rights of all WTO members, specifically the right of each to be compensated in the event that others take actions that are contrary to the rules; and it gives guidance to MEA negotiators about the kind of agreements and trade measures that will be accepted as GATT-consistent—guidance that they remain free to follow or reject as they see fit.

Morris, *supra* note 75, at 288-89.

113. A party should not use the WTO to contest either the validity of the trade measure sanctioned within an MEA or the validity of the MEA itself. Parties to an MEA should be presumed to have consensually waived their GATT/WTO rights regarding measures specified in the agreement. Nonparties should be able to bring a dispute with an MEA party to the WTO, but the MEA party would benefit from a presumption that the trade measure is consistent with WTO rules if it met the criteria set forth above. Until a proposal like this is accepted, WTO panels will proceed as they do now. Specifically, they will have no agreed criteria with which to judge trade measures embedded in MEAs. Indeed, panels are free to make judgments independent

### E. *Unilateral Use of Trade Measures*

Another area requiring consideration in new trade negotiations is the unilateral use of trade measures, which, for all practical purposes, can be resorted to only by those countries that possess significant market power.<sup>114</sup> Environmentalists argue that “the only effective stimulus to countries to come to the table to negotiate a multilateral solution to an environmental problem is when a country . . . takes action unilaterally.”<sup>115</sup> The situation has been seen as “analogous to that which developed during the last two decades over the safeguard system under GATT.”<sup>116</sup> This observation has led to a suggestion, modeled on the revised safeguard rules, that “the WTO should consider permitting countries to address an environmental harm with unilaterally imposed trade measures when the need is so urgent as to require action before a multilateral solution can be worked out.”<sup>117</sup> To limit the number of such unilateral actions, the amended rule would be available only to deal with “direct threats to living organisms.”<sup>118</sup> An advantage of such an exemption is that it would provide “incentives for all affected parties to begin serious negotiations to see if a multilateral solution is possible.”<sup>119</sup>

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of previous decisions, and neither trade advocates nor environmentalists can have any confidence about how a panel will decide a specific case. *Id.* at 289.

114. *Id.* at 290.

115. While “all countries use trade measures to ensure that important products comply with national standards or technical regulations,” as has already been noted, “some also use them to enforce national laws or policies regarding the methods by which certain products are produced,” and “these often go beyond what is internationally authorized to render a product ‘fit for use.’” *Id.*

116. Seeking to avoid the rigors of the GATT-authorized system for getting temporary relief from import competition, some governments increasingly made use of voluntary export restraints (VERs) by countries thought to be the main source of the competitive pressure. To remedy this undesirable situation, the Uruguay Round negotiated a revision of the GATT Article XIX safeguard regime. Under it a country can impose import restrictions for a limited period in order to gain temporary relief from competitive imports. As long as this restrictive action meets certain conditions, the country is exempt from the requirement to pay compensation or accept retaliation for up to three years while the restrictions are phased out. *Id.*

117. *Id.* at 290-91.

118. “While other environmental harms may be more dangerous, such as air or water pollution, climate change, and so forth, these threats are rarely so imminent as to justify action before an international consensus is developed.” Further, such action “should be required to be nondiscriminatory and should not restrict trade more than necessary.” *Id.* at 291.

119. *Id.*

### F. *Role of the Environment in Trade Agreements*

While it may be easier to deal with environmental issues in environmental agreements and trade issues in trade agreements, it is difficult to keep them totally separate. Instead, trade agreements should include specific provisions addressing environmental concerns. Such inclusion would make trade agreements into a primary instrument for advancing international environmental policy.<sup>120</sup> The argument against such a role for trade agreements is the problem created by trading parties of varying economic levels,

If the agreement is among countries of significantly different levels of economic power, such provisions begin to look like means of coercing the less powerful. It is begging the question to say that such provisions are freely agreed on by all parties when the less powerful are, in effect, required to accept them as a price for getting the market access advantage that is the main attraction of the agreement.<sup>121</sup>

Despite the desirability of addressing some aspects of environmental policy in trade agreements, some accommodations for less developed countries must be made until they are able to build their economic base through expanded trade.

The USTR has noted “other nations are more likely to work with us to improve local standards if the U.S. approach is positive and cooperative, not intimidating.”<sup>122</sup> The Doha Declaration acknowledged that developed countries need to assist less-developed countries in building their capacity to conform to higher environmental standards.<sup>123</sup> The Doha Declaration must be followed by a commitment from WTO member countries to reduce the tensions that have emerged between continued trade liberalization on the one hand, and valid environmental concerns on the other. Ultimately, trade measures must be accompanied by appropriate and necessary environmental and sustainable development policies.<sup>124</sup>

### III. FREE TRADE AND LABOR CONDITIONS

All aspects of public international law bear a common weight—“the unresolved tension between positivism (what ‘is’) and natural

120. *Id.* at 292.

121. *Id.*

122. USTR Fact Sheet, *supra* note 109.

123. See Doha Declaration, *supra* note 36, arts. 6, 32, 33. “We recognize the importance of technical assistance and capacity building in the field of trade and environment to developing countries in particular the least developed among them.” *Id.* art. 33.

124. Martin, *supra* note 42, at 146-50.

law (what 'should be')."<sup>125</sup> This tension is no more dramatically seen than in the issue of whether the WTO's power to link trade benefits with labor standards should remain dormant or be finally realized. Secondary issues of how such core labor standards could be defined and then enforced may seem almost moot after the Doha Ministerial Conference. While recognizing the "intense debate" among WTO members regarding the issue of trade and labor conditions, the WTO's Briefing Notes for Doha stated that "it seems unlikely that the issue [of labor standards] will be taken up in any official way" at the conference.<sup>126</sup> This prediction proved true.<sup>127</sup>

The WTO's role in defining and enforcing global labor standards remains unfulfilled<sup>128</sup> as Member States resist efforts to address worker rights in the context of free trade.<sup>129</sup> This resistance is produced "when first-world appetites collide with third-world realities."<sup>130</sup> Member governments from "the developing world" view attempts to define and enforce global labor rights through the WTO as an effort by protectionists to reduce "the comparative advantage of lower-wage countries."<sup>131</sup>

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125. Hillary K. Josephs, Symposium, *Global Trade Issues in the New Millennium: Upstairs, Trade Law; Downstairs, Labor Law*, 33 GEO. WASH. INT'L REV. 849, 851 (2001).

126. World Trade Org., *Trade and Labour Standards: A Difficult Issue for Many WTO Governments, DOHA WTO MINISTERIAL 2001: BRIEFING NOTES*, available at <http://www.wto.org/english> [hereinafter *BRIEFING NOTES*].

127. Charlotte Deny, *For Richer – and For Poorer: The Latest Round of World Trade Organisation Talks in Qatar Proves that Western Trade Blocs Need Developing Countries On-Side to Get a Deal*, GUARDIAN, Nov. 23, 2001, at 21.

128. The WTO agreements, and the GATT before them, contain only one explicit reference to labor, in a clause allowing prohibitions on imports of goods made with prison labor. See Elissa Alben, *GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link*, 101 COLUM. L. REV. 1410, 1416 (2001) (citing GATT 1994 Article XX).

129. Justine Nolan & Michael Posner, *International Standards to Promote Labor Rights: The Role of the United States Government*, 2000 COLUM. BUS. L. REV. 529, 535.

130. Leslie Kaufman & David Gonzalez, *Labor Standards Clash with Global Reality*, N.Y. TIMES, Apr. 24, 2001, at A1 (reporting that in El Salvador, government officials will not raise the minimum wage to provide a living wage, nor will it even enforce existing labor laws too vigorously for fear that foreign employers would move many jobs to "another poor country").

131. *BRIEFING NOTES*, *supra* note 126. The failure to effectively address labor rights in multilateral trade agreements is not limited to the WTO. At the first Summit of the Americas, held in December 1994 in Miami, leaders of the Western Hemisphere agreed that by the year 2005 an agreement for a Free Trade Area of the Americas (FTAA) should be concluded. Eleven working groups on technical questions to be resolved were formed but did not include a group on worker rights. A more modest proposal to establish a "study group" for this issue was also denied, as worker rights issues were relegated to a "vague and undefined" Committee on Civil Society. See JEROME LEVINSON, *CERTIFYING INTERNATIONAL WORKER RIGHTS: A PRACTICAL*

The WTO's neglect of labor standards is not free from opposition. The United States and the European Union have proposed that the WTO address the issue of global labor standards. At the first ministerial meeting of the WTO held in Singapore in 1996, the U.S. proposal to form a working group to study worker rights issues was rejected.<sup>132</sup> At the Seattle Conference in 1999, the United States, the European Union, and other developed countries succeeded in establishing a working group.<sup>133</sup> "Developing country delegates," however, firmly resolved to prevent the use of trade sanctions to enforce labor standards, defeated consensus on what role the WTO would play in global labor rights.<sup>134</sup>

Labor advocates argue that ignoring the link between free trade and labor conditions undermines the goal of globalization, which is the elevation of global living standards.<sup>135</sup> Accepting the legitimacy of including labor rights issues in the context of free trade agreements and the appropriateness of addressing labor standards in the WTO,<sup>136</sup> legal scholars propose several alternate routes to the intended ends of free trade. One solution is to include a "social clause" in the WTO rules incorporating the core labor rights developed by the International Labor Organization (ILO).<sup>137</sup> Another approach seeks the aid of Dispute Solution Bodies (DSBs) to create an "interpretive amendment" that extends coverage of current clauses to labor conditions.<sup>138</sup> This Section will analyze these alternate routes to the protection of basic worker rights under the WTO, and will conclude that these routes may converge to create meaningful labor protections in the context of free trade.

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ALTERNATIVE, (Econ. Policy Inst., Briefing Paper, 1999), available at <http://www.epinet.org/briefingpapers/levinson.html>.

132. See Nolan & Posner, *supra* note 129, at 535.

133. *Id.*

134. *Id.*

135. See, e.g., Remarks by John Sweeney, *Can We Take Open Markets for Granted?*, World Economic Forum, Davos, Switzerland, Jan. 28, 2000, available at <http://www.aflcio.org/publ/speech2000/sp0128.htm> ("The fundamental test of globalization . . . is not whether markets are more open or less open. That mistakes the means for the end. The end is human development . . . helping to lift the poor from poverty. . ."). Sweeney is the President of the AFL-CIO.

136. One legal scholar observes: "The WTO is the one international agency with the ability to exert pressure on all countries to observe [labor] rights . . . [by] extending its protection to goods produced in violation of these rights, and allowing any member country to burden imports of such products." Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61, 90 (2001).

137. Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1, 6 (1999).

138. See generally Summers, *supra* note 136.

### A. GATT and Labor Standards

In 1946, states met to devise a trading system that would promote social good.<sup>139</sup> Labor issues played a significant role in these negotiations.<sup>140</sup> The ill-fated Havana Charter for an International Trade Organization (ITO) proclaimed a global “common interest” in the achievement and maintenance of “labor standards related to productivity, and thus in the improvement of wages and working conditions as productivity will permit.”<sup>141</sup> Accordingly, each member of the proposed charter would “take whatever action may be appropriate and feasible to eliminate [unfair labor] conditions within its territory.”<sup>142</sup>

A reasonable conclusion drawn from this agreement is that the ITO conceived of unfair labor standards in reference to wage policy. This conclusion has been based on the connection drawn between labor standards and productivity, and the members’ negotiations on full employment.<sup>143</sup> Signed but never ratified, the ITO treaty still set an important precedent for the GATT in its active discussion of labor issues.<sup>144</sup>

The ensuing GATT arose out of “parallel negotiations” on substantive tariff concessions and was the only part of the ITO agreement to survive.<sup>145</sup> GATT’s preamble recognized trade not as an end in itself, but rather as a means for raising standards of living and ensuring full employment.<sup>146</sup> GATT did not include, however, the ITO’s section on employment or labor standards,<sup>147</sup> and did not include any other clause on unfair labor conditions.<sup>148</sup> Rather, GATT only prohibited the import of goods made with prison labor.<sup>149</sup>

Nevertheless, it is “inaccurate to conclude . . . that the GATT amounted to an active rejection of the idea of including labor

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139. See Blackett, *supra* note 137, at 6.

140. See Alben, *supra* note 128, at 1430.

141. *Id.* at 1431 (citing RAJ BHLA, INTERNATIONAL TRADE LAW HANDBOOK 2-5, at 86 (2d ed. 2001)).

142. See Blackett, *supra* note 137, at 7 (citing U.S. Dep’t of State, Pub. No. 3117, Commercial Policy Series 113, Havana Charter for an International Trade Organization, art. 7 (1948)).

143. See Alben, *supra* note 128, at 1430.

144. *Id.*

145. *Id.*

146. See Blackett, *supra* note 137, at 6 (citing GATT preamble).

147. See Alben, *supra* note 128, at 1431.

148. See Blackett, *supra* note 137, at 7 (citing Donald M. McRae, *The Contribution of International Trade Law to the Development of International Law*, in RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 99, 178 (Academie De Droit International ed., 1996)).

149. See Alben, *supra* note 128, at 1430.

standards in a multilateral trade agreement.”<sup>150</sup> The ITO negotiations suggest that the parts of the agreement, of which GATT was one, were designed to “complement one another on matters of labor policy,”<sup>151</sup> and that the GATT is properly placed in the context of labor principles developed in the Havana Charter.<sup>152</sup>

### B. Core Labor Rights Debate

The WTO has delegated jurisdiction over labor matters to the ILO.<sup>153</sup> Drawing from human rights conventions, the ILO proclaimed four core labor standards in approving a Declaration on Fundamental Principles and Rights at Work (Declaration).<sup>154</sup> These four core labor standards are: (1) freedom of association and the effective right of collective bargaining,<sup>155</sup> (2) the prohibition of forced or compulsory labor,<sup>156</sup> (3) the abolition of child labor,<sup>157</sup> and (4) the elimination of discrimination in regard to employment or occupation.<sup>158</sup> The Declaration equates ILO membership with accession to the Declaration’s provision of mandatory core labor rights standards.<sup>159</sup>

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150. *Id.* at 1432.

151. *Id.*

152. For example, an ITO subcommittee responded to the suggestion that the general exceptions provision on prison labor, that was to remain as part of GATT, be used to enforce labor standards by noting that the objective was covered by other terms of the agreement, such as the section of workers’ rights, that did not survive the ITO’s failure. Further evidence of GATT’s early struggle with labor issues is seen in the 1953 debates surrounding Japan’s accession request. Negotiators suggested that the lower Japanese wage would create unfair advantage against foreign markets. Further, broader issues of freedom of association, working hours, and other labor conditions were considered in reviewing Japan’s request. Such considerations were made in the context of Japanese wages, and the effect that such an impact on wages may have on Japan’s trading partners.

153. Marjorie Cohn, *The World Trade Organization: Elevating Property Interests Above Human Rights*, 29 GA. J. INT’L & COMP. L. 427, 434 (2001).

154. See Alben, *supra* note 128, at 1413.

155. See Convention Concerning Freedom of Association and Protection of the Right to Organize, July 9, 1948, ILO Doc. 011948087, available at <http://www.ilo.org>; Convention concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, July 1, 1949, ILO Doc. 011949098, available at <http://www.ilo.org>.

156. Convention Concerning the Abolition of Forced Labour, June 25, 1957, ILO Doc. 011957105, available at <http://www.ilo.org>.

157. Convention Concerning Minimum Age for Admission to Employment, June 26, 1973, ILO Doc. 011973138, available at <http://www.ilo.org>.

158. Convention Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, ILO Doc. 011958111, available at <http://www.ilo.org>.

159. *Id.* See also Yasmin Moorman, *Integration of ILO Core Rights Labor Standards into the WTO*, 39 COLUM. J. TRANSNAT’L L. 555, 556 (2001). The term “standards” is used interchangeably with “rights” in this Section. However, in the context of the ILO Declaration, there is a shift toward defining labor standards as “human rights.”

The ILO, however, has no effective mechanism by which to enforce labor rights.<sup>160</sup>

Relying on the Declaration in attempting to include labor standards in the WTO is open to criticism. First, the Declaration's four core labor rights offer *de minimus* protection.<sup>161</sup> These core labor rights include only seven of the ILO Conventions, all of which are almost universally accepted.<sup>162</sup> Rights to workplace safety, limits on the hours of work and rights to periods of rest, and freedom from workplace abuse are not protected by the Declaration.<sup>163</sup>

In addition, the four core labor rights omit wage-based standards. The Declaration does not assert a global minimum wage, or create a right to a fair or living wage.<sup>164</sup> Instead, there appears to be "a general acceptance that the differential in wages due to the availability of cheap labor serves as a legitimate comparative advantage in international trade" and "that low wage countries should not be deprived of this advantage."<sup>165</sup>

This seeming acquiescence to disparately low wages is perhaps the result of defining labor standards as individual rights. For example, child labor is prohibited not because children receive disparately low wages, but because work stunts children's growth and development.<sup>166</sup> Freedom of association is protected as a human right regardless of the efficacy of a union to bargain for a living wage.<sup>167</sup> Indeed, the core rights articulated in the Declaration have been recognized as human rights as articulated in the Universal Declaration of Human Rights and a number of other human rights conventions.<sup>168</sup>

Developing countries fear that inclusion of core labor rights in the WTO will act to diminish their comparative advantage. Empirical studies show, however, that observance of the core labor rights would not significantly reduce the comparative advantage gained by providing cheap labor.<sup>169</sup> For example, in 1992 it cost Nike

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160. See Cohn, *supra* note 153, at 434 (citing Elisabeth Cappuyns, *Linking Labor Standards and Trade Sanctions: An Analysis of Their Current Relationship*, 36 COLUM. J. TRANSNAT'L L. 659 (1998)).

161. See Summers, *supra* note 136, at 67.

162. *Id.*

163. *Id.* at 68, 81.

164. *Id.* at 66.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 68 (citing Christopher R. Coxson, *The 1998 ILO Declaration on Fundamental Rights at Work: Promoting Labor Law Reforms Through the ILO as an Alternative to Trade Sanctions*, 17 DICK. J. INT'L L. 469 (1999)).

169. See Summers, *supra* note 136, at 68-69 (citing Bob Hepple, *A Race to the Top: International Investment Guidelines and Corporate Codes of Conduct*, 20 COMP. LAB. L. & POL'Y J. 347, 349 (1999)).

\$5.60 to produce a pair of shoes in Indonesia which sold for \$45.00 to \$80.00 in the United States.<sup>170</sup> Any increase in costs associated with the observance of core labor rights would not measurably reduce Indonesia's cost advantage in producing shoes.<sup>171</sup> Developing countries also believe that enforcement of the core labor rights would invade their sovereignty.<sup>172</sup> Importing countries would be able indirectly to regulate labor conditions in the exporting countries. In response, these countries are already required to protect the core labor rights found in the Declaration by virtue of their membership in the ILO.<sup>173</sup>

### C. Enforcing Labor Rights Using WTO's Unfair Trade Provisions

The WTO's failure to explicitly protect workers' rights through adoption of a "social clause" containing core labor rights has led to the suggestion that the unfair trade provisions under GATT and WTO be utilized to vindicate certain labor rights violations.<sup>174</sup> These clauses could be applied to regulate labor related trade issues.<sup>175</sup> Article VI (social dumping) and Article XX (general exceptions) are the key provisions to such an approach.<sup>176</sup>

Social dumping can be used to support an interpretation of the WTO rules to encompass labor standards.<sup>177</sup> Under Article VI, domestic producers who can demonstrate both that an exported good is being sold at a price "less than normal value" and an "injury" to the domestic industry are entitled to relief.<sup>178</sup> This reasoning could be extended to substandard labor practices, which give firms an unfair cost advantage over firms in countries observing fair labor practices, giving rise to coverage by the WTO's antidumping provisions.<sup>179</sup> The "injury requirement" is satisfied if labor practices have a detrimental

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170. *Id.* at 69 (citing Jennifer L. Johnson, Note, *Private-Public Convergence: How the Private Actor Can Shape Public International Labor Standards*, 24 BROOK. J. INT'L L. 291, 330 n.83 (1998)).

171. *Id.*

172. *Id.* (citing Lance Compa, *International Labor Rights & the Sovereignty Question: NAFTA & Guatemala, Two Case Studies*, 9 AM. U. J. INT'L POLY 117 (1993)).

173. *Id.* at 71.

174. *Id.*

175. See Alben, *supra* note 128, at 1416.

176. *Id.* at 1416.

177. *Id.*

178. *Id.*

179. *Id.* at 1417 (citing Lena Ayoub, *Nike Just Does It – and Why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad*, 11 DEPAUL BUS. L.J. 395, 436 (1999) ("Through this mechanism, child labor, for example, may be found to violate the antidumping provisions of each treaty because employment of children artificially lowers production costs, thus giving the manufacturer an economic advantage for engaging in child employment.")).

effect on wages. In addition, substandard labor laws<sup>180</sup> may be viewed as illegal subsidies because they offer an unfair advantage to firms in countries with lower labor standards.<sup>181</sup>

A limitation on the effectiveness of this approach comes from the 1994 Agreement on Implementation of Article VI of GATT that requires "special regard . . . be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures."<sup>182</sup> This language creates an obstacle for use of Article VI "to the extent that labor standards are correlated to a country's level of development, they should not be included in antidumping calculations."<sup>183</sup> Similarly, subsidies law imposes injury requirements and allows special consideration for developing countries.

Article XX permits laws that, among other things, restrict imports of goods that were produced by forced labor, to protect public morals or to address health concerns.<sup>184</sup> Labor advocates urge member countries to adopt a general exception to their GATT and WTO tariff obligations for certain products that are made under conditions that violate core labor rights. For example, the "public morals exception" could be invoked to justify trade sanctions against products that involve the use of child labor.<sup>185</sup> In addition, since Article XX does not contain an "injury" requirement for the imposition of sanctions,<sup>186</sup> it is a viable means for the enforcement of modern labor standards that focus on human rights rather than wage-based issues.<sup>187</sup> In sum, "public morals" could be interpreted as

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180. GATT/WTO jurisprudence looks to the law as implemented in practice, not merely the "law on the books." See Josephs, *supra* note 125, at 866 (citing WTO Panel Report on Japan—Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R (Mar. 31, 1998)).

181. See Alben, *supra* note 128, at 1418.

182. *Id.* (citing Janelle M. Diller & David A. Levy, *Notes and Comments: Child Labor, Trade, and Investment: Toward the Harmonization of International Law*, 91 AM. J. INT'L L. 663, 681 (1997)).

183. *Id.*

184. *Id.* at 1421 (citing ANNEX 1 A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND VOL. 1 (1994), 33 I.L.M. 1125 (1994)).

185. See Moorman, *supra* note 159, at 558-59 (citing Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 131 (1999)).

186. *Id.*

187. See Alben, *supra* note 128, at 1423. Currently, no precedent exists in WTO Panel or Appellate Body reports for Article XX(a) claims or defenses in the labor context. See Moorman, *supra* note 159, at 559. However, labor advocates that propose an expansive interpretation of "public morals" have found legal support in a recent WTO ruling on U.S. restrictions on imports of shrimp from countries that failed to mandate turtle excluder devices on shrimp boats. Alben, *supra* note 128, at 1422 (citing *Shrimp/Turtle Dispute*, *supra* note 187). Although the Appellate Body ultimately rejected the U.S. defense, it stressed that the WTO exceptions provision

including better living conditions that would be achieved through a living wage or full employment.

#### D. *Proposed Plan of Action*

The United States should lobby for the inclusion of a “social clause” in WTO rules based on the ILO core labor rights. This inclusion could take the form of an amendment to Article XX providing that products produced under conditions violating basic labor rights shall not be protected from duties, quotas, or embargoes.<sup>188</sup> Similar action could be taken to enforce wage-based labor standards. The defense for such action would rest on treaty interpretation principles that allow for the introduction of the negotiating history of the GATT and WTO. The debate over establishment of a minimum wage or living wage would be more heated, as developing countries would characterize such attempts as mere forms of protectionism. The developed countries will need to provide the impetus for the debate to move beyond this point of criticism. In this way, the original intent of free trade agreements, which was to raise global living conditions, may be fulfilled. The following three subsections will analyze alternative approaches, including a consumer-based initiative, unilateral governmental action, and multinational corporation (MNC)-based initiatives.

##### 1. Labor Rights and Free Trade Stakeholders

Beginning in the 1970s, U.S.-based MNCs took advantage of lower production costs in other countries. U.S. jobs in basic manufacturing, or “smokestack” goods, moved overseas.<sup>189</sup> The lure of lower costs started a “race to the bottom,”<sup>190</sup> in which countries competed to suppress wages and restrict unionization in order to attract MNCs.<sup>191</sup> This trend created a growing pool of *silent stakeholders* including workers in the United States and abroad. As a result, public concern for sweatshop conditions has grown. For example, in 1995 at the Mandarin International Factory in El Salvador, worker strikes led to media exposure of the workers’

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should be read “in light of contemporary concerns of the community of nations,” to include live animals, “even if it did not encompass living species at the time of the drafting.” *Id.* (citing Shrimp/Turtle Dispute, *supra* note 187). Such an approach to the “public morals” exception supports its inclusion of the core labor rights articulated by the ILO as “contemporary concerns of the community of nations.” *Id.*

188. See Summers, *supra* note 136, at 90.

189. *Id.* at 81. Summers also notes that increasingly, U.S. jobs in “high-technology goods” are moving overseas.

190. See David Moberg, *Everything You Need to Know About the WTO*, SALON NEWS, at <http://www.salon.com>.

191. *Id.*

plight.<sup>192</sup> Two of the four U.S. retailers—J.C. Penny and Dayton-Hudson (Target)—left following the protests.<sup>193</sup> Consumer groups such as Sweatshop Watch seek to educate consumers about labor violations in the United States and overseas.<sup>194</sup> It is vital that consumers send a clear message that violations of labor rights outweigh cost savings in the production of goods.

## 2. U.S. Unilateral Efforts

The failure of U.S. attempts to incorporate core labor rights into multilateral trade agreements has emphasized the need to make unilateral efforts to meet the objective of protecting workers while promoting free trade.<sup>195</sup> U.S. national interest is best served by an international system where core labor standards are recognized and enforced. U.S. domestic labor legislation will erode without tangible U.S. unilateral action to protect core labor rights in the global workplace.<sup>196</sup>

One approach involves targeting U.S. assistance to countries making efforts to comply with acceptable labor standards.<sup>197</sup> For example, the Labor Standards Initiative provides funding to assist the ILO in providing technical assistance to countries, businesses, and NGOs working to establish and protect core labor standards. Additional funding was appropriated to the Department of Labor, for example, to provide assistance to countries seeking to develop social programs regarding unemployment, employment services, and workforce training.<sup>198</sup>

A unilateral strategy would create a linkage between trade and investment agreements on one hand, and core labor rights on the other. U.S. trade legislation, such as the General System of Preferences (GSP), has provided that countries must effectively assure core labor rights before receiving trade preference.<sup>199</sup> The Special Trade Representative (STR) determines whether core labor rights are enforced and whether trade preferences ought to be withdrawn.<sup>200</sup> The rules governing U.S. participation in international financial institutions such as World Bank require that

192. *Id.*

193. *Id.*

194. Laura Ho et al., *(Dis)Assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. L. REV. 383, 409 (1996).

195. See LEVINSON, *supra* note 131.

196. *Id.*

197. Nolan & Posner, *supra* note 129, at 537.

198. *Id.*

199. See LEVINSON, *supra* note 131.

200. *Id.*

the Treasury Department direct the U.S. executive directors in these institutions to persuade borrowing countries to respect core worker rights.<sup>201</sup>

The STR and Treasury Department have been criticized, however, for sacrificing core labor rights to other priorities, such as assuring the security and mobility of capital.<sup>202</sup> Therefore, the responsibility of certifying the enforcement of core labor rights should be transferred to the Department of Labor, which in turn would rely on the ILO to evaluate the state of labor standards in the country being reviewed. These actions would provide leverage to enforce compliance with core labor rights in the global workplace and positively influence efforts to include such requirements in multilateral trade agreements.

### 3. MNC-Based Solutions

Due to the shortcomings of formal legal mechanisms in protecting labor rights, an alternative approach to securing labor rights internationally is the adoption of voluntary codes of conduct by MNCs. Manufacturers and retailers, such as Levi Strauss & Co., have adopted corporate codes that set out labor “guidelines” for their business partners.<sup>203</sup> These “terms of engagement” require business partners to comply with local laws regarding wages, hours, and benefits, and prohibit contractors’ use of forced or child labor.<sup>204</sup> The problem with such codes is the lack of effective enforcement mechanisms.<sup>205</sup> In addition, MNCs typically do not monitor their business partners.<sup>206</sup> As a result, the voluntary codes of conduct are sometimes dismissed as merely a “public relations gesture.”<sup>207</sup>

## IV. CONSUMER PROTECTION

Forty years ago President John F. Kennedy proposed a set of four basic consumer rights: to safety, to be informed, to choose, and to be heard.<sup>208</sup> The international consumer movement, as a manifestation of its growth and scope, has doubled the number of these rights by adding the right to satisfaction of basic needs, to

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201. *Id.*

202. *Id.*

203. *See* Hepple, *supra* note 169, at 355.

204. *Id.*

205. *Id.* at 356, 359.

206. *Id.*

207. *Id.* at 358.

208. *See* Richard Alexander, *The Development of Consumer Rights in the United States Slowed by the Power of Corporate Political Contributions and Lobbying*, at <http://consumerlawpage.com/article/lobby.shtml>.

redress, to education, and to a healthy environment.<sup>209</sup> In 1985, the U.N. General Assembly adopted the *U.N. Guidelines for Consumer Protection*, which effectively established international recognition for the consumer interest, although the demarcation among human, consumer, and environmental rights remains a matter of debate.<sup>210</sup>

The purpose of this Section is to focus on the WTO mandate to liberalize international trade relates to consumer protection. Because consumption is obviously interwoven with environmental and labor issues, an effort is made to identify principles that are predominantly of a consumption nature. A brief review of the theory of consumer benefits of free trade under the WTO regime is followed by a summary of popular criticisms in the consumer domain. Three high profile, yet distinct, WTO consumer protection cases are then reviewed to highlight the intersection between free trade and consumer issues. The Section closes with a statement of challenges for WTO reform.<sup>211</sup>

#### A. Theory of Consumer Benefits of Free Trade

The competitive marketplace is not a level playing field between producers and consumers. Producers typically have more information and economic power than consumers. It is generally accepted that domestic consumer protection, in the form of legislation and other trade protections, is necessary in all economies.<sup>212</sup> In contrast, the WTO and free trade operate on the utility theory of comparative advantage: those economies that are endowed with the resources and efficiencies to produce goods and services at lower comparative costs should be permitted to exploit those advantages for the cost and choice benefit of all consumers.<sup>213</sup> Trade liberalization facilitates the distribution of those efficiencies, which also leads to the domination and dependence effects on smaller markets and their consumers who

209. These are generally attributed to the work of Consumers International. See <http://www.consumersinternational.org>.

210. G.A. Res. 39/248, U.N. GAOR, 39th Sess., 106th mtg, Annex, Agenda Item 12, U.N. Doc. A/RES/39/248 (1985).

211. See generally JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* (1998); WTO SECRETARIAT, *FROM GATT TO THE WTO: THE MULTILATERAL TRADING SYSTEM IN THE NEW MILLENNIUM* (2000); THE EU, THE WTO, AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE? (J.H.H. Weiler ed., 2000).

212. Robert Mayer, *Presentation of Consumers International Study of Consumers' Experiences With International Internet Transactions*, June 8, 1999 (Fed. Trade Comm'n Pub. Workshop), available at <http://www.ftc.gov>.

213. See, e.g., Jeffrey L. Dunoff, *Rethinking International Trade*, 19 U. PA. J. INT'L ECON. L. 347, 349 (1998).

cede control over their economy and, to some extent, over their own lives.<sup>214</sup>

Detractors of the WTO maintain that the ultimate beneficiaries are the supplying corporations, which will continue to grow in size.<sup>215</sup> Consumer protection laws allow governments to correct the market failures and redress the inequalities of information and power. Because national governments cannot individually police international trade, however, the responsibility for ensuring consumer protection has fallen to the WTO.

### B. Consumer Criticisms of the WTO Regime

The WTO executes the Uruguay Round of GATT agreements in a "common institutional framework"<sup>216</sup> by: (1) facilitating a multilateral trading system and liberalizing trade through administering trade agreements, (2) acting as a forum for trade negotiations,<sup>217</sup> (3) settling trade disputes,<sup>218</sup> (4) reviewing national trade policies, (5) assisting developing countries in trade policy issues, and (6) cooperating with other international organizations. It follows from this mission<sup>219</sup> that the impact of free international trade on consumers is not specifically included in the WTO's mandate.<sup>220</sup> In fact, the WTO has barred Member States from "considering social, environmental and justice issues" when deciding what and from whom to buy.<sup>221</sup> Moreover, consumer groups portray the WTO as a secretive bureaucracy outside of democratic control that serves exclusively the interests of MNCs at the expense of human health and safety concerns.<sup>222</sup>

WTO tribunals can determine that a country's legislation is restrictive of its policies and then implement economic sanctions

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214. See Mayer, *supra* note 212.

215. See David B. Sutton, *Free Market Fundamentalism*, available at <http://www.dangerous.com>.

216. Final Act, *supra* note 2, art. II, para.1.

217. In addition to increasing global economic prosperity and welfare, the work of the WTO is expected to reduce violent conflict between nations through resort to the dispute settlement process.

218. See DSU, *supra* note 10; *Rules of Conduct, 1996*, WT/DSB/RC/1 (96-5267); Appellate Body, *Working Procedures for Appellate Review*, WT/AB/WP/3 (Feb. 28, 1997).

219. Consumer protection was not an explicit part of the WTO's mandate, but non-governmental organizations argue that it should be, because consumers within Member States have little protection from the ruination of the concentration of corporate power that flows from the WTO policies.

220. See Richard O. Cunningham, *Commentary on the First Five Years of the WTO Antidumping Agreement and Agreement on Subsidies and Countervailing Measures*, 31 LAW & POL'Y INT'L BUS. 897, 904 (2000).

221. *Id.* at 910.

222. *Id.*

when it deems necessary.<sup>223</sup> This operates as a form of judicial review, by ruling on the legality of Member States' laws. Domestic laws favoring consumers must be undertaken in the "least trade restrictive" manner possible, subordinating consumption to production interests, and ultimately undermining democratic institutions.<sup>224</sup>

One of the most pervasive criticisms of the WTO, from a consumer perspective, is that it has no comprehensive consumer protection policy.<sup>225</sup> While WTO rules allow competing Member States to challenge consumer protection policies in other countries on the basis that they hinder trade,<sup>226</sup> there is no corresponding mechanism to sanction a state for failing to adequately protect its consumers. The SPS Agreement<sup>227</sup> constitutes the essence of WTO consumer protection legislation.<sup>228</sup> Under this Agreement, the WTO permits each member state to set its own standards and inspection methods, both based on scientific evidence, that are necessary to preserve human, animal, and plant health and life.<sup>229</sup> These standards cannot be arbitrary and cannot be applied to discriminate against the products of another country.<sup>230</sup> When changes in domestic consumer protection regulations are proposed, the WTO must be granted advance notice and information.<sup>231</sup>

The main beneficiaries of the current trading system are big corporations and businesses because they can threaten appeals to the WTO to intimidate governments to soften their local consumer protection laws.<sup>232</sup> World trade has increased but people in the developing countries have seen their standards of living and per capita consumption decline.<sup>233</sup> If WTO policies are designed to benefit consumers, how can these benefits be equitably distributed? Freer markets have also increased the global concentration and market power of large MNCs, which has tended to reduce competition and, accordingly, reduced choice and value for consumers

223. *Id.* at 911.

224. *Id.*

225. *Id.*

226. *Id.*

227. This document sets out standards and guides for inspection, controls and procedures for processing food for export. Members cannot restrict trade unless there is a scientific basis for their increased concern and imposition of higher standards. SPS, *supra* note 23.

228. Article XX of the predecessor GATT Agreement allowed Member States to protect human, animal, or plant life or health. Final Act, *supra* note 2, art. XX.

229. *Id.*

230. Non-discrimination by members to imports and exports of other members is the Most-Favored-Nation Treatment. *Id.* art. I

231. *Id.*

232. Cunningham, *supra* note 220, at 913.

233. *Id.*

generally.<sup>234</sup> This is the biggest NGO concern with respect to the WTO.

### C. Consumer Case Studies

This Section will examine three consumer case studies that explore the linkage between free-trade rules and consumer protection. In the Hormone-Treated Beef Case, the WTO's rejection of the *precautionary principle* in favor of scientifically probative evidence limited national governments' ability to restrict the importation of goods on health and safety grounds.<sup>235</sup> In the Bananas Trade Dispute, the conflict between trade preferences for lesser-developed countries and free trade was examined.<sup>236</sup> Finally, the patent protection offered by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) has worked to advance free trade over consumer protection.<sup>237</sup> This free trade bias has become most pronounced in preventing poorer countries from producing generic life-saving drugs.<sup>238</sup>

#### 1. Growth Hormone-Treated Beef

A widely publicized WTO consumer protection controversy dealt with a dispute between the European Union and the United States over hormone-treated beef.<sup>239</sup> The U.S. cattle industry relies on growth hormones to accelerate livestock growth and produce beef with less cost.<sup>240</sup> The European Union banned six commonly used growth hormones out of concerns about their contributory effects to genotoxicity, carcinogenicity, embryotoxicity, and the negative endocrine and reproductive effects on human health.<sup>241</sup> The European Union banned beef imports from the United States due to these health concerns, and the United States contested this ban.<sup>242</sup> A WTO panel held that the ban violated the SPS Agreement.<sup>243</sup>

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234. *Id.*

235. European Comtys., *Measures Concerning Meat and Meat Products*, WT/DS26/AB/R—WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *Measures Concerning Meat*].

236. European Communities, *Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R (Sept. 25, 1997).

237. Agreement on Trade Related Aspects of International Property Rights, Apr. 15, 1994, 33 I.L.M. 1197.

238. *Id.* art. II.

239. *Measures Concerning Meat*, *supra* note 235.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

According to the SPS, Member States have the sovereign right to enact measures protecting the health and life of individuals within their territory, but may do so only if such measures are not unjustifiably discriminatory and do not constitute disguised trade restrictions.<sup>244</sup> Measures protecting health and safety that may burden international trade must be grounded in scientific fact, must be predictable, and must not be discriminatory.<sup>245</sup> The U.S. position on growth-accelerated beef is that such trade-restrictive measures are non-tariff, disguised barriers inhibiting trade.<sup>246</sup> The European Union asserted that such measures are neither facially nor patently discriminatory, and that the measures are designed to protect the health and safety of their citizenry.<sup>247</sup> In this case the WTO panel found<sup>248</sup> that the EU concern over hormone-treated meat was not scientifically based, and ruled that the EU's ban violated the WTO's rules on discriminatory trade.<sup>249</sup>

In this respect, consumer concerns parallel environmental concerns as both call for the application of the precautionary principle.<sup>250</sup> The WTO prevents states from acting in response to potential risk by requiring scientific probability before action may be taken.<sup>251</sup> Arguably, these policies compromise consumers.<sup>252</sup> Allowing hormonally enhanced meat to be exported, for example, may not demonstrate risks today, but the long-term effects of continued consumption of these hormones have not been identified or assessed.<sup>253</sup>

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244. SPS, *supra* note 23.

245. *Id.*

246. *Measures Concerning Meat*, *supra* note 235.

247. *Id.*

248. SPS, *supra* note 23, art. 2(2).

249. The WTO decision was sustained on appeal. See David A. Wirth, *European Communities Restrictions on Imports of Beef Treated With Hormones*, 92 AM. J. INT'L L. 755, 757 (1998).

250. This case generated considerable controversy. See, e.g., *Groups Urge White House to Call for Moratorium on WTO Challenges to Consumer and Environmental Protection Rules*, at <http://www.cspinet.org/new/wto.htm> [hereinafter *Groups Urge White House*].

251. A similar issue, still emerging, is the EU rule on mandatory labeling of genetically-modified food products. See Branden Mitchener, *U.S. is Protesting an E.U. Measure on Genetic Foods*, WALL ST. J., July 2, 2002, at A14.

252. See *Groups Urge White House*, *supra* note 250.

253. Another consumer issue involves the use of specific hazardous materials in products that have been banned by the European Union. The United States raised concerns that the ban would eliminate "the use of certain specified risk materials in a wide range of products." The WTO ruling maintained the ban. Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting held Oct. 15-16, 1997, Note by the Secretariat*, Decision 97/5469EC (Dec. 15, 1997), available at <http://www.wto.org>.

## 2. The Banana Trade Dispute

The Banana Trade Dispute illustrates how consumers and producers face an inconsistent regulatory process.<sup>254</sup> These inconsistencies are manifested in the varied responses the WTO takes to achieve its regulatory goals of ensuring equitable solutions applicable to individuals, countries, and corporations. The main players in the Banana Trade Dispute included: (1) the European Union; (2) the African, Caribbean, and Pacific (ACP) banana-producing countries, many of which were former European colonies; (3) the Latin American banana-producing countries; and (4) the WTO.<sup>255</sup> In 1993 the European Union introduced a system of tariff quotas for bananas and instituted a system of licensing restrictions on the distribution of bananas.<sup>256</sup> This apparatus created a banana regime that strongly favored the importation of bananas originating in ACP countries and their subsequent distribution by European firms.<sup>257</sup> In 1996, Ecuador, Guatemala, Honduras, Mexico, and the United States instituted a WTO Panel action questioning the consistency of the EU banana regime with WTO agreements.<sup>258</sup>

This consistency was scrutinized against two agreements: (1) GATT and (2) the General Agreement of Trade in Services (GATS). The former dealt with trade in goods,<sup>259</sup> in this case Latin American bananas. The latter dealt with distributive services.<sup>260</sup> Under Article I of GATT, the “most-favored nation” obligation required that “any advantage, favor, privilege, or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately or unconditionally to the like product originating or destined for the territories of all other contracting parties.”<sup>261</sup> By constructing the banana regime, the European Union

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254. See generally Robert Read, *The Anatomy of the EU-US WTO Banana Trade Dispute*, 2 THE ESTEY CENTRE J. INT'L L. & TRADE POLY 257 (2001), available at [http://www.128.233.58.173/estey/j\\_pdfs/read2-2.pdf](http://www.128.233.58.173/estey/j_pdfs/read2-2.pdf).

255. See Global Issues, *The Banana Trade War*, available at <http://www.globalissues.com/traderelated/bananas.asp>.

256. Council Regulation 404.93 on the Common Organization of the Market in Bananas, 1993 O.J. (L 47) 1.

257. Dispute Settlement Body—Draft Annual Report, *Regime for the Importation, Sale and Distribution of Bananas*, WT/DS31 (Nov. 7, 1997); *1999 Caribbean/Latin American Regional Profile*, available at <http://www.agroinfo.org>.

258. European Comtys., *Regime for the Importation, Sale and Distribution of Bananas, Request for Consultations by Ecuador, Guatemala, Honduras, Mexico and the United States*, WT/DS27/1 (Feb. 12, 1996).

259. *Id.*

260. *Id.*

261. Final Act, *supra* note 2.

allowed ACP bananas to enter through a preferential process not attainable by Latin American producers.<sup>262</sup>

A WTO panel found the system of licensing to conflict with the most-favored nation provision in Article II of GATS (most-favored nation provision for services) and Article XVII (regarding national treatment).<sup>263</sup> These breaches, including those identified under GATT, were ordered corrected by January 1, 1999.<sup>264</sup> To stave off retaliation, the European Union announced the implementation of a "new" Banana Regime,<sup>265</sup> which was subsequently declared inconsistent with WTO policy.<sup>266</sup> The WTO granted the United States \$191.4 million in damages through the use of retaliatory tariffs.<sup>267</sup> Despite these rulings, the dispute continues.<sup>268</sup>

The Banana Trade Dispute illustrates how WTO decisions impact different stakeholders, including countries, companies, and individuals. These entities have varying motives, varying interests, and suffer varying consequences. The effects on each, nonetheless, are substantial. The pressing question is whether the WTO, or any trade regulatory body, should strive for an equitable solution or an economically prudent solution when mediating trade disputes.

The WTO is highly ambivalent toward the interests of developing countries. The WTO panel's rejection of the Lome Waiver is an example of its free-trade bias over development concerns.<sup>269</sup> When evaluating the Lome Waiver, the regulatory agents of world

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262. See generally Jack J. Chen, Note, *Going Bananas*, 63 *FORDHAM L. REV.* 1283 (1995). The European Union attempted to meet its obligations to ACP countries under the Lome Convention. The Lome Convention links 70 countries in Africa and the Caribbean and Pacific to the European Union. These countries (the ACP countries) benefit from generous trade policies and a large proportion of their exports have free access to European markets. The Waiver challenged the central tenet of GATT—the "most-favored nation principle"—because the Waiver allowed various forms of preferential treatment when importing bananas from ACP countries. The hope of this preferential treatment is that it will serve as a means of assistance in the development of these nations' developing economies. If the "most-favored nation" obligation overrode this Waiver, the European Union would be required to offer this preferential treatment to all members of the WTO. If the Waiver was accorded supremacy over the WTO agreements, the Banana Regime would be unassailable. The WTO found the Waiver in violation of GATT Article I (MFN), as well as Article XII (discriminatory allocation of tariffs).

263. European Cmty.s., *Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States—Report of the Panel*, WT/DS27/R/USA (May 22, 1997) [hereinafter U.S. Report].

264. *Id.*

265. Dispute Settlement Body, *Minutes of Meeting—Held in the Centre William Rappard on 25, 28, and 29 January and 1 February 1999*, WT/DSB/M/54 (Apr. 20, 1999).

266. *Id.*

267. Chakravarthi Raghavan, *U.S. Authorized to Retaliate Over E.C. Banana Regime*, available at <http://www.twinside.org.sg>.

268. *Id.*

269. See generally Chen, *supra* note 262.

trade often appear captive to economics and efficiency, while negating equity and development. By the mid-1990s, the Lome Convention had become a “model of cooperation for development.”<sup>270</sup> Individual banana farmers were directly benefited from access to the European markets, and the absence of competition from their more efficient Latin counterparts.<sup>271</sup> This aggregate success helped spur the economic development of ACP countries. The prevalence of “pro-developing countries” language in the Doha Declaration is a partial recognition of past WTO indifference to the needs of the poorer countries.<sup>272</sup>

The Banana Trade Dispute shows that the competing interests are not always a battle of developed versus developing countries. In the banana case, the real tension was between Latin American countries and ACP countries.<sup>273</sup> In evaluating the consistency of the banana regime, the WTO relied on data such as tariff levels and allocations of distribution licenses to reach a decision, avoiding considerations of individual equity.<sup>274</sup> In the end, the WTO aim of establishing an equitable trading system was subjected to the majority's interest, not the wisdom of independent legal reason.

Compounding the problems of a politically-motivated majority are regional economic pacts.<sup>275</sup> Under the North American Free Trade Agreement (NAFTA), the United States gives preferential treatment to Canada and Mexico.<sup>276</sup> Under the Lome Waiver, the preferential treatment granted by the European Union to ACP countries was initially allowed, but then attacked.<sup>277</sup> For various reasons, including the definition of what constitutes a “customs union,” whether reciprocity was offered, and whether restrictions went beyond required levels, NAFTA varies from the Lome Waiver.<sup>278</sup> Is the special relationship between the United States and its NAFTA

270. *Id.* at 1296 n.64.

271. See Zsolt K. Bessko, *Going Bananas Over EEC Preferences? A Look at the Banana Trade War and the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes*, 28 CASE W. RES. J. INT'L L. 265, 265-71 (1996).

272. Chakravarthi Raghavan, *The UN's Ambivalent and Contradictory Message on Trade*, at <http://www.twinside.org.sg>.

273. See generally Bessko, *supra* note 271.

274. See U.S. Report, *supra* note 263.

275. All regional agreements examined have been found to conform to WTO guidelines. Gary P. Sampson, *Compatibility of Regional and Multilateral Trading Agreements: Reforming the WTO Process*, 86 AM. ECON. REV. 88, 90 (1996). The European Union can best be described as a quasi-legally recognized member of the WTO.

276. See generally North American Free Trade Agreement, Dec. 8-17, 1992, H.R. Doc. No. 103-59, 32 I.L.M. 296 [hereinafter NAFTA].

277. See U.S. Report, *supra* note 263.

278. See generally NAFTA, *supra* note 276; Chen, *supra* note 262.

partners “better” or more deserving of legality than the relationship between the European Union and the ACP countries?<sup>279</sup>

### 3. TRIPS and Third World Access to Life-Saving Drugs

TRIPS came into effect in 1995, at the time of the WTO Agreement.<sup>280</sup> Its role is to oversee the TRIPS Agreement and enforce intellectual property rights on a global level for trade-related purposes.<sup>281</sup> WTO opponents argue that these international intellectual property rights impede the development and distribution of effective, yet affordable, drugs to combat AIDS and other diseases in developing countries.<sup>282</sup>

The political and moral debate revolves around whether patent rights act to encourage or limit the ability of impoverished countries to access less expensive generic sources of life-saving drugs. The WTO enforcement of the drug patents sets up barriers in developing countries to obtain necessary medication.<sup>283</sup> The South African

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279. Germany challenged the EU Banana Regime. It included in the treaty establishing the European Economic Community a provision known as the Banana Protocol, which gives Germany alone the freedom to import an adjustable number of Latin American bananas free of duty. With the imposition of the Banana Trade Regime in 1993, many Germans in the business of transporting Latin bananas began to decry a perceived violation of their property rights. Germany, joined by Belgium, Denmark, and various private fruit importers filed suit in the European Court of Justice (ECJ) attempting to invalidate the Banana Regime. The attempt failed. The ECJ determined that “fruit importers were not ‘individually concerned’...and thus lacked standing to challenge the Community Act.” Lacking recourse in each of these forums, several German fruit importers stated their intention to pursue the matter in the German Federal Constitutional Court. Should they succeed, an ECJ ruling would directly conflict with the German court, precipitating a constitutional crisis within the European Union. See Chen, *supra* note 262, at 1294-1301; Gerald G. Sander, *The Banana Regime—A Test Case for the Relationship Between WTO, Regional and National Law*, available at <http://www.jura.uni-tuebingen.de>.

280. General Agreement on Tariffs and Trade—Multilateral Negotiations (the Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, 33 I.L.M. 81 (1994), art. 68, Council for Trade-Related Aspects of International Property Rights, Annex 1C [hereinafter TRIPS].

281. *Id.* For an empirical understanding of the WTO constitution as a response to the logic of intellectual property law, see GAIL E. EVANS, *LAWMAKING UNDER THE TRADE CONSTITUTION: A STUDY IN LEGISLATING BY THE WORLD TRADE ORGANIZATION* (2000). The author identifies the advent of the information economy as a significant factor in the institutional reform of the international trading system, and the resulting imperative to protect intellectual property.

282. See Michael J. Dennis, *The Fifty-Seventh Session of the UN Commission on Human Rights*, 96 AM. J. INT’L L. 181, 190-94 (2002); see generally, Andrea M. Curti, *The WTO Dispute Settlement Understanding: An Unlikely Weapon in the Fight Against AIDS*, 27 AM. J.L. & MED. 469 (2001).

283. Theresa Agovino, *U.S. Criticized Over Drug Patents*, N.Y. TIMES, Nov. 3, 2001, at A1.

government, for example, recently enacted national health laws favoring the manufacture and use of generic drugs.<sup>284</sup> In addition, the government sought to introduce a procedure called “parallel importing,” which would permit companies to import drugs from countries where drugs are less expensive.<sup>285</sup> Some 40 firms appealed these initiatives to the WTO as violations of free trade principles.<sup>286</sup>

The Doha Declaration recognizes the concerns of poorer countries posed by TRIPS’ protection of patented drugs.<sup>287</sup> The Declaration encourages the use of “creative” interpretation of the TRIPS Agreement “in a manner supportive of public health, by promoting both access to existing medicines, and research and development into new medicines.”<sup>288</sup> This provision avoids the issue of conflict by stressing the need to interpret TRIPS, when possible, to allow greater access to life-saving drugs.<sup>289</sup> The provision fails, however, to call for an express exemption for instances of crisis. The general principal remains that TRIPS-recognized intellectual property rights can be used to block any unauthorized use of patented drugs. Nonetheless, the call for creative or flexible interpretation places some pressure on patent owners to relax enforcement measures involving health crises in poorer countries.

#### D. Challenges for WTO Reform in the Consumer Domain

At first blush, consumers should embrace global free trade. Free trade increases choice and quality, and lowers prices. In our capacity as consumers, we should all be euphoric about what the WTO is doing.<sup>290</sup> Because the consumer interest is universal, however, the ability to focus and represent that interest is difficult to manage. Unlike more narrowly-focused interest groups, consumer interests have not been advanced in a systemic and global way. At the same time the “adversaries” of consumers are governments, producers, and powerful corporate interests. In the end, the inherent tension

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284. Curti, *supra* note 282, at 485.

285. *Id.* at 476-77.

286. For the WTO position on the intersection of intellectual property rights and access to life-saving drugs expressed by WTO Director-General, Mike Moore, see Mike Moore, *Yes, Drugs for the Poor—and Patents as Well*, INT’L HERALD TRIB., Feb. 22, 2001, available at <http://www.wto.org>. See also Global Exchange, *Top 10 Reasons to Oppose the World Trade Organization*, Nov. 14, 2001, available at <http://www.globalexchange.org/economy/rulemakers/topTenReasons.html> [hereinafter Top 10 Reasons] (arguing “[t]he WTO’s fierce defense of intellectual property rights—patents, copyrights and trademarks—comes at the expense of health and human lives”).

287. Doha Declaration, *supra* note 36.

288. *Id.* art. 17.

289. *Id.*

290. An enlargement of regional free trade areas increases world welfare. Carlo Perroni & John Whalley, *How Severe is Global Retaliation Risk Under Increasing Regionalism?*, 86 AM. ECON. REV. 57, 58 (1996).

between free trade and consumer protection has resulted in the WTO being criticized for accelerating the transfer of wealth from poorer to richer states.<sup>291</sup> Most opponents of the WTO would like to see the organization disbanded entirely.<sup>292</sup> On the other hand, some less radical reforms that have been proposed for the WTO call for curtailing its power.<sup>293</sup>

The WTO must answer the charge that it only ensures that a country's consumer protection measures are not too restrictive and does not ensure that a country has enough consumer protection. Likewise, the WTO encourages the exploitation of resources but fails to take notice of how those resources are developed. One step in rectifying such inconsistencies in the area of consumer protection is by exempting essential medicines from the WTO intellectual-property regime.

The WTO, virtually by definition, seeks the least restrictive rules for trade, which predispose it to disregard corresponding consumer protection concerns. Given the WTO's power to liberalize international trade, apply its dispute-resolution procedures to deal with the disputes that arise, and strike down domestic consumer protection legislation,<sup>294</sup> the needs for universal consumer protection rules must be addressed by the WTO. The option is whether the international body mandates its own supranational consumer protection legislation, or whether it requires a certain floor of consumer protection legislation.

A major challenge for the WTO is the bulbous nature of the consumer interest and the idiosyncratic character of consumer protection itself. Greenpeace's motto that "we all live downstream"<sup>295</sup> applies equally to consumers. The consumer interest, therefore, overlaps with the other non-trade interests explored in this Article. Inherent human consumption issues are often embraced as environmental issues. For example, environmental interests and

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291. See Top 10 Reasons, *supra* note 286.

292. See, e.g., Russell Mokhiber & Robert Weissman, *Ten Reasons to Dismantle the WTO*, available at <http://www.zmag.org>. The ten reasons they offer include: the WTO places trade and commerce over all other values; it undermines democracy; it facilitates global commerce at the expense of local economic development and self-reliance; the rural Third World is disproportionately injured; it ignores the precautionary principle; it discourages diversity by the process of harmonization; it is a secretive organization; it constrains governmental remedial social programs; it is indifferent to how products are produced; and it permits patents on life forms. *Id.*

293. See Top 10 Reasons, *supra* note 286.

294. See generally Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478 (2000) (discussing the impact of the WTO as an institution).

295. Check in to Find Out What's Happening on Board, available at <http://www.greenpeaceusa.org>.

consumerism share the precautionary principle.<sup>296</sup> In short, a new product or process should not be approved until it is proven to be safe for the environment and human consumption.

While consumers around the world encounter many of the same issues and problems, differences in national laws make it difficult to address consumer protection issues.<sup>297</sup> There are several domestic approaches to consumer protection, including self-regulation and voluntary guidelines.<sup>298</sup> Consumer protection in most jurisdictions is the domain of numerous government agencies. Traditional issues of marketing practices, safety, and advertising do not lead to easy or singular solutions within jurisdictions. International consensus is elusive on how to resolve all of these matters,

The catalogue and range of consumer interests are likely to grow. These include security of food and utility supply, integrity and privacy of information (particularly in health care and for online transactions),<sup>299</sup> provision of choice, product standards, biotechnology and genetically modified foods, health care, trade practices, electronic commerce, food irradiation, patients' rights, product safety, health, services, investment, competition policy, services, market power and social issues such as poverty.<sup>300</sup>

The WTO operates as a supranational law-making and law-enforcing authority, and it must accordingly embrace the consumer interest. To the extent that it operates as a constitutional body, what the WTO achieves in breadth of coverage, it sacrifices in flexibility.<sup>301</sup> As with the application of most constitutions, some built-in play for special circumstances in international trade is needed.<sup>302</sup>

296. See Frank B. Cross, *Paradoxical Perils of the Precautionary Principle*, 53 WASH. & LEE L. REV. 851 (1996) (discussing the precautionary principle).

297. Newly-elected President Clinton in 1993 insisted on labor and environmental parallel agreements, but not one benefiting consumers, in the North American Free Trade Agreement. See generally NAFTA, *supra* note 276.

298. See generally Debra Valentine, *Protecting the Consumer on the Global Information Infrastructure*, 1 YALE SYMP. L. & TECH. 4 (1999).

299. Will the WTO press members to abandon privacy protections because they hinder international trade?

300. See generally William A. Kerr, *A Club No More—The WTO After Doha*, 3 ESTEY CENTRE J. INT'L L. & TRADE POL'Y 1 (2002).

301. The legal instruments underlying the WTO vest it with more flexibility than it is credited with. For example, GATT Article XIX titled "Emergency Action on Imports of Particular Products" provides an "escape clause" for the overall Agreement to relieve the WTO in extenuating circumstances. See Final Act, *supra* note 2.

302. It is incorrect to assert that there is no flexibility in the interpretive process. For example, Canadian law permitted pharmaceutical companies to develop and approve generic drugs that are patented in preparation for the expiry of patents. Under Canada's Patent Act, this was referred to as an "early working exception" and was seen as a concession to consumers in that it made the distribution of generic copies of patented drugs possible immediately after the formal patent had expired. A generic manufacturer could take from 2 to 4 years to develop a regulatory submission, and up to another 3 years for approval by Health Canada. The TRIPS agreement was silent on the "early working exception" concept, but in April 2000, the WTO approved the

If the WTO does *not* operate as an agency of world government, where WTO guidelines and domestic policies collide, the latter should prevail. In any event, the WTO might choose to incorporate the standards of other more mature global organizations, such as the U.N. Food and Agriculture Organization and the World Health Organization. The WTO should also develop a consultative framework with non-governmental organizations.<sup>303</sup> The WTO would then be able to better balance its free trade mandate with the need to provide minimum levels of consumer protection.

## V. SOVEREIGNTY CONCERNS AND THE WTO

As an international organization, the WTO requires Member States to agree to certain rules and to abide by certain decisions through its dispute resolution system.<sup>304</sup> At times, these obligations have worked to invalidate U.S. laws. This Section examines the conflict between U.S. law and U.S. commitments under the WTO.

Before examining the WTO, a review of the United Nations as a benchmark to judge the workings of the WTO is needed. The United Nations is chief among international organizations because of its large membership and high visibility.<sup>305</sup> The United Nations is typical of worldwide international organizations in that the United States was deeply involved in its creation and its maintenance.<sup>306</sup> The United Nations also has been responsible for creation of many international entities that facilitate free movement of trade and services around the world. One example is the International Trade Center of the United Nations, which provides trade information to assist developing countries in their efforts to realize their full

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Canadian practice. See Press Release, Gov't of Can., Canada Welcomes WTO Ruling on EU Challenge of Canada's Pharmaceutical Patent Regime, No. 48 (Mar. 17, 2000), available at [http://198.103.104.118/minpub/Publication.asp?FileSpec=Min\\_Pub\\_Docs/103101.htm](http://198.103.104.118/minpub/Publication.asp?FileSpec=Min_Pub_Docs/103101.htm).

303. There are several NGO's serving as a focus and resource for organizations and individuals to protect and promote consumer rights, one of the most prominent being London-U.K. based Consumers International. It describes itself as the "worldwide non-profit federation of consumer organizations dedicated to the protection and promotion of consumer interests." See Consumer Int'l, *History and Purpose*, available at <http://www.consumersinternational.org/about/history.html>.

304. See DSU, *supra* note 10.

305. The United Nations has 189 Member States. Although there have been proposals to allow non-governmental agencies to join the United Nations, at the current time, only recognized nations may join. See generally United Nations, *Member States*, available at <http://www.un.org/members/index.html>.

306. See generally World Trade Org., *The WTO*, available at <http://www.wto.org>.

business potential.<sup>307</sup> The U.N. Economic and Social Council (ECOSOC) is concerned with economic problems, including trade and social issues.<sup>308</sup> The United Nations has also been responsible for many international agreements and much of the creation of public international law since 1945. One example is its Universal Declaration of Human Rights.<sup>309</sup>

The U.N. General Assembly is able to express its intentions through the resolutions it adopts.<sup>310</sup> Decisions on important questions, such as those on peace and security, admission of new Member States, and budgetary matters, require a two-thirds majority,<sup>311</sup> while decisions on other matters require a simple majority.<sup>312</sup> The United States, along with all Member States, has one vote in the General Assembly.<sup>313</sup> Decisions of the General Assembly have no legally binding force for governments or citizens in the Member States, but they do carry the weight of world opinion.<sup>314</sup>

The United States was also instrumental in the establishment of the GATT in 1947, which eventually led to the creation of the WTO in 1995.<sup>315</sup> Since the beginning of the GATT system, the United States has been at the forefront in the establishment of free trade agreements. During the 1980s, the United States and Canada entered into the historic U.S.-Canada Free Trade Agreement that evolved in 1992 into NAFTA.<sup>316</sup> With the beginning of the 21st century, the Bush administration seems willing to push for trade deals.<sup>317</sup>

Critics have argued that the binding commitments of WTO membership infringe on U.S. sovereignty. Some question the validity of the assumption embodied in the WTO that elimination of trade

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307. See Int'l Trade Ctr., *What is the International Trade Centre UNCTAD/WTO(ITC)?*, available at <http://www.intracen.org>.

308. U.N. CHARTER, art. 62, para. 1.

309. Universal Proclamation of Human Rights, G.A. Res. 217 A (III), U.N. GAOR, at 71, U.N. Doc A/810 (1948).

310. Keith Harper, *Does the United Nations Security Council Have the Competence to Act as Court and Legislature?*, 27 N.Y.U. J. INT'L L. & POL. 103, 153-54 (1994).

311. U.N. CHARTER art. 18, para. 2.

312. *Id.* para. 3.

313. *Id.* para. 1.

314. See generally U.N. CHARTER.

315. Peter Hayes, *Freer Trade, Protected Environment*, 35 COLUM. J. TRANSNAT'L L. 213, 249 n.185 (1997).

316. NAFTA, *supra* note 276.

317. For example, during the early months of the Bush Administration, the U.S. Trade Representative Robert Zoellick made the starting of a new round of WTO trade talks a priority. Guy de Jonquières, *US Pushes for New Trade Talks*, FIN. TIMES, May 17, 2001, at 1. In addition, President George W. Bush called for a trade agreement among the democracies of the Western Hemisphere. Jim VandeHei & Chris Chipello, *Bush, in Quebec, Argues for Trade Deal*, WALL ST. J., Apr. 23, 2001, at A3.

restrictions is fundamentally beneficial to the state's prosperity.<sup>318</sup> These issues of sovereignty will be explored in the following sections.

### A. *Defining Sovereignty: The U.S. Perspective*

When any sovereign state joins an international organization or enters into an agreement with another country, what are the ramifications for national sovereignty? The answer to this question is largely determined by how sovereignty is defined. The dictionary defines sovereignty as "supreme power" and "freedom from external control."<sup>319</sup> Sovereignty is how a state sets its boundaries; it is what gives a state its status among other states.<sup>320</sup> The framers of the Constitution drafted it so that the historic document presumes inherent sovereign power in the U.S. government over the territory of the United States.<sup>321</sup> The Preamble states that the purpose of the Constitution was to "form a more perfect Union."<sup>322</sup>

Along with establishing the sovereignty of the United States, the Constitution allocates power among the three branches of federal government<sup>323</sup> and to the states.<sup>324</sup> The actions of the states are made subject to the sovereign power of the federal government through the Supremacy Clause,<sup>325</sup> which states that the "Constitution, and the Laws of the United States . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land."<sup>326</sup> Therefore, the 50 states are sovereigns with independent powers,<sup>327</sup> yet subject to the provisions of the Constitution and the power of the federal government.<sup>328</sup> Respect for the sovereignty of the states relative to

318. See, e.g., Dani Rodrik, *Trading in Illusions*, FOREIGN POL'Y, Mar.-Apr. 2001, at 55.

319. WEBSTER'S NEW COLLEGIATE DICTIONARY 1129 (9th ed. 1983).

320. Jeffrey Wutzke, *Dependent Independence: Application of the Nunavut Model to Native Hawaiian Sovereignty and Self-determination Claims*, 22 AM. INDIAN L. REV. 509, 513-14 (1998).

321. See generally U.S. CONST.

322. U.S. CONST. pmbi.

323. U.S. CONST. arts. I, II, III.

324. See, e.g., U.S. CONST. amend. X; *Worcester v. Georgia*, 31 U.S. 515, 570 (1832) (with exception of limitations upon state authorities given exclusively to federal government, states are supreme, and their sovereignty cannot be invaded by action of federal government).

325. U.S. CONST. art. VI, § 2.

326. *Id.*

327. The Constitution recognizes the sovereignty of the states. In the tenth amendment, the Constitution specifies that all powers "not delegated to the United States . . . are reserved to the states." U.S. CONST. amend. X.

328. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). The U.S. Supreme Court discussed the sovereignty issue when it held "the Eleventh Amendment, and the

the federal government was instrumental in the drafting of the Constitution.<sup>329</sup>

The debate over the extent of states' rights continues to this day. The civil rights legislation of the 20th century, for example, saw many court decisions questioning the authority of the federal government over matters previously considered reserved to the states. In *Heart of Atlanta Motel v. United States*,<sup>330</sup> the Supreme Court concluded that Congress was permitted under the Constitution to pass the Civil Rights Act of 1964.<sup>331</sup> This Act was challenged on the basis that civil rights legislation was reserved to the states, but the Court rejected this argument.<sup>332</sup> The Court held that Congress had power to pass this type of legislation by virtue of the Commerce Clause.<sup>333</sup> By doing so, the Court recognized that the states had sovereign powers, but that those powers were subject to the power granted to the federal government.<sup>334</sup>

Indian tribes in the United States, like individual states, possess a certain amount of sovereignty.<sup>335</sup> The tribes have been declared "nations" within the United States with a certain amount of sovereignty, yet subject to the plenary power of Congress.<sup>336</sup> The status of Indian tribes that endures today and permeates all matters involving tribal governance was enunciated in 1831 in the Supreme Court's decision in *Cherokee Nation v. Georgia*.<sup>337</sup> In *Cherokee Nation*, Chief Justice John Marshall characterized Indian tribes as "domestic dependent nations."<sup>338</sup> In explaining the seeming dichotomy between the words "nations" and "dependent," the Court explained that the tribes "are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian."<sup>339</sup> This dependent relationship was restated in *United States v. Kagama*,<sup>340</sup> in which the Court stated, "Indian tribes are the wards of the nation. They are communities dependent on the United States. They owe no allegiance to the States, and receive from them no protection."<sup>341</sup>

This ward relationship eventually developed into the plenary power Congress has over Indian tribes. While Congress recognizes

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principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of section 5 of the Fourteenth Amendment." *Id.* at 456.

329. *See generally* U.S. CONST.

330. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

331. *Id.* at 243.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831).

336. *Id.*

337. *Id.*

338. *Id.* at 17.

339. *Id.*

340. *United States v. Kagama*, 118 U.S. 375 (1886).

341. *Id.* at 384-85.

that the tribes have some sovereign powers, Congress nevertheless assumed plenary power over the tribes. In 1903, in *Lone Wolf v. Hitchcock*,<sup>342</sup> the Supreme Court asserted that “[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”<sup>343</sup> As a result of this relationship, Native Americans find themselves in a unique position. As of 1924, all Indians born in the United States are U.S. citizens,<sup>344</sup> with all rights and duties of all other citizens.<sup>345</sup> As such, Indians are allowed full participation in federal and state matters, including the right to vote and to hold public office.<sup>346</sup> As Indians, though, they also enjoy certain additional privileges not afforded other citizens. For example, after analyzing treaties secured generations earlier, the Supreme Court in 1968 determined that Indians enjoy special hunting and fishing rights.<sup>347</sup> The fact that many of the Indian sovereignty decisions were made in the past 40 years shows that tribal sovereignty is still an unsettled area. It is undisputed, though, that while Congress recognizes that tribes have certain sovereign rights, it has retained plenary power over the tribes and Indian affairs.

### B. *Sovereignty in the International Arena*

As the above discussion of sovereignty in the United States demonstrated, instead of thinking of sovereignty as a single concept that can be kept or given away in its entirety, it is best to think of sovereignty as a bundle of sticks—the sovereign is at liberty to give up certain sticks while retaining others. Sovereignty is a fluid, rather than a static, concept. To illustrate, most would agree that the 15 Member States of the European Union surrendered a certain amount of their national sovereignty after becoming members. The Treaty on European Union, signed at Maastricht in 1992,<sup>348</sup> while respecting “the national identities of its Member States,”<sup>349</sup> established a “European Union.”<sup>350</sup>

The Maastricht Treaty called for the European Union “to assert its identity on the international scene, in particular through the

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342. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

343. *Id.* at 565.

344. 8 U.S.C. § 1401(b) (2000).

345. *Id.*

346. *Id.*

347. *See Puyallup Tribe v. Dep't of Game*, 391 U.S. 392 (1968).

348. TREATY ON EUROPEAN UNION, Oct. 1, 1997, O.J. (C 340) (1997).

349. *Id.* art. 6(3).

350. *Id.* art. 1.

implementation of a common foreign and security policy including the progressive framing of a common defense policy.”<sup>351</sup> As such, the European Union is a supranational entity—a type of regional government; and in contrast to other international organizations, it is coupled with certain sovereign powers.<sup>352</sup> For example, the European Union has the power to implement legislation directly in each of the Member States through either: (1) a system of regulations, which are self-executing; or (2) directives, which require implementation of laws at the national level.<sup>353</sup> One of the EU’s goals,<sup>354</sup> to harmonize legislation throughout its Member States, is accomplished through this process of regulations and directives. Directives have been issued in such diverse areas as health and safety, including use of workplace safety equipment;<sup>355</sup> rules for use of computer terminals;<sup>356</sup> and protection of workers from exposure to dangerous elements in the environment.<sup>357</sup> The European Union also instituted a European court system. The European Court of Justice has the power to impose fines and other sanctions over individuals, companies, and even Member States that violate the Treaty of Rome.<sup>358</sup>

After the devastation resulting from the World War II, in starting the task of rebuilding Europe, there was a strong belief in the need to restructure European political society to prevent future wars on the continent.<sup>359</sup> This conviction fostered a willingness to relinquish certain aspects of national sovereignty for the greater economic and political good.<sup>360</sup> As a result, the EU’s supranational status distinguishes it from other international organizations, such as the WTO and the United Nations.

### C. *The Sovereign Status of the WTO*

The preamble to the WTO Agreement<sup>361</sup> recognizes the importance of trade for both developed and developing countries. It resolves “to develop an *integrated*, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and

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351. *Id.* art. 2.

352. See THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) (1997) [hereinafter EC TREATY].

353. *Id.* art. 249.

354. *Id.* arts. 2, 3.

355. Council Directive 73/23, art. 2, 1973 O.J. (L 77) 29.

356. Council Directive 99/287, 1999 O.J. (L 116) 1.

357. Council Directive 67/548, art. 1, 1967 O.J. (L 196) 1.

358. EC TREATY, *supra* note 352, pt. 5, tit. I, ch. 1, § 4.

359. See Hayes, *supra* note 315.

360. *Id.*

361. TRIPS, *supra* note 280.

all of the results of the Uruguay Round of Multilateral Trade Negotiations.”<sup>362</sup> It is significant that the parties used the term “integrated” to express their desires. Integrated implies more than a cooperative effort of sovereign states. It implies a concentrated degree of permanent and reciprocal commitments. In contrast, the preamble of the U.N. Charter does not speak of integration, but calls on the peoples of the United Nations to “practice tolerance” and “unite our strength to maintain international peace and security.”<sup>363</sup> Article II of the WTO Agreement continues the integration model, establishing a “common institutional framework for the conduct of trade relations.”<sup>364</sup> Article VIII calls for members to afford the WTO and its representatives “such privileges and immunities as are necessary for its functions.”<sup>365</sup> The WTO Agreement also has an elaborate procedure for settling disputes that includes an appellate mechanism.<sup>366</sup> The United States, however, like any other member state, may withdraw from the WTO Agreement.<sup>367</sup>

### 1. The WTO and National Sovereignty

How does the U.S.’s commitment to develop an “integrated multilateral trading system” with a “common institutional framework” impact national sovereignty? Inherent in this question is a further question: What is the relationship between national sovereignty and international law? More fundamentally, what is international law? One argument is that international law really is not law because there is no international sovereign to enforce it.<sup>368</sup> The better argument is that international law is law “quite simply, because states and individuals regard it as such.”<sup>369</sup> Because this is so, the U.S. legal system needs to incorporate international agreements. This incorporation requires that national sovereignty bend to incorporate these international agreements. Consequently,

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362. *Id.* (emphasis added).

363. U.N. CHARTER pmbl.

364. WTO Agreement art. II (1).

365. *Id.* art. VIII(2), (3). Federal law in the United States empowers the president to withhold from any international organization, including the WTO, any “privileges, exemptions, and immunities provided.” 22 U.S.C. § 288 (2000).

366. WTO Agreement Annex 2.

367. *Id.* art. XV.

368. Asaad Siddiqi, *Welcome to the City of Bytes? An Assessment of the Traditional Methods Employed in the International Application of Jurisdiction Over Internet Activities*, 14 N.Y. INT’L L. REV. 43, 54-55 (2001).

369. RAY AUGUST, *INTERNATIONAL BUSINESS LAW* 1 (3d ed. 2000).

subsequent acts of sovereignty must yield to commitments made to the WTO.<sup>370</sup>

Founding documents of international organizations in which the United States is a member, though, do not contain the sweeping assumption of sovereignty as found in the Constitution or even in the documents creating the European Union. The United Nations relies on the good will of its Member States for cooperation and for its income.<sup>371</sup> Specifically, the U.N. Charter recognizes the “sovereign equality” of its 189 members.<sup>372</sup> In a similar vein, the WTO extracts no sovereignty from its members. The WTO is a multinational organization designed to deal with rules of trade between states.<sup>373</sup> When the WTO grew out of GATT, it was set up to work with its core agreements, which were negotiated, signed, and ratified by the major trading states.<sup>374</sup> Federal law specifies that WTO agreements shall not supersede federal laws:

No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect. . . .

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370. The U.S. Supreme Court in *Reid v. Covert* asserted its right to determine whether an international agreement is constitutional or whether it may violate laws of the United States. 354 U.S. 1 (1957). In 1957, the Supreme Court in *Reid v. Covert* held that “no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.” *Id.* at 16. In reaching this conclusion, the Court analyzed the Supremacy Clause and said,

There is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. . . . It would be manifestly contrary to the objectives of those who created the Constitution, . . . to construe [the Supremacy Clause] as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.

*Id.* at 16-17. The reason treaties were not limited to those made in “pursuance” of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect. *Id.* The Constitution itself is unyielding, though, in its placement in the supreme position in U.S. jurisprudence. It declares, though, that treaties, while subordinate to the Constitution, have a status on the same level as federal laws. U.S. CONST. art. VI. The courts have regularly and uniformly recognized the supremacy of the Constitution over treaties. *Reid*, 354 U.S. at 16-17.

371. For example, in early 2001, the United States agreed to pay back dues owed to the United Nations. See Christopher Marquis, *Satisfied With U.N. Reforms, Helms Relents on U.N. Dues*, N.Y. TIMES, Jan. 10, 2001, at A8 (stating that Senator Jesse Helms, a leading critic of the United Nations, said he would allow the release of \$582 million the United States owed to the United Nations).

372. U.N. CHARTER art. 2, para. 1.

373. See World Trade Org., *World Trade Organization*, available at <http://www.wto.org>.

374. See World Trade Org., *The WTO in Brief: The Multilateral Trading System—Past, Present and Future*, available at <http://www.wto.org>.

[n]othing in this Act shall be construed to amend or modify any law of the United States.<sup>375</sup>

U.S. courts, however, have acknowledged the authority of the WTO.<sup>376</sup> The U.S. Court of Appeals for the Federal Circuit noted that, while the WTO's predecessor—GATT—did “not trump domestic legislation,” Congress has an “interest in complying with U.S. responsibilities under the GATT.”<sup>377</sup> Congress anticipated that the WTO Agreement might be inconsistent with state laws, and established a procedure for dealing with such situations.<sup>378</sup> It provided, though, that no state law “may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the U.S. for the purpose of declaring such law or application invalid.”<sup>379</sup>

In *Hyundai Electronics Co. v. United States*,<sup>380</sup> the Court of International Trade explained that a WTO panel's findings may be a source of information, but are not binding on the court.<sup>381</sup> It also held that “an unambiguous statute will prevail over an obligation under [an] international agreement.”<sup>382</sup> The Supreme Court, however, has indicated its desire to accommodate international accords. In *Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer*,<sup>383</sup> it considered U.S. obligations when entering into international accords. It stated, “[i]f the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements.”<sup>384</sup>

Critics of the WTO, though, have questioned whether U.S. participation in the WTO infringes on constitutionally-protected national sovereignty.<sup>385</sup> These arguments have been increasingly

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375. 19 U.S.C. § 3512 (a)(1)-(a)(2)(A) (1999).

376. See, e.g., *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co.*, 221 F.3d 924, 928 (6th Cir. 2000).

377. *Suramerica v. United States*, 966 F.2d 660, 667-68 (Fed. Cir. 1992).

378. 19 U.S.C. § 3512(b).

379. 19 U.S.C. § 3512(b)(2)(A).

380. *Hyundai Elec. Co. v. United States*, 53 F. Supp. 2d 1334 (Ct. Int'l Trade 1999).

381. *Id.* at 1343.

382. *Fujitsu Gen. Am. Inc. v. United States*, 110 F. Supp. 2d 1061, 1083 (Ct. Int'l Trade 2000).

383. *Seguros v. M/V Sky Reefer*, 515 U.S. 528 (1995).

384. *Id.* at 539.

385. Such issues were raised during the 1994 WTO hearings. President Clinton sought congressional approval for the WTO in 1994 not by proposing it as a treaty, which would have required two-thirds approval in the Senate, but by submitting it to Congress for a simple majority vote. At the time, many questioned whether the

asserted after a number of unpopular WTO rulings against the United States. For example, in January 2002, the WTO Appellate Body ruled against the United States regarding the "U.S. Tax Treatment for Foreign Sales Corporations."<sup>386</sup> It upheld a ruling that the U.S. Foreign Sales Corporations Act constituted an illegal subsidy.<sup>387</sup> The Foreign Sales Corporations Act allows U.S. corporations to shield some foreign profits from tax.<sup>388</sup> The question raised by such rulings is: when the United States complies with a decision of the WTO, is it yielding to another sovereign institution, or is it merely meeting its obligation as a sovereign to the world community?

The issue of sovereignty becomes a paramount concern for the WTO when countries ignore WTO enforcement decisions. The WTO relies on the goodwill of its members to implement its decisions. This problem has become apparent during another series of EU-U.S. trade disputes involving products ranging from bananas to steel.<sup>389</sup> For example, as previously discussed, the United States complained that the European Union ignored WTO rulings directing the Union to open its markets to bananas from U.S. companies.<sup>390</sup> The WTO has twice ruled the EU procedure illegal, but the European Union has refused to modify its scheme.<sup>391</sup> Such disregard of WTO rulings challenges the effectiveness of the WTO in reducing trade barriers.

#### D. NAFTA and the WTO Compared

On January 1, 1994, NAFTA and its supplemental agreements came into existence.<sup>392</sup> Like the WTO Agreement, President Clinton

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approval process was constitutional. Professor Laurence Tribe addressed the issue of the constitutionality of the approval of the WTO in testimony before the Senate Committee on Commerce. Tribe argued that the WTO agreement was a treaty and should be approved as such. The issue became academic when the Senate approved the WTO agreement by over two-thirds. See *The World Trade Organization and the Treaty Clause: the Constitutional Requirement of Submitting the Uruguay Round of GATT as a Treaty: Hearing on S. 2467 Before the Senate Comm. on Commerce, Sci., and Transp.*, 103rd Cong. (1994) (statement of Lawrence H. Tribe, Professor, Harvard University Law School).

386. WTO Appellate Body Report on United States—Tax Treatment for Foreign Sales Corporations, WT/DS108/AB/RW (Jan. 14, 2002).

387. *Id.*

388. Helene Cooper, *WTO Ruling On Tax Break Has Bush in Bind*, WALL ST. J., June 25, 2001, at A2.

389. See, e.g., David E. Sanger, *Bush Puts Tariffs of as Much as 30% on Steel Imports—Allies See a Trade Fight*, N.Y. TIMES, Mar. 6, 2002, at A1.

390. In mid-April 2001, the United States and the European Union reached another agreement on bananas. Helene Cooper, *U.S., EU End Trans-Atlantic Banana War*, WALL ST. J., Apr. 12, 2001, at A2.

391. Mike Smith, *EU Slips up over Banana Imports*, FIN. TIMES, July 18, 2000, at 16.

392. NAFTA, *supra* note 276.

submitted NAFTA to Congress as a trade agreement<sup>393</sup> for approval by a simple majority. NAFTA created a free trade area in the territory of the three countries: the United States, Mexico, and Canada.<sup>394</sup> The agreement announced several objectives, including the elimination of trade barriers and increased investment opportunities in the territories of NAFTA countries.<sup>395</sup> The implementing legislation specified that federal laws would prevail over NAFTA in case of conflict.<sup>396</sup> Some have argued, however, that the institutions created under NAFTA, like those created under the WTO, infringe on national sovereignty.<sup>397</sup> Both NAFTA and the WTO created dispute resolution mechanisms that render decisions that may conflict with U.S. law.

The constitutionality of NAFTA was challenged in court. The plaintiffs argued that NAFTA had been approved by a simple majority in Congress and not by two-thirds of the Senate as required by the Constitution.<sup>398</sup> In *Made in the USA Foundation v. United States*,<sup>399</sup> the Eleventh Circuit declined to reach the merits of the case, finding the issues surrounding the constitutional question to be a non-justiciable political question.<sup>400</sup> The government argued on the merits that NAFTA's enactment did not require Senate ratification because it was not a "treaty."<sup>401</sup> The Eleventh Circuit noted that

the United States Supreme Court has never in our nation's history seen fit to address the question of what exactly constitutes and distinguishes "treaties," as that term is used in Article II, Section 2, from "alliances,"

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393. Had the WTO Agreement been submitted as a treaty, it would have required a two-thirds vote of the Senate. U.S. CONST. art. II, § 2, cl. 2.

394. NAFTA, *supra* note 276, art. 101.

395. *Id.* art. 102(1).

396. See H.R. REP. NO. 103-361(I), at 16 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2552, 2566.

397. Laura Okin, *The Labor Side Agreement Under the NAFTA: An Analysis of its Failure to Include Strong Enforcement Provisions and Recommendations for Future Labor Agreements Negotiated With Developing Countries*, 29 GEO. WASH. J. INT'L L. & ECON. 769, 795-96 (1996). For example, the NAFTA supplemental agreement on labor, called the North American Agreement on Labor Cooperation (NAALC), created both international and domestic institutions, which serve to carry out the policies behind the agreement. The international institution is the Commission for Labor Cooperation, consisting of a Council supported by a Secretariat. The Council consists of the three national cabinet level labor officials and sets policy for the Commission's work. While the NAFTA Implementation Act specifies that no NAFTA provision shall conflict with U.S. domestic law, it can be argued that the authority of the international organizations created under NAFTA and the NAALC do just that.

398. *Made in the USA Found. v. United States*, 242 F.3d 1300 (11th Cir. 2001).

399. *Id.* at 1319.

400. *Id.*

401. *Id.* at 1302.

“confederations,” “compacts,” or “agreements,” as those terms are employed in Article I, Section 10.<sup>402</sup>

Accordingly, the Court has never decided what sorts of international agreements require Senate ratification pursuant to the procedures outlined in Article II, Section 2.<sup>403</sup>

### E. Summary

Ultimately, the effects of the WTO on U.S. sovereignty have been minor. In many cases, the United States has the option to honor or ignore its obligations to the WTO. Eric Stein,<sup>404</sup> in discussing the United States and the power of the WTO, explained, “the WTO institutions do not make important decisions (except in dispute settlement) since, in principle, any substantive obligations must be independently accepted by the members, a factor pointing strongly to a lower level of integration.”<sup>405</sup> This lesser degree of integration translates into fewer obligations to the WTO and, thus, a virtually unaffected degree of national sovereignty. On the other hand, Stein also pointed out that the “GATT/WTO was one of the significant factors contributing to the massive reduction of trade barriers and the corresponding increase in international trade.”<sup>406</sup> This massive reduction of trade barriers inevitably leads to some compromise of national and international law. Stein further stated, “[t]hese achievements raise the level of WTO integration in terms of the social-empirical yardsticks.”<sup>407</sup>

Professors John O. McGinnis and Mark L. Movsesian disagree. They assert that economic growth cannot be confused with the independence and authority a state possesses; power is not synonymous with sovereignty.<sup>408</sup> A country must weigh the advantages of such economic growth against the disadvantages of

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402. *Id.* at 1305.

403. The appeal to the Eleventh Circuit was taken from the Northern District of Alabama, which held that the case did not present a nonjusticiable political issue and reached the merits of the case. The lower court held that the treaty clause of the Constitution was not the exclusive means of enacting international commercial agreements, given Congress’s plenary powers to regulate foreign commerce under the commerce clause and the president’s inherent authority under Article II to manage the nation’s foreign affairs. The lower court therefore held that *Naivete’s* passage in 1993 by simple majorities of both houses of Congress was constitutionally sound. *Made in USA Found. v. United States*, 56 F. Supp. 2d 1226 (N.D. Ala. 1999).

404. Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT’L. L. 489 (2001).

405. *Id.* at 507.

406. *Id.* at 503.

407. *Id.*

408. John O. McGinnis & Mark L. Movsesian, *Commentary: The World Trade Constitution*, 114 HARV. L. REV. 511, 515 (2000).

WTO integration.<sup>409</sup> As trade becomes more global and countries become increasingly interdependent, integration of WTO regulations will only increase.<sup>410</sup> For this reason, McGinnis and Movsesian reject what they call the “regulatory model” of the WTO, a model that promotes regulatory powers of the WTO over issues such as labor, the environment, health, and safety laws.<sup>411</sup> They stated that this involvement of WTO authority would give interest groups “even more disproportionate leverage than they [have] in the domestic context” because they “would capture the organization and skew regulation in their favor.”<sup>412</sup> McGinnis and Movsesian conclude that “granting the WTO the power to establish global rules on labor, the environment, health, and safety would detract from sovereignty and lead to inefficient regulation.”<sup>413</sup>

Despite the concerns outlined by McGinnis and Movsesian, criticisms of the WTO, outlined in earlier sections, have focused upon WTO decisions invalidating national environmental, safety, and health laws. These criticisms are compounded by the fact that nothing in the WTO rules require countries to implement even minimum levels of consumer, worker, or environmental protection. The Doha Declaration implicitly recognizes the inconsistency of invalidating national health, safety, and environmental laws while not requiring the challenging states to establish minimum levels of protection. It declares that “under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate,”<sup>414</sup> while in the same breath reaffirming “internationally recognized core labor standards.”<sup>415</sup> The contradictory nature of these two declarations is evidence of the WTO's attempts to respond to the NTCs while also opening new trade negotiations.

The Doha Declaration attempts to respond to what critics refer to as the “pro-trade bias on the part of the WTO.”<sup>416</sup> As a trade organization, it makes sense that the WTO would be inclined to improve trade relations, even with possible negative consequences such as loss of national sovereignty. On the other hand, because a country cannot be forced to implement trade policies, it is likely that a country that highly values national sovereignty would choose to implement WTO laws only when they do not conflict with current

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409. *Id.*

410. *Id.* at 513-14

411. *Id.* at 517.

412. *Id.* at 518.

413. *Id.* at 520.

414. Doha Declaration, *supra* note 36, art. 6.

415. *Id.* art. 8.

416. See McGinnis & Movsesian, *supra* note 408, at 534.

national laws. Such disregard of WTO commitments, however, would challenge the integrity and viability of the WTO system.

## VI. RECOMMENDATIONS: BROADENING THE INTELLECTUAL BASE OF THE WTO

The review of criticisms of the WTO presented in Parts II through VI provides a basis for reform recommendations. Section A recommends the broadening of the participant base in WTO governance to include NTCs. Section B stresses the importance of further study of the relationship between the WTO rules and NTCs. This includes the funding of new programs within the WTO system aimed at protecting consumers, workers, and the environment. Section C reviews the Doha Declaration and its accompanying Work Programme as a partial implementation of these recommendations.

### A. *Broadening the Participant Base to Include Non-Trade Interests*

Steps must be taken to make the WTO more responsive to NTCs and the interests of developing states.<sup>417</sup> In other words, it must become more democratic. Processes and projects must be implemented by the WTO to enable a wide cross-section of citizens, organizations, and governments to voice their concerns. The WTO must open its decision-making in dispute-resolution bodies, within committees, and within the Council, to a variety of viewpoints including, but not limited to, those of environmentally oriented NGOs and developing countries. Under its DSU provisions, WTO member governments have the sole right to file complaints and intervene in proceedings.<sup>418</sup> Significant progress was made when the WTO's Appellate Body (AB) decided that it must accept and consider *amicus* briefs attached to the U.S. submission.<sup>419</sup> Mere incorporation of the brief, however, is not sufficient to require the panel or AB to consider the entire brief. NGOs should be allowed to submit *amicus* briefs directly to panels. The DSU procedures need to be amended to allow non-state actors to make such submissions.

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417. Paulette L. Stenzel, *Fettering the Unruly Horse of Free Trade: Checks on the WTO Trade Regime to Foster Environmental, Labor, Consumer Protection, and Sovereignty Needs* (Aug. 10, 2001) (unpublished manuscript, on file with author). The recommendations in this subsection were made by Professor Paulette L. Stenzel, Professor of International Business Law, Michigan State University, in an unpublished paper prepared in conjunction with and as a participant in a Panel Discussion at the Annual Meeting of the Academy of Legal Studies, Albuquerque, New Mexico. The other participants in the panel discussion were co-authors, Professors DiMatteo, Bowal, Frantz, and Dosanjh.

418. See DSU, *supra* note 10, art 6.

419. *Id.*

The European Union and the United States have recently supported changes in the dispute settlement process to increase transparency, such as requiring WTO panels to review *amicus* briefs.<sup>420</sup> Such changes have not been implemented, however, because most WTO members oppose such reforms.<sup>421</sup> At the 1999 Ministerial in Seattle, WTO members agreed to make WTO decisions and other documents available to the public. But they did not agree to requests that dispute-resolution processes be opened to the public or that NGOs be allowed to participate in dispute resolutions with environmental impacts. In view of events in Seattle, Washington, D.C., and Genoa, the WTO must do more to welcome and accept the input of environmentalists, consumer lobbyists, and labor leaders.<sup>422</sup>

The WTO also needs to encourage input from citizens and NGOs in other WTO venues. It must do so by inviting and listening to their voices in study groups. For example, at the 1999 Ministerial the WTO set up a group to study issues related to trade in genetically modified foods.<sup>423</sup> The input of representatives from developing countries and NGOs are needed in that study group and others dealing with environmental issues. Finally, citizens around the world must be educated regarding means for recognizing consumer protection, environmental protection, and labor issues.

#### B. *Funding New Programs to Protect the Environment, Consumers, and Workers*

The WTO should fund projects to protect consumer, labor, and environmental interests. In short, the WTO needs to provide significant funds for in-house expertise on the environment, labor, and consumer protection issues.<sup>424</sup> It needs a staff with experts competent to listen to environmental, labor, and consumer-protection concerns and fight for them. In addition to funding for a staff assigned to environmental protection, the WTO must provide direct funding for environmentally-sustainable development projects. NGOs have proposed that a tax be imposed on foreign currency

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420. Kim Van der Borgh, *The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate*, 14 AM. U. INT'L L. REV. 1223, 1227 (1999).

421. *DSU Review in Tatters*, 3 BRIDGES WKLY. TRADE NEWS DIG., Sept. 27, 1999, available at <http://ictsd.org>.

422. Criteria must be established for determining which NGOs can participate.

423. See World Trade Org., *Report on the Results of the Third Ministerial Conference*, Dec. 8, 1999, available at <http://www.wto.org>; Denise M. Lietz, *A Precautionary Tale: The International Trade Implications of Regulating Genetically Modified Foods in Australia and New Zealand*, 10 PAC. RIM L. & POL'Y J. 411, 433 n.210 (2001).

424. Stenzel, *supra* note 417.

transactions. Funds raised from this tax, called the "Tobin Tax," would be used to provide funds for such projects in poor countries.<sup>425</sup> Simultaneously, it would reduce the volume of short-term, cross-border financial flows that can be destabilizing for poor countries.<sup>426</sup> Monies should also be used to fund research projects investigating the effect of trade on areas of the environment, labor, and consumer protection.

*C. New Rules and Policies: The Doha Declaration as an Initial Step*

At the Fourth Ministerial Conference in Doha, the Doha Declaration was issued outlining a blueprint for further action to precede the convening of the Fifth Ministerial Conference.<sup>427</sup> The Doha Declaration is important not because it implements substantive reforms, but because it recognizes a number of NTCs. For example, in the area of the Agreement on Agriculture, Article 13 states that, "[w]e take note of the non-trade concerns reflected in the negotiating."<sup>428</sup> The two most dramatic topics of sensitization involved the environment and the interests of lesser-developed countries. The underrepresentation of these interests in WTO governance is recognized, and further study is authorized. Regarding lesser-developed countries, the Declaration states that

we shall continue to make positive efforts to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade. . . . We are committed to addressing the marginalization of least-developed countries in international trade and to *improving their effective participation in the multilateral trading system.*<sup>429</sup>

This statement recognizes the undemocratic nature of the WTO institutions relative to lesser-developed countries. In response to claims of undemocratic, secretive decision-making processes, the Declaration declares that "we are committed to making the WTO's operations more transparent, including more effective and prompt dissemination of information, and to improve dialogue with the public."<sup>430</sup> Greater transparency and democratization is the linchpin that will allow the WTO to be more constructive in advancing the cause of NTCs. Professor Kaushik Basu asserts that the implementation of higher international labor standards will only be

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425. See Ctr. for Envtl. Econ. Dev., *Tobin Tax Initiative*, available at <http://www.ceedweb.org/iire> (describing the initiative and various participation groups).

426. Michael Albert, *Q&A: WTO, IMF, World Bank, and Activism*, Z MAG., Jan. 2000, available at <http://www.thirdworldtraveler.com>.

427. See generally Doha Declaration, *supra* note 36.

428. *Id.* art. 13.

429. *Id.* arts. 2, 3 (emphasis added).

430. *Id.* art. 10.

possible through democratization: “[T]here has to be a major effort to democratize international organizations, such as the WTO, so that they can be entrusted with the important task of crafting and implementing policies for better labor standards.”<sup>431</sup> This is equally true for higher environmental and consumer protection standards.

In the area of safety, health, and the environment, the Doha Declaration recognizes the interrelationship between these concerns and the multilateral trading system. Article 6 states that “[w]e are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and sustainable development can and must be mutually supportive.”<sup>432</sup> It further states that “[w]e recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life, or health, or the environment.”<sup>433</sup> By this recognition the Declaration implies a role for the WTO in meeting these NTCs. The area that fails to solicit any meaningful statement of commitment is labor. The Doha Declaration continues past practice of simply deferring to the work of the ILO<sup>434</sup> and fails to commit the WTO to active intervention in the promotion of labor standards.

In the attached Work Programme, the Ministerial Conference further commits the WTO and its constituent parts to undertake research in incorporating NTCs into the WTO governance structure. Article 17, for example, supports future interpretations of the TRIPS agreement on intellectual property rights “in a manner supportive of public health, by promoting access to existing [and future] medicines and research.”<sup>435</sup> The Work Programme is vague in much of its wording, but it is a clear response to the recent criticisms outlined earlier in this Article. It states that “[w]e agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding.”<sup>436</sup> This is most assuredly a response to the undemocratic nature of WTO dispute panel deliberations. In the area of the environment, the Work Programme commits the WTO “to negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental

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431. Kaushik Basu, *Compacts, Conventions, and Codes: Initiatives for Higher International Labor Standards*, 34 CORNELL INT’L L.J. 487, 496 (2001).

432. Doha Declaration, *supra* note 36, art. 6.

433. *Id.*

434. “We reaffirm our declaration made at the Singapore Ministerial Conference regarding internationally recognized core labor standards. We take note of work under way in the International Labour Organization (ILO) on the social dimension of globalization.” *Id.* art. 8.

435. *Id.* art. 17. It further states that it plans a separate declaration regarding future research. *Id.*

436. *Id.* art. 30.

agreements.”<sup>437</sup> This need for negotiation recognizes the increasingly conflicting relationship between free-trade rules and environmental protection.

The issue that remains is whether the Doha Declaration, and its accompanying Work Programme, represent a substantial step forward in the incorporation of NTCs into the world trading system or merely a public relations instrument. The answer seems to be somewhere in between. The Doha Declaration is vaguely worded and adopts few substantive reforms of the WTO governance structure as it relates to NTCs. To label it a mere public relations instrument, however, would be a premature assessment. First, its recognition of NTCs as relevant to WTO proceedings is an important step towards reform. The past history of denial is replaced with open recognition of the relationship between the WTO and NTCs. Second, the Doha Declaration commits WTO members to a far-reaching set of negotiations to be completed within a three-year timeframe.<sup>438</sup> It is only after this period of study and negotiation that the importance of the Doha Declaration can be assessed. It is safe to say that the Doha Ministerial Conference has placed many NTCs on the WTO’s negotiation table.

## VII. CONCLUSION

In view of the events in Seattle, D.C., and Genoa, the WTO and other organizations that promote globalization of trade will face continued public pressure. The WTO must be prepared to do more than simply announce plans and make generalized promises. Instead, it must listen to the messages conveyed by NTC voices and take meaningful action to address citizens’ concerns. The WTO cannot afford, and should not be allowed, to proceed without taking significant actions that protect our environment, consumers, and workers from the detrimental effects of globalization of trade. The first step toward such protective actions is to make the WTO significantly more democratic.

Addressing the symptoms of the “unruly” condition of globalization first requires consideration of the hoped-for objectives it is intended to meet. If the goals of globalization include better working and living conditions for workers, safe and healthy products for consumers, and an environmentally sound planet for everyone, then the advancement of core labor, environmental, and consumer rights should no longer be viewed as an obstacle to the pursuit of an open, multilateral trading system. Instead, the WTO should be used

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437. *Id.* art. 31.

438. *See generally* Doha Declaration, *supra* note 36.

as an instrument to advance the goals of a clean and diversified environment, core labor rights, and acceptable levels of consumer protection. Ultimately, these are the same goals that the free trade system was formulated to achieve.