

# RETHINKING INTERNATIONAL TRADE

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## 1. INTRODUCTION

In recent years, “linkage” issues—such as “trade and environment,” “trade and labor,” and “trade and intellectual property”—have moved from the periphery to the center of the trade agenda. Despite the investment of substantial diplomatic capital, meaningful multilateral agreements in many of these areas have been elusive. This Symposium offers an ideal opportunity to explore why these issues have come to the fore now, and why they appear to be so intractable. My focus is on a related question: Can the trade regime accommodate these new issues—or do they call into question fundamental premises of the trade regime?

While an exhaustive treatment of these questions is beyond the scope of this paper, I will focus on a central component of these larger issues: the serious practical and theoretical challenges linkage issues pose to conventional understandings of the trade regime. To do so, I first outline the leading economic, game theoretic, and political science models that international lawyers typically use to explain or understand the trade system. I then show how linkage issues undermine each of these models. In particular, by presenting different and oftentimes novel types of difficulties, linkage issues suggest that, in each instance, the model has identified the wrong “problem.” Second, the “solutions” offered by each model rest upon a number of assumptions about the nature of states, international markets and/or the international system. Linkage issues pose foundational questions regarding the accuracy and appropriateness of the assumptions underlying these models.<sup>1</sup>

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By undermining these conventional models, the linkage issues herald the “death of the trade regime” in much the same way that Grant Gilmore detailed the “death of contract”: In light of new developments, the models, ideas, and concepts that have traditionally explained a substantive area of the law are rendered insufficient.<sup>2</sup>

Having identified problems in the current models, I then briefly consider the prospects for a new model of the trade system. First, I review some of the leading scholarship that purports to criticize the trade regime, and show why this scholarship is unlikely to generate a new model of the trade regime. I then outline a more general argument for why trade scholars are unlikely to successfully develop a new, parsimonious model that can usefully explain the linkage issues, or the trading system more generally.

Finally, by juxtaposing the types of issues presented in linkage disputes and the institutional competence of the World Trade Organization (“WTO”) dispute resolution system, I identify a paradox raised by continued WTO efforts to resolve controversies involving linkage issues.

This paper has several goals. First, as an analytic matter, I wish to highlight the enormous tensions between conventional understandings of the trade regime and the current trade agenda. Second, I seek to identify some of the practical and theoretical difficulties in generating a new overarching model of the trade system. These arguments may help direct future scholarship into areas more likely to prove fruitful. Finally, by drawing on economic, game theoretic, and political science scholarship, I implicitly emphasize the value of blending insights from multiple perspectives on the same phenomenon. International trade is, at once, an economic, political, and legal phenomenon. Thus, when

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<sup>1</sup> My claim is *not* that linkage issues are the *only* issues that raise these foundational questions; indeed, many of these questions pre-date the ascent of “trade and” issues. Rather, the more limited claims here are that (1) linkage issues highlight the deficiencies of the traditional models, and (2) the heightened political visibility of linkage issues renders impossible the hitherto successful strategy of ignoring or overlooking these deficiencies.

<sup>2</sup> I defend this larger thesis in Jeffrey L. Dunoff, *The Death of the Trade Regime* (unpublished manuscript, on file with author). The title alludes to GRANT GILMORE, *THE DEATH OF CONTRACT* (1974).

attempting to rethink the trade system, one would be well-advised to incorporate insights from at least these three disciplines.

## 2. LINKAGE ISSUES AND THE EFFICIENCY MODEL

Before exploring the challenges that the linkage issues pose to the international trading system, it is useful to briefly review the underpinnings of this system. Why did the international community engage in the lengthy and arduous Uruguay Round negotiations? What theory can explain why we need the WTO and identify the benefits it is designed to secure?

### 2.1. *The Efficiency Model*

The leading, if not dominant, justification for the international trade regime is the economic one. As summarized by John Jackson, “[t]he objective [of the General Agreement on Tariffs and Trade (“GATT”)/WTO system] is to liberalize trade that crosses national boundaries, and to pursue the benefits described in economic theory as ‘comparative advantage.’”<sup>3</sup> The economic concept of comparative advantage can be traced back to the writings of David Ricardo. Ricardo argued that:

Under a system of perfectly free [international] commerce, each country naturally devotes its capital and labour to such employments as are most beneficial to each. This pursuit of individual advantage is admirably connected with the universal good of the whole. By stimulating industry, by rewarding ingenuity, and by using most efficaciously the peculiar powers bestowed by nature, it distributes labour most effectively and most economically:

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<sup>3</sup> John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1231 (1992); see also Ronald A. Brand, *Sustaining the Development of International Trade and Environmental Law*, 21 VT. L. REV. 823, 842 (1997) (“The fundamental goal of the WTO system is the reduction of trade barriers through rules consistent with the underlying theory of comparative advantage . . . .”); Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices*, in 2 FAIR TRADE & HARMONIZATION 95, 108 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (“The GATT’s economic goal is to promote, through liberal international trade policies, the greater effectiveness of national economies.”) [hereinafter Bhagwati & Hudec].

while, by increasing the general mass of productions, it diffuses general benefit . . . .<sup>4</sup>

The theory of comparative advantage teaches that, in the absence of trade restrictions, each nation will specialize in the production and export of goods and services that it can produce relatively more efficiently than other nations. This specialization increases the efficiency of international production and results in increased trade and greater aggregate welfare. As a result, consumers enjoy lower prices and greater availability of goods. All of this can most efficiently occur through open and competitive markets that accurately price goods and services, enabling the producers in each country to discover what they are comparatively better at producing.

Under this theory, trade barriers are inefficient intrusions into otherwise autonomously functioning markets, and tend to divert resources from their most highly valued uses. In particular, tariffs and other barriers transfer wealth from consumers to firms and workers in protected industries.<sup>5</sup> In addition, trade barriers create “deadweight losses,” reductions in the welfare of one group that are not transferred to any other group or groups. In this way, trade restrictions produce a net loss of global economic welfare. By disciplining the use of trade restrictions, the trade regime reduces these inefficiencies and permits markets to operate without state interference, thereby promoting global economic wealth. For purposes of this paper, I call this understanding of the trade regime the “efficiency model.”

## 2.2. *Challenges to the Efficiency Model*

Under the efficiency model, the “problem” to be solved is how to maximize economic welfare. The “solution” to this “problem” is to reduce or eliminate government regulations that

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<sup>4</sup> DAVID RICARDO, *THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* 81 (Everyman's Library 1969) (1817). While Ricardo's theory has undergone substantial refinement over the years, it still “continues to form the basis of conventional trade theory . . . .” MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 2 (1995) [hereinafter TREBILCOCK & HOWSE].

<sup>5</sup> See James Bovard, *The Morality of Protectionism*, 25 N.Y.U. J. INT'L L. & POL. 235, 239 (1993) (noting that protectionism harms the general public in order to provide a “private benefit”).

interfere with voluntary, welfare-enhancing market exchanges. For many of the classic problems in international trade law—export subsidies, discriminatory treatment, and the like—this may be a useful way of approaching the issues. But linkage issues—particularly trade and environment and trade and labor issues—involve different sorts of problems, in part because they often present tensions between economic and non-economic values. As linkage disputes multiply, it is becoming increasingly apparent that the efficiency model's welfare maximizing calculus does not adequately account for these non-economic values.<sup>6</sup> Indeed, many of these non-economic values—as expressed in, for example, laws requiring decent working conditions or clean air and water—often cannot be realized through trade liberalization or other market mechanisms alone.<sup>7</sup> Rather, they can only be achieved through governmental action or intervention.

From the efficiency perspective, it is difficult to differentiate labor or environmental standards that restrict trade from other government policies that affect trade.<sup>8</sup> Labor and environmental laws, however, are typically not intended to and do not serve purely economic goals: "To notice that the Endangered Species Act is not cost-beneficial is to recognize the obvious. That is the *point* of the Act, and of much of our environmental regulation."<sup>9</sup>

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<sup>6</sup> See, e.g., Frank J. Garcia, *Trade & Justice: Linking the Trade Linkage Debates*, in, Symposium, *Linkage as Phenomenon: An Interdisciplinary Approach*, 19 U. PA. J. INT'L ECON. L. 201 (1998); Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658 (1996).

<sup>7</sup> For an extended discussion of the ways in which the GATT system privileges trade interests over non-economic interests, see Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043 (1994) [hereinafter Dunoff, *Institutional Misfits*].

<sup>8</sup> For a representative discussion of how trade experts view environmental regulations as non-tariff barriers, see Steve Charnovitz, *The Regulation of Environmental Standards by International Trade Agreements*, 16 Int'l Env't Rep. (BNA) 631, 631-33 (Aug. 25, 1992).

<sup>9</sup> MARK SAGOFF, *THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW AND THE ENVIRONMENT* 16-17 (1988). Another important example involves the Clean Air Act, which requires the EPA to set national primary ambient air quality standards at a level that will protect the public health with an adequate margin for safety, without regard to the cost of attaining the standards. See 42 U.S.C. § 7409(b)(1) (1994); see, e.g., *Natural Resources Defense Council v. EPA*, 902 F.2d 962, 972-73 (D.C. Cir. 1990) (stating that national ambient air quality standards for particulate matter must not include consideration of cost of consequent unemployment); *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1150 (D.C. Cir. 1980) (noting that the EPA is precluded from considering economic factors when developing national ambient air quality standards for lead).

Rather, many of these laws are grounded in normative arguments that purport to trump or countervail market values. Thus, the increasingly common conflicts between these bodies of law and international trade law inescapably call into question the appropriate scope and limits of the efficiency model. This critical issue is not resolved by the argument that, from within the efficiency perspective, environmental rules are similar to other trade-restricting rules. This response presupposes precisely the assumption that the environmental rules call into question.<sup>10</sup> By raising questions about the limits of the efficiency model, the linkage issues are an international legal instantiation of larger debates about the appropriate limits of market ordering and economic analysis.<sup>11</sup>

Moreover, by questioning the limits of the efficiency model, linkage issues also raise difficult institutional issues. As we inhabit a world of finite resources and inevitable trade-offs, who should decide how much economic growth, or environmental protection, we seek?<sup>12</sup> Domestic polities typically use various institutions, such as legislatures, courts, administrative agencies, and markets, to make such decisions. Each of these institutions has particular strengths and capacities, and domestic polities can not only exploit these comparative advantages, but may also benefit from the interaction among these various institutions.<sup>13</sup> The

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<sup>10</sup> "The ground of the debate is elsewhere—in evaluating the justifications of certain forms of political and economic ordering—not pre-empting that debate by appealing to one possible resolution of it. . . . To paraphrase Keynes, those who think they can avoid this sort of theorizing are simply in the grips of another theory." Brian Alexander Langille, *General Reflections of the Relationship of Trade and Labor (Or: Fair Trade is Free Trade's Destiny)*, in Bhagwati & Hudec, *supra* note 3, at 231, 246. Professor Langille's excellent article presents an extended version of this argument.

<sup>11</sup> For an analysis of similar debates in various domestic contexts, see Jane B. Baron & Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 *CARDOZO L. REV.* 431 (1996).

<sup>12</sup> For an insightful analysis of the ways that various international fora resolve these types of issues, see Joel P. Trachtman, "Trade and . . ." *Problems, Cost-Benefit Analysis and Subsidiarity*, 19 *EUR. J. INT'L L.* 32 (1997).

<sup>13</sup> The study of these interactions has given rise to a growing body of literature known as 'Positive Political Theory.' See, e.g., Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 *S. CAL. L. REV.* 1447 (1995); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331 (1991); John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 *INT'L REV. L. & ECON.* 263 (1992). I've argued elsewhere that a similar study of the interactions among international institutions

trade regime does not have a similarly rich institutional menu from which to draw.<sup>14</sup> It lacks relevant administrative capacity and a conventional legislative apparatus. Also, while there is a dispute resolution process, its results have lacked formal precedential effect and the process has not, to date, produced a comprehensive body of “common law.”<sup>15</sup>

More importantly, trade bodies, like firms, governments, law schools, and all other institutions, have certain areas of proficiency. They are well-equipped to address certain issues, and ill-equipped to address others. There is, however, little evidence to suggest that the WTO possesses the requisite expertise to sensibly address many of the linkage issues. Environmental advocates have repeatedly and persuasively detailed the GATT’s shortcomings with respect to “trade and environment” issues;<sup>16</sup> even a

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would likely be fruitful. See Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Laws: An Invitation and a Caveat* (unpublished manuscript, on file with author). See also Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599 (1997) (urging focus on interactions among domestic and international institutions and norms).

<sup>14</sup> See, e.g., Joel P. Trachtman, *The International Economic Law Revolution*, 17 *U. PA. J. INT’L ECON. L.* 33, 52-55 (1996).

<sup>15</sup> As a recent WTO Appellate Body report stated:

The generally-accepted view under GATT 1947 was that the conclusions and recommendations in an adopted panel report bound the parties to the dispute in that particular case, but subsequent panels did not feel legally bound by the details and reasoning of a previous panel report. . . .

Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*.

Japan - Taxes on Alcoholic Beverages, Oct. 4, 1996, at 14-15. For other discussions of the legal effect of panel reports see Canada—Import Restrictions on Ice Cream and Yoghurt, Dec. 5, 1989, GATT B.I.S.D. (36th Supp.) at 68, 85 (1990) (stating that prior panel reports are relevant but not dispositive); European Economic Community—Restrictions on Imports of Dessert Apples Complaint by Chile, June 22, 1989, GATT B.I.S.D. (36th Supp.) at 93, 124 (1990) (noting that panel is not bound by reasoning employed by prior panels). Scholarly treatments of these issues can be found in Philip M. Nichols, *GATT Doctrine*, 36 *VA. J. INT’L L.* 379, 430-33 (1996); Jackson, *supra* note 3, at 1272-73.

<sup>16</sup> See, e.g., DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* (1994); C. FORD RUNGE, *FREER TRADE, PROTECTED ENVIRONMENT: BALANCING TRADE LIBERALIZATION AND*

GATT report candidly conceded that "[t]he GATT is not equipped to become involved in the tasks of reviewing national environmental priorities, setting environmental standards or developing global policies on the environment."<sup>17</sup> Leading commentators have detailed similar institutional problems in the context of competition law,<sup>18</sup> labor law,<sup>19</sup> and intellectual property law.<sup>20</sup> In short, if we applied the theory of comparative advantage to institutions, we might conclude that trade bodies were not terribly well-positioned, by virtue of mission, experience, or expertise, to deal with some of the most contentious linkage issues.<sup>21</sup>

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ENVIRONMENTAL INTERESTS (1994); Steve Charnovitz, *Environmental Harmonization and Trade Policy*, in TRADE AND ENVIRONMENT: LAW, ECONOMICS AND POLICY (Durwood Zaelke et al. eds., 1993). I have addressed the institutional issues in Dunoff, *Institutional Misfits*, *supra* note 7, and in Jeffrey L. Dunoff, *Resolving Trade-Environment Conflicts: The Case for Trading Institutions*, 27 CORNELL INT'L L.J. 607 (1994).

<sup>17</sup> Report by Ambassador Hidetoski Ukawa, Chairman, Group on Environmental Measures and International Trade, 49th Session of the GATT Contracting Parties, at 3 (Jan. 25, 1994) (on file with author).

<sup>18</sup> As Judge Wood noted:

It is also unclear whether the WTO process would yield the right rules in the end. Competition authorities have tried to de-politicize these rules and to ground them instead on economic criteria. The WTO, however, is a fundamentally political forum, better suited to mediating disputes between States than to analyzing the ins and outs of relevant market definition or the contestability of a particular market. Finally, even though many (including myself) believe that the fundamental principles of competition law can be applied universally, at a more practical level it is not clear that the same competition rules that are best for the United States and Europe are equally suitable for Byelarus, Zimbabwe, and Pakistan. The level of economic development, the strength of social and legal institutions, and the type of economy that a country has had may require refinements in competition rules from place to place that are better handled individually than under the umbrella of an international organization.

Honorable Diane P. Wood, *Regulation in the Single Global Market: From Anarchy to World Federalism?*, 23 OHIO N.U. L. REV. 297, 307 (1996).

<sup>19</sup> Michael Hart, *Coercion or Cooperation: Social Policy and Future Trade Negotiations*, 20 CAN.-U.S. L.J. 351, 380 (1994) ("Trade bureaucrats are not the best officials to address the complexities of fair labor standards or other social issues, nor are trade agreements necessarily the best instruments for addressing them.").

<sup>20</sup> See generally Frederick M. Abbott, *The Future of the Multilateral Trading System in the Context of TRIPS*, 20 HASTINGS INT'L & COMP. L. REV. 661 (1997) (noting respective competencies and strengths of the WTO and the World Intellectual Property Organization).

<sup>21</sup> See Steve Charnovitz, *The World Trade Organization, Meat Hormones, and Food Safety*, 14 Int'l Trade Rep. (BNA) No. 41, at 1781, 1785 (1997). While



In addition, to the extent that linkage issues continue to be incorporated into the ever more expansive trade regime, a different set of problems arises. The logic of the efficiency model suggests that we understand measures which restrict trade in, for example, environmentally harmful products, as non-tariff barriers that reduce aggregate welfare. Similarly, we might understand lax environmental or labor laws as implicit subsidies to industry.<sup>22</sup> In other words, these laws can be 'translated' into the economic rhetoric associated with the efficiency model. As noted above, however, this rhetoric fails to capture fully the values embodied in, for example, environmental laws. In this sense, to use economic rhetoric to describe linkage issues is to use an impoverished vocabulary: "[t]he attempt to translate our diverse valuations of social goods, such as [worker protections] or environmental amenities, into monetary items, 'does not account for the way we actually think.'"<sup>23</sup> Rather, we value diverse social goods—such as pristine lands or endangered species—in a variety of non-economic ways. For this reason, the use of economic rhetoric and analysis in these contexts would obscure many of the important forms of valuation that individuals and societies commonly use.<sup>24</sup> I believe that this accounts, in part, for the widespread resistance to the

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this "institutional competence" argument is often raised by critics of the trade regime, these issues should concern the regime's defenders as well. The difficulties associated with linkage issues are part of a larger problem the GATT/WTO system has with trade measures designed to serve non-trade or non-economic values. Consider, for example, the GATT's handling of disputes arising out of US-Nicaragua relations in the 1980's, the suspension of Poland's MFN status following the suppression of Solidarity, and embargoes imposed during the Falklands/Malvinas war.

<sup>22</sup> See, e.g., Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L L. 361, 379 (1995) (arguing that forced and child labor should be considered a subsidy under international trade rules).

<sup>23</sup> Baron & Dunoff, *supra* note 11, at 460-61 (citing Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 800 (1994)).

<sup>24</sup> As Cass Sunstein argues, in a world understood solely in terms of economic rhetoric:

a loss of friendship or the death of a parent would really be like a loss of money, thought undoubtedly a lot of it. An achievement in something that one prizes—like art or music—would be valued in the same way as an increase in net worth, or the birth of a new child, or falling in love, or the relief of human suffering . . . . A great deal would be lost in such a world.

Sunstein, *supra* note 23, at 854.

trade regime's expansion into an ever increasing number of linkage areas.

But the problem of extending the use of economic rhetoric to the linkage issues is not simply one of descriptive inaccuracy, or of the reductionism associated with that rhetoric. The larger issue is that use of this vocabulary has an important constitutive dimension. "[B]ecause they do not merely ascribe properties to objects, but instruct us about how to think about them, characterizations do not leave the phenomena unchanged."<sup>25</sup> To translate environmental (and other social) goods into an economic vocabulary—as the efficiency model does—is to risk changing our understanding of these social goods in objectionable ways.<sup>26</sup> In other words, different vocabularies "are important both because they describe in inadequate ways and because they do not merely re-describe. They also have an important constitutive dimension—that is, they may help transform how . . . we value or experience events and relationships."<sup>27</sup> For this reason, the decision whether to incorporate linkage issues into the trade regime, and the associated decision whether to apply economic rhetoric and vocabulary to these social goods, has an often overlooked—but crucially important—transformative dimension. By threatening to transform our understanding of certain social goods, incorporation of the linkage issues into the trade regime threatens the social values underlying these goods.<sup>28</sup>

For these reasons, debates raised by the linkage issues problematize the efficiency model's premise that the central issue to be solved is how to maximize aggregate welfare. But, in addition, the linkage issues suggest that the efficiency model is based on a series of inaccurate or misleading assumptions. As noted above,

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<sup>25</sup> GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 335 (1986).

<sup>26</sup> See, e.g., Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993). For a criticism of this argument and others associated with the position that values are incommensurable see Richard Greenstein, *On a Scale of One to Ten* (unpublished manuscript, on file with author). For a sophisticated discussion of various ways to commensurate values in the linkage context, see Trachtman, *supra* note 12.

<sup>27</sup> Sunstein, *supra* note 23, at 815.

<sup>28</sup> Ironically, then, the challenges identified in this paper run in two directions. The incorporation of linkage issues into the trade system threatens our conventional understandings of that system. But, as the conventional models privilege economic over non-economic values, this incorporation also threatens the non-economic values present in linkage issues.

the efficiency model assumes the autonomy and priority of international markets. It also assumes a sharp distinction between government action and government inaction. The goal is to reduce or eliminate government interference with markets, so that they can operate "on their own."

But markets do not simply exist "on their own." Rather, as the legal realists persuasively demonstrated in the domestic context, all markets require the establishment of numerous background norms, such as rules about property, contract, fraud, competition and the like. These norms are not "distortions" of the market; rather they enable functioning markets to exist at all. Moreover, these norms reflect and express public policy; they are created and enforced by governments. As any number of different background norms are possible, these norms should be understood as a form of economic regulation, just as we understand traditional public law to be economic regulation.<sup>29</sup>

Much the same is true in the international context. International markets similarly presuppose the existence of numerous background norms, particularly enforceable property rights. Absent such rights, markets may never develop; different conceptions of these background rights will give rise to vastly different markets. A good example is the intellectual property ("IP") field. Prior to the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), nations varied dramatically in their definition and protection of IP rights. Absent protected or enforceable IP rights in certain developing countries, developed nation IP holders often could not or would not do business in these developing countries.<sup>30</sup> Developed nation governments and private firms claimed that lax IP regimes in developing nations produced "distorted" markets that annually cost them millions of dollars in lost export sales.<sup>31</sup>

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<sup>29</sup> For early articulations of this argument, see ROBERT L. HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* 542-48 (1952); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

<sup>30</sup> This problem is not new. As Stephen Ladas wrote in 1949, "[i]nternational trade is inconceivable today without trade-marks and their adequate protection." Stephen P. Ladas, *The Lanham Act and International Trade*, 14 LAW & CONTEMP. PROBS. 269, 269 (1949).

<sup>31</sup> The prevailing developed nation view was well captured by EC negotiator Willy de Clercq in his speech at the start of the Uruguay Round negotiations:

The TRIPS Agreement is designed to address many of these market "distortions." This comprehensive agreement deals with each of the main categories of intellectual property rights and establishes standards of protection and rules of enforcement. It also obliges members to enact legislation granting aggrieved foreign intellectual property owners effective remedies in domestic proceedings. Finally, it provides that WTO dispute settlement mechanisms will be used to resolve disputes between member states. Presumably, this agreement will facilitate markets in many goods and services that did not previously exist.

This suggests, however, that international markets do not simply form spontaneously and without government intervention; rather, certain government *actions* (i.e., those required by TRIPS) are necessary to *create* or *facilitate* markets for certain goods and services in the first place. Paradoxically, free international trade, like the domestic free market, *requires* state intervention.<sup>32</sup> The efficiency model presupposes a distinction between private market activity and public governmental action that linkage issues tend to undermine.<sup>33</sup>

For all of these reasons, the linkage issues pose serious conceptual challenges to the traditional understanding of the trade regime embodied in the efficiency model.

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The absence of adequate protection in the case of intellectual property has led to considerable distortions in trade in certain sectors. The GATT can and must act in parallel with other institutions in framing principles and rules relating to the trade aspects of intellectual property. Our aim in this area . . . must be to create a favorable, dynamic climate which will give a fresh boost to the world economy.

Willy de Clercq, Speech Delivered at the Uruguay Round (Sept. 16, 1986), *in* BULL. EUR. COMMUNITIES No. 9-1986, at 15 (1986), *quoted in* James J. Callaghan, *Analysis of the European Court of Justice's Decision on Competence in the World Trade Organization: Who Will Call the Shots in the Areas of Services and Intellectual Property in the European Union?*, 18 LOY. L.A. INT'L & COMP. L.J. 497, 504 (1996).

<sup>32</sup> See KARL POLANYI, *THE GREAT TRANSFORMATION* 203 (1957); *see also* ERIC J. HOBSBAWM, *INDUSTRY AND EMPIRE* (1971).

<sup>33</sup> Again, my claim is *not* that the linkage issues are the *only* issues that suggest this insight; rather it is that these issues highlight this often overlooked idea.

### 3. LINKAGE ISSUES AND THE COLLECTIVE ACTION MODEL

#### 3.1. *The Collective Action Model*

Game theory provides an alternative explanation of the trade regime. Under this understanding, nations seek to use trade policy to maximize their welfare, but confront a Prisoner's Dilemma.<sup>34</sup> That is, each is tempted to profit at others' expense by manipulating trade policy in an effort to limit imports without hurting exports. Policies to achieve these ends include higher tariffs, competitive exchange rate devaluations, and similar strategies designed to alter the flow of goods and capital. As the international economic history of the 1930's suggests, however, once one country adopts such a strategy, other nations are likely to follow suit. These individual acts will, in the aggregate, lead to a massive decline in the volume of international trade and hence reduce global welfare. The dilemma is that the pursuit of individually rational strategies results in a sub-optimal collective outcome.

Adopting this game theoretic perspective, many scholars have suggested that the WTO/GATT system is best understood not as a means for maximizing the gains available through trade, but

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<sup>34</sup> See, e.g., ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 7-9 (1984); PETER B. KENAN, *THE INTERNATIONAL ECONOMY* 143-44 (3d ed. 1994); DAVID A. LAKE, *POWER, PROTECTION AND FREE TRADE: INTERNATIONAL SOURCES OF U.S. COMMERCIAL STRATEGY, 1887-1939* (1988); Kenneth W. Abbott, *The Trading Nation's Dilemma: The Functions of the Law of International Trade*, 26 HARV. INT'L L.J. 501 (1985) [hereinafter Abbott, *Trading Nation's Dilemma*]; John Conybeare, *Trade Wars: A Comparative Study of Anglo-Hanse, Franco-Italian, and Hawley-Smoot Conflicts*, 38 WORLD POL. 147, 170 (1985). At times, other game theoretic models are used to describe the relationship between trading nations, such as the games of chicken and stag hunt. See, e.g., Jonathan Macey, *Chicken Wars as Prisoners' Dilemma: What's in a Game?*, 64 NOTRE DAME L. REV. 447, 449-50 (1989).

Of course, game theorists have not limited their sights to the international trading system. Rather, this model has been applied to, inter alia, arms races and arms control, nuclear nonproliferation, crisis management, military alliances, monetary cooperation, and tax policy coordination. See Joseph M. Grieco, *Realist Theory and the Problem of International Cooperation: Analysis with an Amended Prisoner's Dilemma Model*, 50 J. POL. 600, 601 n.2 (1988) (collecting citations). As a result, some claim that the "prisoners' dilemma . . . has proliferated as the key metaphor of international politics." Helen Milner, *International Theories of Cooperation Among Nations*, 44 WORLD POL. 466, 467 (1992); see also Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 360 (1989) [hereinafter Abbott, *Prospectus*] ("Situations characterized by P[risoners'] D[ilemma] incentives are common, if not pervasive, in international life.").

rather as "an agreement that, at bottom, seeks to overcome the significant coordination or collective-action problems that its membership otherwise faces."<sup>35</sup> For the purposes of this paper, this understanding of the trade regime is referred to as the "collective action" model.

The collective action model typically incorporates a number of standard "realist" assumptions.<sup>36</sup> Under this model, nations are assumed to be the key actors in an anarchic international arena,<sup>37</sup> and state action is seen as the key variable in analyzing international relations. Moreover, these states are assumed to be rational, welfare-maximizing entities,<sup>38</sup> with interests that sometimes overlap and sometimes conflict. In this context, cooperation among independent states, while often highly desirable, becomes deeply problematic.

Many international relations and international law scholars argue that "[t]o avoid joint defection and gain the higher payoffs available from cooperation, rational states . . . will tend to seek international rules and institutions designed to restrain defection."<sup>39</sup>

<sup>35</sup> Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 209 (1996).

<sup>36</sup> I refer here to the "realist" tradition of political science associated with the writings of scholars such as Hans Morgenthau, Georg Schwartzberger, E.H. Carr, George Kennan, and others, and not to the "Legal Realist" tradition. For more on the political science school of realism, see, for example, HANS J. MORGANTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 3-15 (1960) (identifying six tenets of realism); Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT'L ORG. 485 (1988) (identifying key realist principles).

<sup>37</sup> In this context, anarchy does not mean chaos or disorder, but that power and authority are decentralized. See Abbott, *Prospectus*, *supra* note 34, at 337-338. Seminal works on the anarchic nature of the international system include: HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (1977); KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979) (distinguishing between hierarchic nature of domestic society and anarchic nature of international society). For thoughtful explorations of the assumption that the international system is anarchic, see Helen Milner, *The Assumption of Anarchy in International Relations Theory: A Critique*, 17 REV. INT'L STUD. 67 (1991); Alexander Wendt, *Anarchy is What States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391 (1992).

<sup>38</sup> See, e.g., Charles Lipson, *International Cooperation in Economic and Security Affairs*, 37 WORLD POL. 1 (1984) ("Our analysis . . . presumes that the states are coherent, unitary, rational actors.").

<sup>39</sup> Abbott, *Prospectus*, *supra* note 34, at 359. For a good recent overview of "Institutionalist Theory," see generally William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U. J. INT'L L. & POL'Y 227 (1997).

International institutions can provide "a stable environment for mutually beneficial decision-making [and at the same time] guide and constrain behavior."<sup>40</sup> Specifically, institutions can promote cooperation by, inter alia, reducing the transaction costs associated with international agreements.<sup>41</sup> Institutions make it more convenient and less costly to negotiate agreements in the first place; contribute administrative and institutional services that reduce maintenance costs; and provide authoritative dispute resolution mechanisms that reduce enforcement costs. Additionally, institutions increase access to information,<sup>42</sup> assist in the monitoring of behavior,<sup>43</sup> mediate disputes,<sup>44</sup> and facilitate bargaining across different issues.<sup>45</sup>

Applying these insights in the trade context, one solution to the problem of mutually destructive trade barriers producing lower aggregate welfare, would be the creation of a multilateral institution with binding and enforceable rules limiting such trade barriers.<sup>46</sup> From a game theoretic perspective, the WTO/GATT

<sup>40</sup> Duncan Snidal, *Political Economy and International Institutions*, 16 INT'L REV. L. & ECON. 121, 127 (1996).

<sup>41</sup> See generally ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 89-109 (1984).

<sup>42</sup> Lack of information is considered a cause of the Prisoner's Dilemma. See *id.* at 93-96.

<sup>43</sup> See, e.g., Aceves, *supra* note 39, at 251-55; Paul Milgrom, *The Role of Institutions in the Revival of the Trade: The Medieval Law Merchant, Private Judges and the Champagne Fairs*, 2 ECON. & POL. 1 (1990).

<sup>44</sup> See, e.g., Aceves, *supra* note 39, at 253-54; ABRAM CHAYES & ANTONIA CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 201-25 (1995).

<sup>45</sup> See, e.g., Aceves, *supra* note 39, at 248-49; see also Ernst B. Haas, *Why Collaborate? Issue-Linkages in International Negotiations*, 32 WORLD POL. 357 (1980); James K. Sebenius, *Negotiation Arithmetic: Adding and Subtracting Issues and Parties*, 37 INT'L ORG. 281 (1983).

<sup>46</sup> Significantly, the institutional "solution" also transforms the game from a one-shot enterprise to one that has a large (or infinite) number of plays. This has the benefit of more accurately capturing the strategic environment that trading nations actually face. Iterated games are thought to be more likely to yield cooperative outcomes because "defection is in the long run unrewarding, since the short-run gains thereby obtained will normally be outweighed by the mutual punishment that will ensue over the long run." KEOHANE, *supra* note 41, at 75. If, however, the game is played a finite number of times, and if the players know beforehand the number of games to be played, the dilemma remains. See, e.g., Drew Fudenberg & Eric Maskin, *The Folk Theorem in Repeated Games with Discounting or with Incomplete Information*, 54 ECONOMETRICA 443 (1982); David M. Kreps, *Rational Cooperation in the Finitely Repeated Prisoners' Dilemma*, 27 J. ECON. THEORY 245 (1982). For an application of the

system can be understood as such an institution containing such a set of rules. As Judith Goldstein notes:

nations with common interests—such as the potential welfare gains from trade liberalization—can overcome collective action problems only if some mechanism is found to forestall cheating. According to such logic, GATT rules were appropriate because they assuaged the fears of potential regime participants that they would receive the ‘Sucker’s Payoff’ if they lowered tariff barriers. Interpreting the breakdown of the trading system in the interwar period as a market failure—mutual defection reflected the decline of rules, not of common interests, in international trade—the credit for resurgence of trade under GATT is given to the institutionalization of efficient monitoring and enforcement procedures.<sup>47</sup>

Adherents of the collective action model emphasize several features of the trade regime that help trading nations avoid the sub-optimal outcomes associated with prisoners’ dilemmas. While the GATT has always been a binding international agreement, changes to the dispute settlement system negotiated during the Uruguay Round greatly strengthened the “enforceability” of GATT disciplines, by expanding both the remedies available to aggrieved parties, and the means through which compliance with the GATT can be induced.<sup>48</sup> From a game theoretic perspective, this reduces the incentives to defect in any particular instance and therefore increases the benefits of cooperation. Similarly, the on-

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theory of “iterated” games to international legal issues, see John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT’L L.J. 139 (1996).

<sup>47</sup> Judith Goldstein, *Creating the GATT Rules: Politics, Institutions and American Policy*, in MULTILATERALISM MATTERS: THE THEORY AND PRAXIS OF AN INSTITUTIONAL FORM 201 (John Gerard Ruggie ed., 1993) [hereinafter MULTILATERALISM MATTERS].

<sup>48</sup> See, e.g., Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT’L ECON. L. 555 (1996). Compare Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT’L L. 416 (1996), with John H. Jackson, *The WTO Dispute Settlement Understanding: Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT’L L. 60 (1997) (discussing different views on the sense in which GATT/WTO obligations are “binding”).



going monitoring of state behavior through the Trade Policy Review Mechanism<sup>49</sup> can deter potential violations before they occur, and thereby contribute to the efficacy of cooperative agreements. Finally, by providing a forum for ongoing consultation—as well as administrative, technical and other services through the Secretariat—the WTO helps reduce maintenance and enforcement costs.

### 3.2. *Challenges to the Collective Action Model*

Again, however, the linkage issues seriously challenge this model. In particular, they problematize both the “problem” presented, which is how to avoid sub-optimal outcomes resulting from individually rational decisions, and the solution offered, consisting of iterative processes along with a binding international agreement and an institution that can oversee and enforce the agreement.

Linkage issues suggest that the problems facing the international trading community are primarily those of distribution, rather than those of cooperation and collaboration.<sup>50</sup> While distributional issues animate all the linkage issues,<sup>51</sup> for present purposes consider again the TRIPS Agreement, particularly the central provisions that provide for minimum standards of protection to be provided by each member. For each of the main categories of intellectual property, the Agreement sets out the subject matter

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<sup>49</sup> Trade Policy Review Mechanism, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 3, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1; 33 I.L.M. 1140 (1994). Before this agreement, trade policy review was done pursuant to a decision by the contracting parties. See Functioning of the GATT System, GATT B.I.S.D. (36th Supp.) at 405 (1989).

<sup>50</sup> There are, of course, various types of cooperation problems. For useful typologies, see Lisa L. Martin, *The Rational State Choice of Multilateralism*, in MULTILATERALISM MATTERS, *supra* note 47, at 91; Duncan Snidal, *Coordination versus Prisoners' Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923 (1985); Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, in INTERNATIONAL REGIMES 115 (Stephen D. Krasner ed., 1983). Both the trade and collective-security areas are often understood to present collaboration games. See, e.g., Andreas Hansenclever et al., *Interests, Power, Knowledge: The Study of International Regimes*, 40 MERSHON INT'L STUD. REV. 177 (1996) (surveying relevant literature).

<sup>51</sup> Elsewhere, I have argued that trade and environment issues are largely driven by distributional considerations. See Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?*, 49 WASH. & LEE L. REV. 1407 (1992).

to be protected, the rights to be conferred, and the minimum duration of protection. In large part, the "standards are set at a level comparable to those in the major industrial countries today."<sup>52</sup>

While there is substantial debate over the ultimate economic effects of the TRIPS agreement,<sup>53</sup> there can be little doubt that an agreement that raises worldwide intellectual property protections to developed country levels is not likely to produce a collectively optimal amount of global economic welfare.<sup>54</sup> Neoclassical trade theory suggests that nations will likely differ in their abilities to innovate and to imitate.<sup>55</sup> To best exploit comparative advantage, nations that lag in innovation would likely enact relatively lax IP regimes (at least as compared with nations that are adept at innovation).<sup>56</sup> By permitting cheap domestic imitations of foreign innovations, developing nations may reap significant consumer welfare gains at little cost. The creation of lax IP regimes by many developing nations therefore appears economically reasonable.<sup>57</sup> Developing nations may understand international agreements that raise IP protection to developed nation levels to be, from their perspective, welfare-reducing or pareto-inferior bargains.<sup>58</sup>

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<sup>52</sup> Adrian Otten & Hannu Wager, *Compliance with TRIPS: The Emerging World View*, 29 VAND. J. TRANSNAT'L L. 391, 396 (1996); see also Paul Edward Geller, *Intellectual Property in the Global Marketplace: Impact of TRIPS Dispute Settlements?*, 29 INT'L L. 99 (1995).

<sup>53</sup> See Frederick M. Abbott, *Commentary: The International Intellectual Property Order Enters the 21st Century*, 29 VAND. J. TRANSNAT'L L. 471, 473 (1996).

<sup>54</sup> See, e.g., GENE M. GROSSMAN & ELHANAN HELPMAN, *INNOVATION AND GROWTH IN THE GLOBAL ECONOMY*, ch. 11 (1991); TREBILCOCK & HOWSE, *supra* note 4, at 251, 253-54; Allan V. Deardorff, *Should Patent Protection be Extended to All Developing Countries?*, 13 WORLD ECON. 497 (1990); Kevin Maskus, *Normative Concerns in the International Protection of Intellectual Property Rights*, 14 WORLD ECON. 403 (1991).

<sup>55</sup> See TREBILCOCK & HOWSE, *supra* note 4, at 252.

<sup>56</sup> See *id.*

<sup>57</sup> For well-developed arguments that developing nations should weaken or eliminate their intellectual property laws, see Douglas F. Greer, *The Case Against Patent Systems in Less-Developed Countries*, 8 J. INT'L L. & ECON. 223 (1973); Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L. REV. 89 (1993); A. Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 1987 DUKE L.J. 831.

<sup>58</sup> See TREBILCOCK & HOWSE, *supra* note 4, at 251, 253; Frederick M. Abbott, *The WTO TRIPS Agreement and Global Economic Development*, 72 CHI-KENT L. REV. 385, 387 (1996) (noting "substantial agreement" that the TRIPS Agreement will "likely lead to a transfer of wealth from the developing to industrialized economies, at least over the short term"); Carlos A. Primo Braga &

One response to this argument is that it is a mistake to view the TRIPS agreement in isolation, and that the developing nations traded off a “loss” in the TRIPS context to obtain “gains” elsewhere, as in agriculture.<sup>59</sup> Even if this is true, it simply confirms one of the fundamental differences between linkage issues and other trade issues. The logic of the collective action model—as well as that of the efficiency model—suggests that cooperation and collaboration resulting in a reduction of trade distortions and an expansion in trade will always benefit both the domestic welfare of the liberalizing state and global economic welfare. However, in linkage issues, trade expansion will likely benefit some states at the expense of others.<sup>60</sup> For this reason, a model that sees the cen-

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Carsten Fink, *The Economic Justification for the Grant of Intellectual Property Rights: Patterns of Convergence and Conflict*, 72 CHI.-KENT L. REV. 439 (1996); Carlos Alberto Primo Braga, *The Economics of Intellectual Property Rights and the GATT: A View from the South*, 22 VAND. J. TRANSNAT'L L. 243, 256 (1989) (noting that “it is important to recognize that for a Third World country a reform designed to increase intellectual property rights protection will tend to generate a welfare loss at its initial stages”). Other commentators have argued that increased levels of protection may not even be Kaldor-Hicks efficient, namely, the gains in economic welfare for the nations who benefit from heightened protection may not outweigh the losses to those nations who suffer from it. See, e.g., Deardorff, *supra* note 54, at 501-05.

<sup>59</sup> See Abbott, *supra* note 53, at 471; John H. Jackson, *GATT and the Future of International Trade Institutions*, 18 BROOK. J. INT'L L. 11, 13 (1992) (suggesting that developed nation gains from agreements in services and intellectual property rights be traded off against market access for agricultural and textile products).

Another response is that developing nations will actually benefit from the TRIPS agreement because enhanced levels of IP protection will attract increased levels of foreign investment and technology transfer. While plausible, commentators suggest that empirical support for this argument is “sketchy and anecdotal.” TREBILCOCK & HOWSE, *supra* note 4, at 252 (citing Everson, *Global Intellectual Property Rights Issues in Perspective*, in GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS (M.B. Wallerstein et al. eds., 1993)); see also Abbott, *supra* note 53, at 390-91 (reviewing conflicting studies and noting the absence of empirical evidence on this point).

A final response is to acknowledge the developing nations’ “loss” resulting from heightened IP protections, but to also point to the important concessions to developing nations’ interests included in other provisions of the TRIPS Agreement. For example, the Agreement includes a number of transition periods of which developing nations may take advantage. See TRIPS Agreement art. 65. Further, TRIPS requires developed nations to provide incentives for their companies to transfer technology to least-developed nations. See *id.* art. 66(1).

<sup>60</sup> See Alison Butler, *The Trade-Related Aspects of Intellectual Property Rights: What Is at Stake?*, BULL. FED. RESERVE BANK ST. LOUIS 34 (Nov.-Dec. 1990) (stating that developed nations should compensate developing nations for short-

tral international trade “problem” as one of cooperation and collaboration, with nations having a common interest in achieving a common objective, will tend to obscure the difficult distributional issues that are at the heart of many linkage issues.<sup>61</sup>

Stated differently, an analytic flaw in game theoretic approaches, such as that used in the collective action model, is that the explanatory and predictive power of these theories are driven by the “payoff matrix.”<sup>62</sup> These payoffs, however, are always exogenous to the models. In other words, these particular payoffs are simply assumed.<sup>63</sup> Moreover—and even more unrealistically—game theoretic models frequently assume that the payoffs nations enjoy from collaboration are *symmetric*.<sup>64</sup> As these outcomes are invariably (and arbitrarily) predetermined, these models shed no light on how the net benefits from cooperation are distributed among various nations. But nations are rarely similarly situated,

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term redistributive effects resulting from heightened intellectual property protections).

<sup>61</sup> For political science perspectives on the collective action model’s failure to recognize the centrality of distributional issues at the time of the GATT’s founding, see Goldstein, *supra* note 47, at 201-02; Milner, *supra* note 37, at 489.

<sup>62</sup> Payoff matrices depict the costs and benefits that states receive from cooperation or defection. See Ian Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291 (1990) (reviewing ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* (1989)).

<sup>63</sup> “Standard game-theoretic analysis takes the payoffs of the parties in a game for a given combination of strategies as unalterable.” Wayne Eastman, *Everything’s Up for Grabs: The Coasean Story in Game-Theoretic Terms*, 31 NEW ENG. L. REV. 1, 4 (1996); see also ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 8-9 (1984) (noting that an unalterable payoff structure is an essential element of prisoners’ dilemmas); Abbott, *Prospectus*, *supra* note 34, at 356 (“Assigning payoffs is both the most important and the most problematical aspect of defining a game. Payoffs are intended to represent subjective preferences, but true subjective preferences are necessarily fictional in the case of a collective, inanimate entity like a state.”); Milner, *supra* note 37, at 489.

<sup>64</sup> Conventional presentations of the Prisoner’s Dilemma:

typically [are] done in such a way that not only do the players have a symmetric rank-ordering of outcomes, but the magnitude of cardinal-value payoffs for each player is exactly equal in the mutual cooperation and mutual noncooperation outcomes . . . . The assumption underpinning this practice—which is never expressed explicitly—must be that, in either mutual cooperation or mutual noncooperation, players achieve similar payoffs or believe this to be so. Neither assumption may be valid . . . .

Joseph M. Grieco, *Realist Theory and the Problem of International Cooperation: Analysis with an Amended Prisoner’s Dilemma Model*, 50 J.L. & POL. 600, 603 (1988).

national interests are typically asymmetrical,<sup>65</sup> and disagreements over the distribution of the benefits of cooperation are precisely what drive the linkage issues.<sup>66</sup>

The challenge linkage issues pose to the collective action model go deeper. These issues also challenge the premises upon which the collective action model is built. As explained above, this model incorporates classic realist assumptions about the monolithic state.<sup>67</sup> But linkage disputes reveal that this view of the unitary, rational, maximizing state is incomplete and misleading.<sup>68</sup>

Consider, for example, the extraordinary maneuverings behind the U.S. Clean Air Act provisions challenged in the very first "trade and environment" dispute considered by the WTO.<sup>69</sup> Under this law, all gasoline sold in the nation's most polluted regions must, by 1995, be reformulated so as to reduce automotive pollution. After Congress passed this provision, extensive negotiations ensued among the oil industry, environmental groups and Executive Branch officials, and the EPA issued a rule giving industry various options (for a three year period) on how to meet

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<sup>65</sup> On the increasing asymmetry among nations, see SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER* 13 (1996). The idea that asymmetrical interdependence can be a source of power has long been recognized in political science. See ALBERT O. HIRSCHMAN, *NATIONAL POWER AND THE STRUCTURE OF FOREIGN TRADE* (1945).

<sup>66</sup> Stated more formally, in the strategic environment in which trading nations find themselves, situations that appear to be Prisoner's Dilemmas often entail Coasean bargaining. See Dunoff, *Death of the Trade Regime*, *supra* note 2. For an exploration of the relationship between the Prisoners' Dilemma and the Coase Theorem, see Wayne Eastman, *How Coasean Bargaining Entails a Prisoner's Dilemma*, 72 NOTRE DAME L. REV. 89 (1996).

<sup>67</sup> See *supra* notes 36-38 and accompanying text.

<sup>68</sup> Again, it is not only the linkage issues that suggest that the realist vision of nation-states is misleading. See, e.g., Stephen D. Krassner, *Compromising Westphalia*, 20 INT'L SECURITY 115 (1995-96). The realist model has been under sustained attack by, among others, scholars attempting to articulate a liberal conception of the international community. See, e.g., Anne-Marie Burley, *Toward an Age of Liberal Nations*, 33 HARV. INT'L L.J. 393 (1992); Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 717 (1995). For an excellent attempt to articulate the liberal project in the "trade and environment" context, see Benedict Kingsbury, *The Tuna-Dolphin Controversy, the World Trade Organization, and the Liberal Project to Reconceptualize International Law*, 5 Y.B. INT'L ENV'T L. 1 (1994).

<sup>69</sup> The challenged rule is set forth at 40 C.F.R. §§ 80.40-130 (1995). My discussion of this dispute draws upon the analysis set out by Kingsbury. See Kingsbury, *supra* note 68.

the statutory standard. After much debate, it was decided that foreign refiners should not enjoy a similar menu of options for the three year period. This threatened to adversely and significantly affect Venezuela, which had a substantial share of the gas market in the northeast through its state-owned Citgo chain, and whose fuels are high in certain types of pollutants. However, this differential treatment was strongly supported by Sun Oil Company—not coincidentally, Citgo's main northeastern competitor for the gasoline market. Venezuela objected to this rule, with some support from the U.S. State Department, which apparently focused more on the diplomatic and foreign policy aspects of the dispute. In February 1994, Venezuela raised the issue in the GATT. This created considerable negotiating leverage, given the differential treatment afforded foreign producers under the rule.<sup>70</sup> Following bilateral consultations, the U.S. Trade Representative's office reached a "settlement" with Venezuela under which the EPA would reconsider the rule, and Venezuela would not pursue GATT dispute resolution proceedings.<sup>71</sup> The EPA then issued a new proposed rule, providing that, under certain conditions, foreign refiners would enjoy the same treatment as domestic refiners. Sun Oil opposed the new rule,<sup>72</sup> arguing that USTR had capitulated to Venezuela's demands. Sun lobbied congressional supporters of the original rule, and thereafter Congress added a provision to an EPA appropriations bill blocking the EPA's revised rule.<sup>73</sup> At this point Venezuela raised the issue in the new WTO, and following briefing and a hearing, a dispute resolution panel found the EPA's rule to be inconsistent with the GATT.<sup>74</sup> The U.S. appealed, and the WTO Appellate Body affirmed this result.<sup>75</sup> In December 1996, the U.S. announced that, within fifteen

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<sup>70</sup> See, e.g., *Venezuela May Seek GATT Panel on Reformulated Gas Sales in U.S.*, Int'l Trade Daily (BNA), at D10 (Mar. 9, 1994).

<sup>71</sup> See *USTR Official Says Deal on Reformulated Gasoline Only Temporary*, Int'l Trade Daily (BNA), at D3 (April 1, 1994); *Venezuela Resistance Ebbs as EPA Shifts Air Policy*, WALL ST. J., Mar. 24, 1994, at C15.

<sup>72</sup> See Guy de Jonquières & Leyla Boulton, *Struggle to Jump Green Barriers: The WTO is Caught Between Environmental Concerns and Boosting Free Trade*, FIN. TIMES, Oct. 26, 1995, at 19.

<sup>73</sup> See Department of Veterans Affairs, and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. No. 103-327, 108 Stat. 2298, 2322 (1994).

<sup>74</sup> See United States—Standards for Reformulated and Conventional Gasoline, Gatt Doc. WT/DS2/R (Jan. 29, 1996) reprinted in 35 I.L.M. 274 (1996).

months, it would change its rule—due to expire on January 1, 1998 in any event—to comply with the Appellate Body report.<sup>76</sup>

For present purposes, the merits of the challenged regulation and the panels' reasoning are of less interest than are the complex, halting, and at times contradictory positions of "the United States" in this matter, and the essential role played by non-state actors, such as private industry and interest groups. There actually was no "U.S. position," but a variety of different positions held by Congress, the State Department, the Environmental Protection Agency, and the United States Trade Representative.<sup>77</sup> This, and other, GATT disputes suggest that national and international economic policies are "made and administered by an increasingly heterogeneous and intricately overlapping group of participants, interacting in ever more varied arenas."<sup>78</sup> Classic rationalist assumptions about the unitary rational state, incorporated into the collective action model, seem ill-equipped to explain such state behavior. Indeed, in many ways the reformulated gasoline dispute can be better understood as a sophisticated and multi-track political and economic dispute between Citgo and Sun Oil over the gasoline market in the northeast, than as a dispute

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<sup>75</sup> See United States—Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body, Gatt Doc. WT/DS2/AB/R (Apr. 29, 1996) reprinted in 35 I.L.M. 603 (1996). For a more detailed analysis of this report, see Steve Charnovitz, *New WTO Adjudication and its Implications for the Environment*, Int'l Env't Rep. (BNA), at 851 (1996).

<sup>76</sup> See *Foreign Refiners Get Individual Baselines, Fair Treatment, Under EPA Revised Rule*, Int'l Env't Daily (BNA) (May 2, 1997). This followed an opportunity for public comment on how to comply with the WTO decision. See 61 Fed. Reg. 33703 (1996).

<sup>77</sup> Inter-agency conflict is not limited to the trade realm. An impressive body of literature discusses the extensive inter-agency negotiation process that proceeds the articulation of the "U.S. position" in the context of treaty negotiations. See, e.g., RICHARD ELLIOT BENEDICK, *OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET* (1991) (discussing "the inter-agency minuet" regarding international negotiations leading to ozone treaties); Phillip R. Trimble, *Arms Control and International Negotiation Theory*, 25 STAN. J. INT'L L. 543 (1989) (describing arms control treaty negotiation from a theoretical perspective). Similar domestic, political, and bureaucratic conflict can occur in the context of treaty withdrawal as well. See Abram Chayes, *An Inquiry into the Workings of Arms Control Agreements*, 85 HARV. L. REV. 905 (1972); Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988).

<sup>78</sup> Jacques deLisle, *Of Chinese Walls, Battering Rams and Building Permits: Five Lessons About International Economic Law from Sino-U.S. Trade and Investment Relations*, 17 U. PA. J. INT'L ECON. L. 513, 525 (1996).

between the sovereign nations of Venezuela and the United States.<sup>79</sup> Again, a model that assumes that state interests and behavior are the key variables to be analyzed—as the collective action model does—will miss the important roles played by private individuals, interest groups and business in influencing the national and international policies of nations.<sup>80</sup>

#### 4. LINKAGE ISSUES AND THE EMBEDDED LIBERALISM MODEL

##### 4.1. *The Embedded Liberalism Model*

Yet a third model that purports to explain the international trading system is the “embedded liberalism” model. Most closely identified with the writings of John Ruggie,<sup>81</sup> this model focuses

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<sup>79</sup> I explore these issues in more detail in Jeffrey L. Dunoff, *Problematizing the Public-Private Distinction in WTO Dispute Resolution* (unpublished manuscript, on file with author), where I use the Reformulated Gasoline and Kodak-Fuji disputes to illustrate the ways in which private parties are able to use public international legal processes to serve private ends. For a good recent example of interest group influence in the creation of U.S. domestic trade policy, consider the Administration’s unsuccessful attempts to include provisions on the Caribbean Basin Initiative (“CBI”) parity in the recent tax bill. As one staffer closely involved in the issue summarized the outcome, “[w]e’ve certainly learned our lesson . . . . We’ve been through this twice and Fruit of the Loom has succeeded both times in blocking the measure . . . . That’s the end of [the issue].” *GSP in Tax Package but CBI Does Not Make Cut*, Int’l Trade Daily (BNA), at D3 (July 30, 1997).

<sup>80</sup> The argument that linkage issues challenge the conventional realist vision of states is *not* equivalent to an argument that states have now been rendered irrelevant. See, e.g., John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT’L ORG. 139, 157-60 (1993) (noting that the emergence of postmodern political forms challenges traditional understandings of states without consigning them to irrelevance); Janice E. Thomson & Stephen D. Krasner, *Global Transactions and the Consolidation of Sovereignty*, in GLOBAL CHANGES AND THEORETICAL CHALLENGES (Ernst-Otto Czempiel & James N. Rosenau eds., 1989) (saying that claims that states are irrelevant are “fundamentally misplaced”).

<sup>81</sup> Ruggie is the former Dean of the School of International and Public Affairs at Columbia University. For purposes of this essay, I have drawn on the following works: MULTILATERALISM MATTERS, *supra* note 47; John Gerard Ruggie, *Embedded Liberalism Revisited: Institutions and Progress in International Economic Relations*, in PROGRESS IN POSTWAR INTERNATIONAL RELATIONS 201 (Emanuel Adler & Beverly Crawford eds., 1991) [hereinafter Ruggie, *Embedded Liberalism Revisited*]; JOHN GERARD RUGGIE, WINNING THE PEACE: AMERICA AND WORLD ORDER IN THE NEW ERA (1996); John Gerard Ruggie, *At Home Abroad, Abroad at Home: International Liberalization and Domestic Stability in the New World Economy*, 24 MILLENNIUM 507 (1994) [hereinafter Ruggie, *International Liberalization*]; John Gerard Ruggie, *International Re-*



less on the economic or collective action justifications for the GATT and more on its political foundations. Under Ruggie's formulation, one of the principal goals of the GATT's drafters was the creation of a multilateral, nondiscriminatory trade system. However, they did not embrace the efficiency model and were far from being doctrinaire free traders.<sup>82</sup> They instead recognized and were responsive to the widespread public rejection of nineteenth century laissez-faire capitalism,<sup>83</sup> and the corresponding demand for state intervention in domestic economies to protect against the dislocations associated with economic liberalization. Thus, for example, for the British "the goal of trade policy

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*gimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379 (1982) [hereinafter Ruggie, *Embedded Liberalism*]. A similar understanding of the GATT's origins can be found in the writings of G. John Ikenberry. See, e.g., G. John Ikenberry, *Creating Yesterday's New World Order: Keynesian "New Thinking" and the Anglo-American Postwar Settlement*, in IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS AND POLITICAL CHANGE 57 (Judith Goldstein & Robert Keohane eds., 1993) [hereinafter Goldstein & Keohane]; G. John Ikenberry, *The Political Origins of Bretton Woods*, in A RETROSPECTIVE ON THE BRETTON WOODS SYSTEM 155 (Michael Bordo & Barry Eichengreen eds., 1992).

<sup>82</sup> As a former State Department trade policy analyst stated: "No one was committed to 'free trade'; no one expected anything like it; the term does not appear in the GATT, which simply calls for a process of liberalization with no stated objective." William Diebold, Jr., *From the ITO to GATT—And Back?*, in THE BRETTON WOODS—GATT SYSTEM: RETROSPECT AND PROSPECT AFTER FIFTY YEARS 152, 158 (Orin Kirshner ed., 1996). See also Jacob Viner, *Conflicts of Principle in Drafting a Trade Charter*, 25 FOREIGN AFF. 612, 613 (1947) ("[T]here are few free traders in the present-day world, no one pays any attention to their views, and no person in authority anywhere advocates free trade.").

While this political reality—which is inconsistent with the assumptions of the efficiency model—is often overlooked in current trade scholarship, it was forcefully articulated in two of the leading contemporaneous accounts of the inter-war years. See EDWARD HALLETT CARR, *THE TWENTY YEARS' CRISES, 1919-1939* (1946); KARL POLANYI, *THE GREAT TRANSFORMATION* (1944). Dean Ruggie, in his 1994 Jean Monnet Lecture, pointed out this similarity in what are otherwise two dramatically different accounts of that historical era. See Ruggie, *Embedded Liberalism Revisited*, *supra* note 81.

<sup>83</sup> A contemporaneous account by the lead U.S. negotiator at the time states:

There is no hope that a multilateral trading system can be maintained in the face of widespread and protracted unemployment. Where the objectives of domestic stability and international freedom come into conflict, the former will be given priority . . . . It would be futile to insist that stability must always give way to freedom. The best that can be hoped for is a workable compromise.

CLAIRE WILCOX, *A CHARTER FOR WORLD TRADE* 131 (1949).

was full employment; trade liberalization was an acceptable strategy only to the extent that it met this goal."<sup>84</sup> Given these political constraints, the diplomatic puzzle was how to design a liberal economic system that would maintain an active domestic role for the state.<sup>85</sup>

The embedded liberalism model understands the GATT as incorporating a series of complex compromises designed to achieve these varied ends. Thus, while the agreement was designed to progressively lower tariffs and other trade barriers, its drafters also included a diverse set of exceptions and exemptions designed to protect a variety of domestic social policies.<sup>86</sup> For example, although quantitative restrictions were generally prohibited, they were expressly permitted for balance of payments difficulties, "explicitly including payments difficulties that resulted from domestic policies designed to secure full employment."<sup>87</sup> Through a series of such compromises, the GATT was structured in a manner that sought gains from trade but simultaneously "promised to minimize socially disruptive domestic adjustment costs as well as any national economic and political vulnerabilities" resulting from international specialization.<sup>88</sup> Dean Ruggie has labeled this compromise structure "embedded liberalism": a form of economic liberalism embedded in a larger commitment to interventionist domestic policies.<sup>89</sup> Under this model, the "embedded lib-

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<sup>84</sup> Goldstein, *supra* note 47, at 215. As the British negotiator stated, the purpose of multilateral trade agreements was to "achieve an agreement as to the manner in which the nations can co-operate for the promotion of the highest level of employment and the maintenance of demand and can bring some degree of regulation into world trade and commerce." RICHARD GARDNER, *STERLING-DOLLAR DIPLOMACY* 271 (1969).

<sup>85</sup> See Ruggie, *Embedded Liberalism*, *supra* note 81, at 393.

<sup>86</sup> See *id.* at 393.

<sup>87</sup> *Id.* at 397 (italics omitted). Frieder Roessler has suggested that this provision addressing the relationship between trade and monetary policies was one of the first linkage issues addressed by the GATT. Frieder Roessler, *Domestic Policy Objectives and the Multilateral Trade Order*, in *THE WTO AS AN INTERNATIONAL INSTITUTION* (Anne O. Krueger ed., 1997).

<sup>88</sup> Ruggie, *Embedded Liberalism*, *supra* note 81, at 399. More recent trade liberalization efforts are often accompanied by similar efforts to cushion the domestic impacts of liberalized trade. A good recent example of this is the NAFTA Transitional Adjustment Assistance Act, designed to mitigate any negative impacts the NAFTA might have on U.S. workers. 19 U.S.C. § 2331 (1996).

<sup>89</sup> Ruggie, *Embedded Liberalism*, *supra* note 81, at 393.

eralism” compromise reflected a form of multilateralism compatible with the requirements of domestic stability.<sup>90</sup>

#### 4.2. *Challenges to the Embedded Liberalism Model*

Again, the linkage issues present a challenge to this understanding of the trade regime. First, the embedded liberalism compromise afforded nations wide latitude over their domestic policies, free of interference by other nations. But successful challenges to, for example, environmental or labor practices, and new WTO disciplines in other linkage areas, limit government authority in these areas and tend to undermine the policy tolerance central to the embedded liberalism compromise. In short, “countries which reduce international barriers to either goods or capital sacrifice domestic autonomy in the hope of a higher standard of living.”<sup>91</sup>

Moreover, this loss of autonomy does not affect all governments and interests equally.<sup>92</sup> Rather, the disciplines imposed by the WTO are more likely to significantly constrain progressive or left governments than conservative or right governments.<sup>93</sup> The expanded trade regime has placed pressure on nations with “high”

<sup>90</sup> *Id.* at 399 (noting embedded liberalism would “minimize socially disruptive domestic adjustment costs”). Ruggie’s account of the embedded liberalism compromise has not gone unchallenged. See Anne-Marie Burley, *Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State*, in MULTILATERALISM MATTERS, *supra* note 47, at 125 (focusing on the domestic roots of the existence of international institutions, rather than the ways in which these institutions have had to accommodate domestic interventionism); Goldstein, *supra* note 47, at 225 (noting that embedded liberalism was an “unintended consequence” of a series of political compromises designed to ensure U.S. and British participation in international trade regime).

<sup>91</sup> Assaf Razin & Andrew Rose, *Business Cycle Volatility and Openness*, in CAPITAL MOBILITY: THE IMPACT OF CONSUMPTION, INVESTMENT AND GROWTH (Leonardo Leiderman & Assaf Razin eds., 1994).

<sup>92</sup> The nature of economic liberalization’s effects on domestic politics varies across nations due to, *inter alia*, inequality among states, see Andrew Hurrell & Ngaire Woods, *Globalization and Inequality*, 24 MILLENNIUM 447 (1995), as well as differing political and economic conditions. See, e.g., INTERNATIONALIZATION AND DOMESTIC POLITICS (Robert O. Keohane & Helen Milner eds., 1996) [hereinafter INTERNATIONALIZATION] (exploring effects of globalization on various industrialized democracies, former socialist nations, and parts of the developing world).

<sup>93</sup> See, e.g., Helen V. Milner & Robert O. Keohane, *Internationalization and Domestic Politics: An Introduction*, in INTERNATIONALIZATION, *supra* note 92, at 16-18. In this regard, increased capital mobility will likely have a greater impact than trade openness. *Id.* at 18.

environmental regulations and "low" intellectual property standards. Similarly, other forms of economic liberalization, including increased capital mobility, tend to reduce the efficacy of government intervention in the economy and to liberate market forces, thereby constraining the prospects for progressive political strategies.<sup>94</sup> Moreover, the liberalization that gives rise to the linkage agenda also privileges certain domestic interests over others.<sup>95</sup> For example, to the extent that trade and investment liberalization give mobile firms bargaining advantages over relatively immobile labor, they can threaten "exit" to magnify their "voice" in domestic politics.<sup>96</sup>

Second, by constraining governments' policy options, the trade regime's expansion into linkage areas also affects the embedded liberalism compromise as it historically worked at the domestic level. As previously explained, under this compromise, governments were to have wide latitude to intervene in domestic economies to manage the dislocations caused by trade liberalization. But, by restricting the regulatory and policy tools that governments can use, GATT's expansion into new areas of domestic policy threatens governments' ability to deliver their end of this "social compact."<sup>97</sup> To mention just one example: over time, the social compact in poverty-stricken India has included the provision of inexpensive pharmaceuticals. Consequently, under Indian law, patents have not been available for pharmaceutical products.<sup>98</sup> As Indira Gandhi told the World Health Assembly, "[t]he idea of a better ordered world is one in which medical discoveries

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<sup>94</sup> For nuanced treatments of this argument, see Geoffrey Garrett, *Capital Mobility, Trade and the Domestic Politics of Economic Policy*, 49 INT'L ORG. 657 (1995); Geoffrey Garrett & Peter Lange, *Political Responses to Interdependence: What's "left" for the Left?*, 45 INT'L ORG. 539 (1991). It is possible to distinguish between the effects caused by reductions in barriers to trade and reductions in restrictions on capital mobility. See, e.g., Razin & Rose, *supra* note 91.

<sup>95</sup> See, e.g., Jeffrey A. Frieden & Ronald Rogowski, *The Impact of the International Economy on National Policies: An Analytical Overview*, in INTERNATIONALIZATION, *supra* note 92, at 25, 36-42.

<sup>96</sup> See Milner & Keohane, *supra* note 92, at 243, 244.

<sup>97</sup> See Ruggie, *International Liberalization*, *supra* note 81, at 524.

<sup>98</sup> The Patents Act, 1970, No. 39 Sec. 5(a)-(b) (1970) (India). For more on the history of Indian Patent law and the treatment of pharmaceuticals, see B.K. Kayla, *Patent Protection and the Pharmaceutical Industry*, in INTELLECTUAL PROPERTY RIGHTS 151 (K.R.G. Nair & Ashok Kumar eds., 1994); HEINZ REDWOOD, *NEW HORIZONS IN INDIA: THE CONSEQUENCES OF PHARMACEUTICAL PATENT PROTECTION* (1994).

will be free of patents and there will be no profiteering from life and death.”<sup>99</sup> But, under the TRIPS Agreement, the Indian government will be obliged to provide patent protection to pharmaceuticals, which will likely increase the cost of medicines, and impede the government’s ability to deal with India’s crushing poverty.<sup>100</sup> As GATT disciplines continue to expand into new substantive areas, governments may discover, with increasing frequency, that they have inadvertently subverted their ability to manage the domestic consequences of liberalized trade in goods, services and capital.<sup>101</sup>

Moreover, these limits on domestic regulatory options in linkage areas threaten to provoke a negative reaction from the public. Public reaction to the GATT’s “tuna-dolphin” panel reports, or to the labor issues raised by the NAFTA, illustrate that public concern over linkage issues will not be limited to a particular panel report or recommendation, but can turn into a more general hostility toward trade regimes.<sup>102</sup> The political dynamic

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<sup>99</sup> R. Michael Gadbaw & Leigh A. Kenny, *India, in INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT?* 86 (R. Michael Gadbaw & Timothy J. Richards eds., 1988) (quoting from May 1, 1982 address).

<sup>100</sup> See, e.g., *Patents: The U.S. Turns on the Heat; India: U.S. Complains to World Trade Organization that Country Fails to Give Patent Protection for Pharmaceutical and Agricultural Chemicals*, BUS. WORLD, Aug. 28, 1996. The Indian example has even led a prominent advocate of liberalized trade, Jagdish Bhagwati to acknowledge before a Senate Subcommittee that WTO expansion into linkage areas threatens to overreach, and hence prompt a public backlash.

Similar issues arise in the dispute on India’s balance of payments system and import restrictions on various consumer goods. See, e.g., *India’s Import Control Compromise Not Enough to Resolve WTO Dispute*, Int’l Trade Daily (BNA), at D7 (July 2, 1997) (noting that the Indian Prime Minister cannot make additional concessions on import tariffs “because of domestic political restraints”).

<sup>101</sup> See, e.g., Ruggie, *International Liberalization*, *supra* note 81. For sophisticated treatments of this issue, see *INTERNATIONALIZATION AND DOMESTIC POLITICS* (Robert Keohane & Helen V. Milner eds., 1996); Geoffrey Garrett, *Capital Mobility, Trade and the Domestic Politics of Economic Policy* 49 INT’L ORG. 657 (1995).

Moreover, this incapacity highlights the growing asymmetry among sovereign states in their ability to exercise authority over the domestic economy. For more on this, see STRANGE, *supra* note 65, at 13.

<sup>102</sup> Significantly, this backlash cuts across the domestic political spectrum. For example, after the WTO Appellate Body concluded that provisions of the U.S. Clean Air Act were GATT-inconsistent, Senator Bob Dole stated: “We should decide what our environmental laws should be. We should decide what kinds of regulations are necessary to protect our environment. We should decide that our children deserve cleaner air and purer water, not some bureaucrat in Geneva.” *Dole Calls for Passage of Bill to Set Up WTO Review Commission*,

that resulted in President Clinton's failure to obtain "fast-track" authority illustrates how these concerns can be exploited in ways that threaten to undermine multilateral trade initiatives. This is why the perception that trade bodies have overstepped their appropriate limits can easily escalate into a larger legitimacy critique that undermines public support for trade regimes.<sup>103</sup>

These political tensions reflect a deeper challenge that linkage issues pose to the embedded liberalism model. That model is premised upon a sharp distinction between matters within domestic jurisdiction and those of international concern. However, the emergence of the linkage issues reflects the blurring of the line between domestic and international economic policy. Increasingly, the "international" includes any policy which has an important impact on international transaction flows.<sup>104</sup> This explains the pressures for WTO disciplines in new areas. Any such efforts, however, in the areas of intellectual property, labor, environment, and competition unavoidably challenge the assumptions underlying the embedded liberalism model.

For all of these reasons, the trade regime's expansion into linkage areas tends to undermine the conventional understanding of that regime as embodied in the "embedded liberalism" model.

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Int'l Trade Daily (BNA), at D4 (May 3, 1996). Dole repeated his calls for passage of a WTO review commission to prevent U.S. rights from being "trampled" in Geneva. *See id.*

Environmental activists sounded similar themes:

In its outcome, tone, and reasoning, the ruling of the World Trade Organization's appellate body against U.S. Clean Air Act rules provides a real life example of the WTO's threat to environmental and health protections, democratic policy making and national sovereignty . . . . Of course, it is the World Trade Organization, not U.S. policy, which needs to be changed. The Clinton Administration and the Republican Congress must not cave-in to the World Trade Organization. . . . As a policy matter, the U.S. must draw a line: international trade law cannot be made by secretive panels on an ad hoc basis.

Lori Wallach, Director of Public Citizen's Global Trade Watch, *Press Statement of Apr. 29, 1996* (last modified Apr. 30, 1996) <<http://igc-apc.org/Press/>>.

<sup>103</sup> I develop this argument in Jeffrey L. Dunoff, "Trade and": *Recent Developments in Trade Policy and Scholarship—And Their Surprising Political Implications*, 17 NW. J. INT'L L. & BUS. 759 (1997). For a more generalized approach to the legitimacy issue in the context of the trade regime, see Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681 (1997).

<sup>104</sup> *See, e.g.,* Ruggie, *International Liberalization*, *supra* note 81, at 509.

## 5. TOWARD A NEW MODEL?

If linkage issues undermine the conventional models, should trade scholars attempt to develop a new model of the trade regime?<sup>105</sup> What utility might a new model have? This section outlines some of the ways in which a new model would be useful. It then demonstrates that, to date, trade scholarship has not suggested a new model, and very briefly suggests why such a model is highly unlikely. Finally, it identifies a paradox that this poses for WTO efforts to resolve linkage disputes.

### 5.1. *The Power of Ideas*

Why might a new model of the trade regime be useful? The deceptively simple reason is that in economic policy, as elsewhere, ideas matter.<sup>106</sup> While it is now fashionable in international legal scholarship to focus on the role of interests in trade policy, domestic and international trade policy cannot be explained satisfactorily solely in terms of international or domestic economic interests. Rather, as a number of international relations scholars suggest, attention should be paid to the role and power of ideas.<sup>107</sup>

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<sup>105</sup> Rather than develop a new model, one might instead attempt to reform and rehabilitate the old models. For present purposes, I take no position on whether more sophisticated economic or game theoretic models could account for the difficulties described above. My interest is in the models used in international legal discourse. Trade lawyers and international law scholars are generally unlikely to keep abreast of the most recent theoretical writings in other disciplines including, for example, economics and political science, and are unlikely to successfully use more complex models borrowed from these disciplines. Indeed, a central virtue of the conventional models is their relative simplicity. International lawyers would be more likely to use a new simple model than an improved but relatively more complex version of one of the conventional models.

<sup>106</sup> The claim that ideas exert an independent influence upon economic policy has a long and distinguished lineage. Max Weber famously called ideas the "switchmen" on history's tracks," and John Maynard Keynes emphasized the influence of "defunct economists" upon political leaders. See JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* 383 (1936); Max Weber, *Social Psychology of the World Religions*, in FROM MAX WEBER: *ESSAYS IN SOCIOLOGY* 267, 280 (H.H. Gerth & C. Wright Mills eds., 1958) ("Not ideas, but material and ideal interests, directly govern men's conduct. Yet very frequently 'world images' that have been created by 'ideas' have, like switchmen, determined the tracks along which action has been pushed by the dynamic of interest.").

<sup>107</sup> Recent political science works that explore this theme include, JUDITH GOLDSTEIN, *IDEAS, INTERESTS AND AMERICAN TRADE POLICY* (1993); ERNST HAAS, *WHEN KNOWLEDGE IS POWER: THREE MODELS OF CHANGE IN*

The argument here is not that ideas are *the* determinate force in trade policy-making; rather the more limited claims are (1) an overemphasis on state *interests* is incomplete, and an approach that recognizes the power of ideas is a valuable, if not necessary, supplement to current or future understandings of the trade regime; and (2) significant changes in trade policy require the development of a theoretical alternative to the dominant model(s).

Following other authors who examine the role of ideas in policy, I understand the terms "ideas" and "models" to refer to "principled beliefs," which specify "criteria for distinguishing right from wrong, and just from unjust," "causal beliefs" which "derive authority from shared consensus of recognized elites," and worldviews.<sup>108</sup> Many important economic ideas—including the three models outlined above—incorporate each of these aspects.

It is well beyond the scope of this Article to attempt to describe the intricate and complex interplay between economic ideas, state power, administrative structure and domestic interest groups. Rather, I very briefly summarize only a small portion of a large body of political science writings on the power of ideas. While this literature argues that ideas influence policy-making, the difficulty comes in describing this role. I read the literature to suggest that ideas are important in several different ways. Perhaps most importantly, they can provide "road maps" to policy makers, increasing clarity about goals or strategies for achieving particular goals.<sup>109</sup> Given continuing uncertainty over the basic workings of the trade system,<sup>110</sup> and the difficulty of accurately

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INTERNATIONAL ORGANIZATIONS (1990); PETER HALL, POLITICAL POWER OF ECONOMIC IDEAS (1989); IDEAS AND FOREIGN POLICY (Robert O. Keohane & Judith Goldstein eds., 1993); KATHRYN SIKKINK, IDEAS AND INSTITUTIONS: DEVELOPMENTALISM IN ARGENTINA AND BRAZIL (1991). Trenchant criticisms of the "ideas literature" can be found in Mark W. Blyth, *Any More Bright Ideas? The Ideational Turn of Comparative Political Economy*, 29 COMP. POL. 229 (1997); Mark Laffey & Jutta Weldes, *Beyond Belief: Ideas and Symbolic Technologies in the Study of International Relations*, 3 EUR. J. INT'L REL. 193.

<sup>108</sup> Goldstein & Keohane, *supra* note 81, at 8-11, *see also*, Goldstein, IDEAS, INTERESTS AND AMERICAN TRADE POLICY, *supra* note 107. I believe that Kuhn's work is an important influence on these descriptions of the power of economic ideas. *See* THOMAS J. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1962).

<sup>109</sup> *See* Goldstein, IDEAS, INTERESTS AND AMERICAN TRADE POLICY, *supra* note 107, at 3, 254; IDEAS AND FOREIGN POLICY, *supra* note 107, at 13-17.

<sup>110</sup> As evidence of this confusion, consider that many leading scholars embrace both the efficiency model and the collective action model, even though



predicting the effects of various policies, political actors “must rely on conceptual frameworks to make sense of the world and their place in it.”<sup>111</sup> In other words, “a state perceives its international economic interests on the basis of a set of ideas or beliefs about how the world economy works and what opportunities exist within it.”<sup>112</sup> These ideas or beliefs guide government officials as they identify national interests and goals. But the identification of interests and goals is not, in itself, sufficient to generate policy. Inhabiting a world “shrouded in uncertainty” and marked by limited information and bounded rationality, policy makers frequently may not know which among several strategies will produce a desired outcome. Under such conditions, ideas can suggest causal relationships and rationales for action.<sup>113</sup> Stated differently, “these policy ideas can function like flashlights, guiding policy makers by illuminating a specific path through the darkness of crisis and confusion, and providing policy makers with strategies for governance.”<sup>114</sup>

Ideas also exert political influence by making possible the reshaping of domestic political alignments. A classic example is postwar economic policy in Britain.<sup>115</sup> Broadly speaking, the Labour government was committed to nationalization and central planning to promote efficiency and growth, while the Conservative opposition embraced a traditional laissez faire policy, and denied any governmental responsibility for economic stability and growth. It appeared that no common ground was possible. But both parties subsequently embraced Keynesian economic ideas, including ideas about macro-economic demand management, although for different reasons. As Albert Hirschman argues, “[h]ere is an excellent example of how a new economic idea can affect political history: it can supply an entirely new common

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the theories underlying these models appear to be inconsistent. See, e.g., Daniel A. Farber, *Environmental Federalism in a Global Economy*, 83 VA. L. REV. 1283, 1287 (1997) (identifying examples of inconsistencies).

<sup>111</sup> KATHLEEN R. MCNAMARA, *THE CURRENCY OF IDEAS: MONETARY POLITICS IN THE EUROPEAN UNION* 57 (1998).

<sup>112</sup> Ngaire Woods, *Economic Ideas and International Relations: Beyond Rational Neglect*, 39 INT'L STUD. Q. 161, 161 (1995).

<sup>113</sup> See Goldstein & Keohane, *supra* note 81, at 16.

<sup>114</sup> MCNAMARA, *supra* note 111, at 58.

<sup>115</sup> This discussion follows Margaret Weir, *Ideas and Politics: The Acceptance of Keynesianism in Britain and the United States*, in *POLITICAL POWER OF ECONOMIC IDEAS*, *supra* note 107, at 53.

ground for positions between which there existed previously no middle ground whatever."<sup>116</sup> Generalizing from this and other examples,<sup>117</sup> political scientists argue that ideas can act as "focal points that define cooperative solutions or act as a coalitional glue."<sup>118</sup>

Moreover, ideas have power when they become embedded in political institutions. For example, U.S. trade law has incorporated various ideas about "unfair" trade over the years. But even when an idea that prompts a law falls out of favor, it does not necessarily follow that the law justified by this idea gets repealed. Rather, laws and institutions are 'sticky,' and laws typically remain available for parties to invoke and courts to apply. This persistence of otherwise outdated ideas through institutional inertia helps to explain the otherwise incoherent patterns of protectionism found in U.S. trade law.<sup>119</sup> This argument is congruent with a central theme of this paper: the three dominant models have outlived their usefulness, yet continue to exert substantial influence over our understanding of the international trade system.

Finally, this literature suggests that significant changes in trade policy must be preceded, or accompanied, by the development of a politically salient theoretical alternative to the dominant model. The leading alternative to the dominant efficiency model for many years, however, has been protectionism. This is hardly a politically viable alternative; it is closely associated with failed Depression-era trade policies, and—quite properly—lacks widespread public or elite support. At present, as at the time of GATT's founding, fears that protectionism will produce retaliatory trade restrictions, declining trade, and economic contraction haunt policymakers.<sup>120</sup>

To date, legal scholarship on international trade has paid little attention to the role of ideas. But the "ideas literature" stands as

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<sup>116</sup> Albert O. Hirschman, *How the Keynesian Revolution Was Exported from the United States, and Other Comments*, in POLITICAL POWER OF ECONOMIC IDEAS, *supra* note 107, at 347, 356.

<sup>117</sup> Other examples are identified in Peter A. Hall, *Introduction*, in POLITICAL POWER OF ECONOMIC IDEAS, *supra* note 107, at 3, 12-13.

<sup>118</sup> IDEAS AND FOREIGN POLICY, *supra* note 107, at 17-20.

<sup>119</sup> See, e.g., Michael Borrus & Judith Goldstein, *United States Trade Protectionism: Institutions, Norms, and Practices*, 8NW. J. INT'L L. & BUS. 328, 332-36 (1987); Judith Goldstein, *The Political Economy of Trade: Institutions of Protection*, 80 AM. POL. SCI. REV. 161, 164-66 (1986).

<sup>120</sup> Borrus & Goldstein, *supra* note 119, at 363.

an implicit critique of several more common approaches to trade law and policy. First, it takes aim at those who dismiss ideas as mere ideology, or worse, as illusions and propaganda.<sup>121</sup> While ideas can surely be used for purely instrumental purposes, as demonstrated above, this is not the only role they play in the policy arena.

Second, the “ideas literature” challenges those who understand trade policy as simply a subset or component of a nation’s overall international relationships. An important strand of international political science literature argues that a nation’s trade policy reflects its relative power position in the international system. This power derives from, inter alia, the relative size and economic strength of the nation vis-à-vis other nations, and is thought to drive different trade strategies.<sup>122</sup> But this argument cannot explain why nations with similar “power” pursue different trade policies, or why nations maintain their commitments to a particular trade policy, even when that nation is experiencing a relative gain or decline in its “power.” Similarly, it cannot explain why nations simultaneously pursue more liberal policies in certain sectors, such as manufactured goods and services, and more interventionist policies in other sectors, such as agriculture.<sup>123</sup>

Finally, the “ideas literature” stands as an implicit critique of public choice scholars who explain trade policy as a result of interest group deal-making. Identification of the relevant interests and parties is a valuable exercise, but it rarely tells the whole

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<sup>121</sup> For a strong version of this argument, see Stephen Krasner, *Westphalia and All That*, in IDEAS AND FOREIGN POLICY, *supra* note 107, at 238, 257 (“Ideas have not made possible alternatives that did not previously exist; they legitimated political practices that were already facts on the ground. Ideas have been one among several instruments that actors have invoked to promote their own mundane interests.”).

<sup>122</sup> See, e.g., DAVID LAKE, POWER PROTECTION AND FREE TRADE: THE INTERNATIONAL SOURCES OF UNITED STATES COMMERCIAL STRATEGY 1887-1939 (1988); Robert O. Keohane, *The Theory of Hegemonic Stability and Changes in International Economic Regimes, 1967-1977*, in CHANGE IN THE INTERNATIONAL SYSTEM 131 (Ole R. Holsti et al. eds., 1980); Stephen D. Krasner, *State Power and the Structure of International Trade*, 28 WORLD POL. 317, 317-19 (1976).

<sup>123</sup> See Judith Goldstein, *The Impact of Ideas on Trade Policy: The Origins of U.S. Agricultural and Manufacturing Policies*, 43 INT’L ORG. 31, 31-33 (1989) (outlining how the U.S. pursued widely divergent policies in manufacturing and agricultural sectors in the post-War period).

story.<sup>124</sup> While a nation may support an expanding economy, high wages, stringent environmental protections, and the liberal international economic order, identification of the relevant interests is typically insufficient for predicting any particular policy outcome when governments attempt to harmonize such incompatible goals. Again, attention to the power and roles of ideas serves as a useful supplement to the more traditional ways of analyzing trade policy. Moreover, calling attention to the role of ideas may be particularly important at a time when public choice and other explanations that understand trade policy as reflecting material interests are ascendant.

### 5.2. *Does Scholarship on Linkage Issues Suggest a New Model?*

As linkage issues have moved from the periphery to the center of the political agenda, a critical body of scholarship has emerged. Much of this scholarship purports to critique the ways in which the trade regime has approached linkage issues. "Trade and environment" is perhaps the most contentious of the linkage issues, and provides an important illustration of these arguments.

The environmental community has identified a number of concerns associated with liberalized trade. First, they argue that liberalized trade may promote unsustainable consumption of natural resources and increased waste production.<sup>125</sup> Second, trade liberalization agreements contain market access provisions that can be used to challenge domestic environmental regulations.<sup>126</sup> Third, nations with lax environmental regulations are thought to enjoy a competitive advantage in a global marketplace, creating political pressure in nations with high environmental standards to reduce their level of environmental protection.<sup>127</sup>

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<sup>124</sup> See generally Jeffrey L. Dunoff, *From Green to Global: Toward the Transformation of International Environmental Law*, 19 HARV. ENVTL. L. REV. 241, 261-63 (1995) (critiquing public choice analysis of domestic and international trade policy).

<sup>125</sup> ESTY, *supra* note 16, at 2.

<sup>126</sup> The Tuna-Dolphin dispute is the most famous illustration of this point. *Id.* at 29.

<sup>127</sup> See *id.* at 1-2. Empirical support for the competitiveness claim appears to be limited. See, e.g., Jeffrey L. Dunoff, *Understanding Asia's Economic and Environmental Crises*, 37 COLUM. J. TRANSNAT'L L. (forthcoming 1998) (reviewing various studies); Kristen H. Engel, *State Environmental Standard Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271, 321-37 (1997) (finding, in domestic context, that environmental standards are a minor factor in firm location decisions); Richard B. Stewart, *Environmental Regulation*

Finally, environmentalists seek the ability to use trade measures as leverage in global environmental protection efforts.<sup>128</sup>

Many trade law specialists have strongly resisted arguments raised in much of the critical scholarship, insisting that the environmentalists' agenda threatens to undermine the liberalized trade regime.<sup>129</sup> This scholarship has been attacked for urging a greater freedom for national governments to regulate trade in restrictive ways. From this perspective, the environmentalists' arguments sharply challenge the trade regime's *raison d'être*, which is to limit the ability of national governments to interfere with trade. A related objection is that the critics' arguments for imposing duties on, or banning trade in, products produced in environmentally harmful ways undermine the doctrine of comparative advantage, the phenomenon that drives international trade in the first place.<sup>130</sup>

A shift in perspective, however, might suggest that the hostility of trade specialists to much of this "critical" scholarship should be tempered. For instance, that even the environmental and labor critics of trade regimes define the problems as "trade and . . ." topics, already presupposes a certain perspective on the issues. The "critical" scholarship is largely devoted to discussions of how environmental or labor issues can be accommodated within the existing (or slightly modified) body of international trade law.

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and *International Competitiveness*, 102 YALE L.J. 2039 (1993) (arguing that competitiveness effects of environmental regulations are modest).

<sup>128</sup> See ESTY, *supra* note 16, at 2.

<sup>129</sup> "Many trade scholars—both lawyers and economists—view the increasing preoccupation with 'fair trade' [associated with environmental and labor standards] as the most fundamental challenge or threat to the liberal trading order that has arisen in recent decades." Robert Howse & Michael J. Trebilcock, *The Fair Trade-Free Trade Debate: Trade, Labor and the Environment*, 16 INT'L REV. L. & ECON. 61 (1996) (citations omitted). A representative sampling of traditional scholarship can be found in FAIR TRADE AND HARMONIZATION, *supra* note 3. Similar sentiments are voiced by the corporate community. At a recent American Society of International Law Annual Meeting, an IBM spokesperson declared: "Frankly, I don't view trade and environment—'green trade'—as the biggest threat to trade. I view the whole panoply of trade and issues as the threat to trade." Kristine Hall, *Trade and the Environment: The Business Point of View*, 1994 AM. SOC. INT'L L. PROC. 495, 495.

<sup>130</sup> See, e.g., Piritta Sorsa, *GATT and Environment*, 15 WORLD ECON. 115, 123 (1992) (stating that such trade measures would "work against the reali[z]ation of comparative advantage . . . [and] would undermine the rule-based nature of the GATT and would reduce the opportunities for gains from speciali[z]ation through trade").

Thus, as outlined above, discussions of coercive labor practices or abysmal environmental laws are often transformed into discussions of implicit subsidies or competitive advantage.<sup>131</sup> Similarly, "critical" scholarship devotes substantial attention to perceived shortcomings in the GATT/WTO dispute resolution procedures, and suggests a number of reforms in these processes. But, by assuming the priority of trade law, and by assuming that linkage issues will be resolved pursuant to trade body procedures, critics implicitly assure the privileging of trade values over labor and environmental values.<sup>132</sup> In this sense, the "critical" scholarship lacks significant critical bite.

A similar conclusion results when we focus on the *structure*, rather than the *details*, of the critics' argument. When critics argue that disparate regulations distort trade flows, and that governments should intervene to correct these distortions, they presuppose the existence of "undistorted" or "normal" trade flows.<sup>133</sup> That is, they presuppose the priority and autonomy of international markets in goods.<sup>134</sup> In short, the "critics" tend to adopt the most fundamental assumptions of the efficiency model and therefore tend to reinforce the assumptions underlying the dominant model of the trade regime.

For these reasons, the linkage literature that is ostensibly critical of the trade regime neither offers nor suggests a new model. But perhaps, as Alexander Bickel famously suggested, "[n]o answer is what the wrong question begets."<sup>135</sup> Perhaps the critics, including myself, have been mistaken in criticizing this literature for failing to develop a new model. Indeed perhaps the very

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<sup>131</sup> For a recent example in the labor area, see generally, Ehrenberg, *supra* note 22 (asserting that forced and child labor violates customary international law and should be considered a state subsidy under the WTO).

<sup>132</sup> See Dunoff, *Institutional Misfits*, *supra* note 7.

<sup>133</sup> See Ileana M. Porras, *The Puzzling Relationship Between Trade and Environment: NAFTA, Competitiveness, and the Pursuit of Environmental Welfare Objectives*, 3 IND. J. GLOBAL LEGAL STUD. 65, 79 & n.20.

<sup>134</sup> For critiques of the idea of autonomous international markets, see Kenneth W. Abbott, "Economic" Issues and Political Participation: The Evolving Boundaries of International Federalism, 18 CARDOZO L. REV. 971 (1996); Dunoff, *supra* note 103, at 759; Joel R. Paul, *Free Trade, Regulatory Competition and the Autonomous Market Fallacy*, 1 COLUM. J. EUR. L. 29 (1995); Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546 (1987).

<sup>135</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 103 (2d ed. 1986).

search for a new model, akin to the “efficiency” or “collective action” models, is itself mistaken. In a very different context—the First Amendment of the United States Constitution—Larry Lessig has described two possible responses to doctrinal and theoretical incoherence in an area of the law:

Come then the theorists, with two sorts of replies. The first looks for a principle, or set of principles, with which to explain and justify this complicated array. The idea is to unify the doctrine around a principled core, and the belief is that there will be this one principle, or small set of principles, that can stand outside any particular First Amendment context, yet guide First Amendment inquiry in every First Amendment context. In this way is the approach Rawlsian—not in substance but in form. It is the search for . . . the “free speech principle”—the project of Alexander Meiklejohn, and Martin Redish, and Geoffrey Stone, and the work of a generation of constitutional law.

The second reply begins not in the sky, as it were, but on the ground. It asks not what is the free speech principle, then to be applied in every free speech context, but rather, what are the contexts within which the free speech principle applies, and how do these contexts, and the free speech ideals within them, differ. In political philosophy, it is the approach of Michael Walzer—asking (about a theory of justice) not what is the principle of justice that gets applied in each context of justice, but what are the principles of justice inherent in the separate spheres within which justice questions get raised, how do they relate, and how do we draw boundaries between these separate spheres.<sup>136</sup>

While I cannot detail the full argument here, I want to suggest that perhaps we face a similar choice in the linkage context. We can adopt a Rawlsian approach and attempt to generate a

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<sup>136</sup> Lawrence Lessig, *Post Constitutionalism*, 94 MICH. L. REV. 1422, 1422-23 (1996) (citations omitted).

“linkage” principle that will guide inquiry in all of the linkage areas. But such attempts, to date, have proven exceedingly unsatisfactory. It may be more likely that there is no simple principle or parsimonious model that can neatly tie together the disparate threads running through the various linkage issues. Perhaps, as suggested above, the relationships among the competing values implicated in the various linkage issues are simply too complex to collapse into a model where one or a few values are prioritized as fundamental. If so, then international trade scholars ought to discontinue their attempts to fashion a new model; instead they ought to identify the strengths and weaknesses of the various models available, and pull from each of these models insights that can help illuminate the difficult challenges posed by the linkage issues.

### 5.3. *Linkage Issues and WTO Dispute Resolution: A Paradox*

Many of the features that render linkage issues so difficult for the conventional models also render them difficult for WTO dispute resolution. Many trade scholars have criticized panels for resolving linkage disputes in a way that obscures or ignores the conflicting values at stake. We have urged panels to more forthrightly articulate and balance the diverse interests at issue. But notwithstanding this scholarship, panels continue to slight the underlying values. Why is this?

When evaluating WTO approaches to linkage issues, we should pay close attention to the institutional roles and politics of the WTO. In particular, it is instructive to contrast WTO dispute resolution with other domestic and international fora. When a domestic legislature or international negotiating body confronts, for example, a trade and environment issue, there would be relatively little objection to it openly announcing that it is resolving a value conflict through majoritarian processes. We expect such bodies to confront and resolve conflicting values. But this is not true of WTO panels. While there has long been debate over whether GATT dispute resolution should be a “rule-based” system or a more flexible, diplomatic mechanism,<sup>137</sup> the Uruguay

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<sup>137</sup> See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 85-88 (1989) (claiming that the diplomatic mechanism would have at least implicit reference to the relative power of the parties); William J. Davey, *Dispute Settlement in GATT*, 11



Round Dispute Settlement Understanding represents a clear victory for the legalists who advocated a rule-based, binding adjudicatory system.<sup>138</sup> WTO dispute resolution is not supposed to be simply another forum for the resolution of politicized value conflicts.

Ironically, panels that created and applied sensitive, multifaceted tests truer to the underlying values at stake in linkage issues would undermine their institutional position. Why? Precisely because of the ways in which—as the contributions to this Symposium demonstrate—the linkage issues are so controversial and contested. To be sure, many issues of international trade policy are contested. But the linkage issues are today contested in a particular way, one that appears to take them outside of the “legal” domain and squarely into the “political” domain.<sup>139</sup> WTO panels, like domestic courts, have maximum legitimacy when they work with clear legal authority or apply non-controversial understandings to particular fact patterns. But when there is no clear authority or shared understandings, a court’s, or WTO panel’s, decision will appear inappropriately “political.” The heightened politicalization of many of the linkage issues renders them, at present, effectively non-justiciable. Thus, much of the most influential scholarship on linkage issues asks WTO panels to draw difficult lines in the midst of a larger political struggle; but it is precisely this contestedness that would make it difficult for a panel to apply any nuanced test in a way that would appear consistent. Inconsistent results in these areas would be understood as a signal that WTO panels were using politics—not law—to resolve particular disputes. However, particularly given the understandings contained in the Uruguay Round’s Dispute Settlement Understanding, the “delegalization” of WTO dispute resolution proceedings threatens the delegitimization of these proceedings. As a leading

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FORDHAM INT’L L.J. 51, 69-78 (1987); Dunoff, *Institutional Misfits*, *supra* note 7, at 1124-25; Phillip R. Trimble, *International Trade and the “Rule of Law,”* 83 MICH. L. REV. 1016 (1985).

<sup>138</sup> This discussion assumes a distinction between “law” and “politics” that has been under sustained attack. For present purposes, I assume the validity of this distinction, which is at the heart of much writing about GATT/WTO dispute resolution.

<sup>139</sup> The arguments here draw heavily on Lawrence Lessig’s similar set of arguments regarding the adjudication of contested issues by domestic courts. See, e.g., Lawrence Lessig, *Fidelity and Constraint*, 65 FORD. L. REV. 1365 (1997); Lessig, *Post Constitutionalism*, *supra* note 136; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995).

proponent of legalized, rule-based dispute resolution states, “[i]nappropriate panel ‘activism’ could well alienate members, thus threatening the stability of the GATT/WTO dispute settlement procedure itself.”<sup>140</sup>

All of this suggests a paradox. As scholars, it should be part of our mission to identify and weigh the various competing interests in controversial linkage areas. To do so constitutes a theoretical advance. But to be useful, a theory must be capable of practical application. And a critical dimension of current practice is the institutional constraints WTO panels operate under. What an elegant theory of the linkage issues needs is a politically salient way to apply it.<sup>141</sup>

In short, I now believe that it is no answer to say that WTO panels should “struggle openly” about the value conflicts raised by linkage issues; in this context, open struggle is likely to be self-defeating.<sup>142</sup> So our dilemma is that while the three conventional models are no longer adequate, no new overarching model is likely to replace them. Our paradox is that while the panels’ jurisprudence seems terribly ill-equipped to sensibly resolve trade issues, the development of a more refined and appropriate approach by WTO panels seems politically unfeasible.

## 6. CONCLUSION

In recent years, linkage issues have moved to the forefront of trade policy and scholarship. However, these issues have proven to be particularly difficult and divisive. In this Article, I have tried to demonstrate several of the ways in which these issues challenge our conventional understandings of the trade regime. In particular, I have shown how the linkage issues problematize each of the three leading models—the efficiency, collective action, and embedded liberalism models—used to describe the trade regime. These new issues thus demonstrate the practical and theoretical need for reconceptualizing our understanding of this regime.

I have then tried to show that, notwithstanding these shortcomings, the traditional models—and in particular the efficiency model—nevertheless have important political consequences. In

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<sup>140</sup> Croley & Jackson, *supra* note 35, at 212.

<sup>141</sup> See Lessig, *Post Constitutionalism*, *supra* note 136, at 1449 (making similar arguments about courts in the domestic context).

<sup>142</sup> See Croley & Jackson, *supra* note 35, at 212; Lessig, *Post Constitutionalism*, *supra* note 136, at 1449.

particular, I have outlined how liberalized trade and the triumph of the efficiency model affect domestic politics, and how they constrain national autonomy. Moreover, I have suggested that those who oppose these policies must generate their own model of the trade regime. Absent such a model, the reformers are unlikely to be able successfully to advocate for policy changes.

I then suggested that the “critical” scholarship on linkage issues is unlikely to generate a new model, and introduced a broader argument against the likelihood of a new model to replace the conventional models. This leads to a difficult paradox when WTO panels hear controversial linkage disputes: While the development and application of complex multi-factored analyses may be entirely appropriate in linkage areas, the institutional position of WTO dispute resolution panels makes this politically unfeasible.

The end of the effectiveness of the leading models does not mean the end of international trade, or of the WTO/GATT system. To the contrary, international trade continues to expand, and the WTO/GATT system is surely alive and well. But policymakers, scholars and citizens can understand these developments more or less accurately. I have argued that the linkage issues render conventional understandings of the trade regime no longer viable. By exploring insights from economic, political science, and legal scholarship, this Article implicitly calls for a creative synthesis of ideas and insights from various disciplines as part of our efforts to rethink international trade.

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# TRADE AND JUSTICE: LINKING THE TRADE LINKAGE DEBATES

FRANK J. GARCIA\*

*"I think we get very tangled up when we say, What is our human rights policy and how does it interact with our trade policy? . . . I do not believe that human rights should be a key element of trade policy . . . ."*<sup>1</sup>

## 1. INTRODUCTION

In recent years, the linkage between international trade and various other aspects of social life and concern, or as it is commonly referred to, the "trade and \_\_\_" phenomenon, has been the subject of increasing attention within academic and policy circles.<sup>2</sup>

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<sup>1</sup> Claudia Dreifus, *Ready for Takeoff*, N.Y. TIMES, Aug. 17, 1997, § 6 (Magazine), at 30 (quoting Philip M. Condit, C.E.O., Boeing Company).

<sup>2</sup> Trade linkage is not a new phenomenon, particularly with regard to the link between trade and labor standards. See Virginia Leary, *Workers Rights and International Trade*, in 2 FAIR TRADE AND HARMONIZATION 175, 182-85 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (examining the link between domestic labor standards and international competitiveness asserted in nineteenth century labor reform debates); Frieder Roessler, *Domestic Policy Objectives and the Multilateral Trade Order*, in THE WTO AS AN INTERNATIONAL

The response from the trade community to such linkages has not been one of unalloyed welcome.<sup>3</sup> However, rather than respond to the multitude of issues and problems being linked to trade in

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ORGANIZATION 213 (Anne O. Krueger ed., 1998), *reprinted in* 19 U. PA. J. INT'L ECON. L. 201 (1998) (noting links between employment, balance of payments issues, and fair labor standards recognized in 1947-48 conference leading to the Havana Charter and in the Charter itself). However, in the last five years the literature devoted to these and other linkages has mushroomed, with the trade and environment link arguably leading the way. *See, e.g.*, DANIEL C. ESTY, *GREENING THE GATT* (1994); Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT'L L.J. 459 (1994). Other recognized or asserted linkage fields include: human rights, *see, e.g.*, James F. Smith, *NAFTA and Human Rights: A Necessary Linkage*, 27 U.C. DAVIS L. REV. 793 (1994); Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1 (1996), development, *see, e.g.*, Bartram S. Brown, *Developing Countries in the International Trade Order*, 14 N. ILL. U. L. REV. 347 (1994), competition law, *see, e.g.*, Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1 (1997), intellectual property, *see, e.g.*, Frank J. Garcia, *Protection of Intellectual Property Rights in the North American Free Trade Agreement: A Successful Case of Regional Trade Regulation*, 8 AM. U. J. INT'L L. & POL'Y 817 (1993), and culture, *see, e.g.*, John David Donaldson, "Television Without Frontiers": *The Continuing Tension Between Liberal Free Trade and European Cultural Integrity*, 20 FORDHAM INT'L L.J. 90 (1996); W. Ming Shao, *Is There No Business Like Show Business? Free Trade and Cultural Protectionism*, 20 YALE J. INT'L L. 105 (1995), to name a few. *See generally* Jeffrey L. Dunoff, "Trade and": *Recent Developments in Trade Policy and Scholarship—And Their Surprising Political Implications*, 17 NW. J. INT'L L. & BUS. 759 (1996-97) (assessing recent linkage scholarship).

<sup>3</sup> Some links, like investment and intellectual property, have been readily received by the trade community, as is evidenced by their inclusion in modern trade agreements such as the North American Free Trade Agreement ("NAFTA"), *see* North American Free Trade Agreement, Dec. 17, 1992, chs. 11, 17, 32 I.L.M. 639, 670, and the Agreement on Trade-Related Investment Measures ("TRIMS") and Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 81 (1994). However, other links to areas such as the environment, human rights, and competition law are resisted, *see, e.g.*, Steve Charnovitz, *The World Trade Organization and Social Issues*, 28 J. WORLD TRADE 17, 24 (1994) ("The issues of environment and labour are often reviewed rather negatively by the trade camp."); Fox, *supra* note 2, at 10-12 (noting that the United States resists the linkage between trade and antitrust law); Smith, *supra* note 2, at 806-17 (charting U.S. reluctance to embrace disciplined unilateral human rights linkages); Spencer W. Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 344-45 (1987) (noting that international attempts at integrated transnational competition law are generally ineffective, with the United States playing an ambivalent role), and cautionary notes are sounded about linkage in general. *See, e.g.*, Roessler, *supra* note 2, at 14-15 (arguing that such linkages undermine both the trade order and attainment of the desired domestic policy objectives).

the manner that a ship captain might rail against a sudden increase in barnacles,<sup>4</sup> the trade law and policy community should welcome this abundance as a sign of the increasing prevalence and impact of trade law throughout all aspects of the societies of countries engaged in trade, economic integration, and international economic relations generally. This dramatic increase in the quantity, scope and reach of international economic law is often referred to as the “international economic law revolution,”<sup>5</sup> and the trade linkage phenomenon is one aspect of it.

As international economic law increases in scope and effect, it will become increasingly important to define which issues, problems, and questions are legitimately within its jurisdiction, and how such issues are to be decided. As international economic relations grow more sophisticated, cooperative, and legalized, the rules and decisions of international economic law encroach more and more on other areas of social concern, such as environmental protection, labor law, development assistance, and non-economic human rights. Are these other areas of concern alien to international economic law, and are the linkages and conflicts among these issues and traditional trade law and policy mere “border conflicts,” conflicts at the margin? Or are they central, even constitutive, of modern international economic law? And how shall these issues and conflicts be decided?

It is in this context that recognition of the role of justice in international economic law can make a contribution to the analysis of the “trade and \_\_\_” debates. A re-examination of the classical roots of the Western concept of justice, i.e., Justice as Right Order,<sup>6</sup> and the relationship between justice, or morality generally,

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<sup>4</sup> Roessler exhibits a note of weary frustration by stating:

Many of the proposals to pursue environmental objectives through the multilateral trade order have features that resemble those of past failed linkages between trade policy instruments and domestic policy objectives. *Again* proposals are made that would permit the use of trade measures in the pursuit of policy objectives that cannot be attained efficiently with trade policy instruments. And, *again*, the hoped-for cross-fertilization is likely to turn into cross-contamination.

Roessler, *supra* note 2, at 15 (emphasis added).

<sup>5</sup> See Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33, 36 (1996).

<sup>6</sup> This Article confines itself to the moral and political tradition that traces its ancestry to classical Greece. Outside of the West, other traditions explore fundamental questions of social order under different rubrics, such as *li* or *dharma*. See generally SURYA P. SINHA, LEGAL POLYCENTRICITY AND

and law, suggests that, in fact, we must consider the claims of justice when we try to talk about international economic law. Moreover, as this Article will seek to illustrate, certain problems in international economic relations, including trade linkage problems, can usefully be examined as problems involving the often conflicting claims of justice in the context of international economic law.<sup>7</sup>

Section Two of this Article introduces the concept of justice as a sort of "linkage" itself, joining order with value in legal and social thought, and outlines how justice as "Right Order" is related to the analysis of international economic law.<sup>8</sup> Section Three applies this view to the "trade and \_\_\_" debate, suggesting how such an analysis could contribute to our understanding of trade linkage problems. As the title of this Article suggests, such an examination reveals that the question of justice is actually implicit in the many "trade and \_\_\_" linkages currently under discussion. Understanding how this is so may contribute to improving the questions being asked, and perhaps suggest what the answers might look like.

## 2. JUSTICE AND INTERNATIONAL ECONOMIC LAW

### 2.1. *Justice as Right Order*

In the Western tradition, thinking about justice and its relation to law is as old as organized political life, indeed as old as the tradition itself.<sup>9</sup> In *Protagoras*, Plato writes that a sense of justice

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INTERNATIONAL LAW (1996) (surveying Western, Chinese, Indian, and African approaches to social order). It may be that in these traditions such concepts play an analogous role to the concept of justice, linking order to value in social life, but that is a question left for another day.

<sup>7</sup> Philip Nichols suggests that many trade disputes, and in particular disputes involving linkage issues, conceal underlying conflicts in societal values. See Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 659-61 (1996).

<sup>8</sup> This Article does not develop or adopt a substantive conception of justice, for example, a Rawlsian conception of justice as fairness. The Article aims, rather, to suggest how the concept of justice might function in our analysis of international economic law.

<sup>9</sup> See, e.g., CARL JOACHIM FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* 191 (2d ed. 1963) (noting that the problem of the relation of law to justice is central to the evolution of the philosophy of law).



is a prerequisite to living a civic life, to living in community.<sup>10</sup> Why? Because the non-violent resolution of disputes, a cornerstone, if not the *sine qua non*, of civic life, requires that losing parties understand outcomes as “right,” as consistent with fundamental values.<sup>11</sup> In other words, as “just.”

Over 2,000 years later, we find social psychologists stating, in modern parlance, essentially the same point. Klaus Scherer, in his introduction to an interdisciplinary study of justice research, writes that justice, understood as social outcomes justified by recourse to principles accepted by the community, is a basic and indispensable principle for any kind of human social association.<sup>12</sup> This assertion relies on the grounds that human beings exhibit a powerful emotional response to the perception of injustice that no social system can afford to ignore.

The notion of social outcomes, then, is essential to any meaningful concept of justice.<sup>13</sup> When we speak of justice, however, we speak of social outcomes not in a descriptive sense, but in an evaluative or justificatory sense. In other words, we speak of the acceptability of outcomes.<sup>14</sup> If we consider an outcome just, we consider it acceptable, and its acceptability involves reference to particular criteria. Thus our notion of justice is quite closely linked conceptually and etymologically to justification.<sup>15</sup>

The particular criteria by which the acceptability of an outcome is evaluated will depend on the theoretical framework used for the analysis, and on the discipline posing the general ques-

<sup>10</sup> See PLATO, PROTAGORAS 20-21 (Benjamin Jowett & Martin Ostwald trans., Liberal Arts Press 1965).

<sup>11</sup> See *id.*

<sup>12</sup> See Klaus R. Scherer, *Issues in the Study of Justice*, in JUSTICE: INTERDISCIPLINARY PERSPECTIVES 1-14 (Klaus R. Scherer ed., 1992).

<sup>13</sup> In emphasizing social outcomes, this Article does not mean to deny the importance to the study of justice of the processes of outcome allocation, known in law and social psychology as procedural justice, to an overall theory of justice. See John Bell, *Justice and the Law*, in JUSTICE: INTERDISCIPLINARY PERSPECTIVES, *supra* note 12, at 127 (noting the centrality of procedural justice to legal writing on justice); Tom R. Tyler, *Procedural Justice Research*, 1 SOC. JUST. RES. 41 (1987) (surveying contemporary psychological research on procedural justice).

<sup>14</sup> See John Bell & Eric Schokkaert, *Interdisciplinary Theory and Research on Justice*, in JUSTICE: INTERDISCIPLINARY PERSPECTIVES, *supra* note 12, at 237.

<sup>15</sup> See Scherer, *supra* note 12, at 2; see also SERGE-CHRISTOPHE KOLM, MODERN THEORIES OF JUSTICE 7 (1996); Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127 (1987).

tion.<sup>16</sup> While a social scientist may study the effects of certain variables on our evaluations of acceptability, such as the subjective influence of social representations on individual perceptions of injustice;<sup>17</sup> the effects of status, achievement, power, and social stratification on the distribution of social goods;<sup>18</sup> or the effects of different principles of distribution on the economic system,<sup>19</sup> it falls to philosophy, in particular moral and political philosophy, to articulate the substantive moral principles by which we judge the acceptability of individual and social behavior.

Moral and political philosophy are concerned with the order we bring to our social relations, both on the level of individual decisions and relationships, and in terms of the basic structure of our social institutions.<sup>20</sup> Phrased in terms of the acceptability of outcomes, moral and political philosophy provide certain modes of justification, namely, in terms of moral and political norms, for individual decision-making and social organization.

The classical roots of our tradition of political philosophy yield two fundamental, related, but significantly different starting points on the nature of the concept of justice: the Platonic and the Aristotelian.<sup>21</sup> While neither explicitly replaces the other, and

<sup>16</sup> Disciplines which have studied the question of justice include: philosophy, law, psychology, sociology, and economics. In each discipline, the justification of outcomes is studied in a slightly different aspect. See generally Scherer, *supra* note 12, at 11-14.

<sup>17</sup> See Kjell Törnblom, *The Social Psychology of Distributive Justice*, in JUSTICE: INTERDISCIPLINARY PERSPECTIVES, *supra* note 12, at 177-236 (discussing social psychology).

<sup>18</sup> See Wil Arts & Romke Van der Veen, *Sociological Approaches to Distributive and Procedural Justice*, in JUSTICE: INTERDISCIPLINARY PERSPECTIVES, *supra* note 12, at 143-76.

<sup>19</sup> See Erik Schokkaert, *The Economics of Distributive Justice, Welfare and Freedom*, in JUSTICE: INTERDISCIPLINARY PERSPECTIVES, *supra* note 12, at 65-113. Scherer notes that, normatively, economic analyses of justice may advance the substantive position that efficiency equals justice. See Scherer, *supra* note 12, at 10, 12.

<sup>20</sup> See WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY* 6 (1990). The distinction, never very clear, between moral and political philosophy can be expressed as follows: moral philosophy concerns the questions of what we are to do, and political philosophy concerns that subset of questions involving what we are to do when state power and authority are involved.

<sup>21</sup> I am following Rawls in relying on a distinction between the "concept" of justice and the many varying "conceptions" of justice, the former consisting of "the role which these different sets of principles, these different conceptions, have in common." JOHN RAWLS, *A THEORY OF JUSTICE* 5 (1971).

both in fact are complementary, each emphasizes a different aspect of justice, and both have had a fundamental influence in shaping our culture's investigation of justice.<sup>22</sup>

Plato's sense of justice is comprehensive and magisterial. Justice is Right Order, both within the individual soul and within the polis.<sup>23</sup> Put another way, it is the concept of Justice that links the terms according to which social life is organized with a theory of value, or what is "Good."<sup>24</sup> The "Rightness" of a given order depends on the particular relationship of the parts to the whole, which depends on other matters including a theory of human nature and a theory of value.<sup>25</sup> But the function of the concept of justice, independent of the substantive conception, is to link the

Tom Campbell objects to the concept/conception distinction regarding justice, questioning whether any putative "concept" of justice can truly be neutral regarding substantive principles of justice. See TOM CAMPBELL, JUSTICE 5-6 (1988). However, in proposing his concept of justice as "treatment in accordance with desert," Campbell reveals that he has blurred the concept/conception distinction and is, in fact, advancing a substantive conception of justice as a concept of justice. *Id.* In this Article, I have sought to preserve this distinction in advancing the concept of justice as Right Order, which I believe more closely approximates Campbell's own criteria for a neutral functional concept.

<sup>22</sup> See FRIEDRICH, *supra* note 9, at 26 (crediting Plato and Aristotle with together laying the foundation for all subsequent inquiries into law and justice in the West).

<sup>23</sup> See *id.* at 13 (describing the root of Plato's comprehensive concept of justice in pre-Socratic notions of law as *nomos*, or sacred custom, which "is the order which embraces all").

<sup>24</sup> Friedrich acknowledges that for Plato there is a close and essential link between law and ethics. See *id.* at 15, 18; see also HANS KELSEN, WHAT IS JUSTICE? 101 (1957) (noting that Platonic justice rests on the idea of the Good).

<sup>25</sup> In other words, the substantive view of justice Plato adopts is a particular account of the proper order among the elements of society, based on his particular view of human nature and the Good. In Plato's case, the order advocated—his substantive theory of justice—is one of justice as "rational control," with the philosopher king at the head; the guardians in between; and the artisans at the bottom. See PLATO, REPUBLIC, 441e-442d, 444d (G.M.A. Gube trans., 1992). It is a hierarchy of rational ability and character traits, in which each takes the place most fitting for his or her particular constellation of abilities and traits. Those with the more prized of the Greek virtues—valor and rationality—are accorded pride of place. It is not an egalitarian vision, nor is it particularly attractive to a modern audience.

Later Platonists such as Augustine would modify the nature of the relationships according to more egalitarian principles, while maintaining the fundamental Platonic insight that justice is Right Order. See Ernest L. Fortin, *St. Augustine*, in HISTORY OF POLITICAL PHILOSOPHY 180-91 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987).

social order to a theory of the desirable state or outcome of social relationships.<sup>26</sup> In other words, the acceptability of the particular social order depends on its resemblance to the Good.<sup>27</sup> Thus, for Plato, any question concerning the organization of social life can be framed as a question concerning justice.<sup>28</sup>

In contrast, Aristotle's analysis of justice, while arguably more influential, is somewhat narrower and more technical than Plato's. Aristotle's inquiry into justice begins with a distinction between justice in general as the supreme virtue,<sup>29</sup> and specific forms of justice, with the latter being his principle interest.<sup>30</sup> Specific forms of justice and injustice concern aspects of one's social relations that involve gain, and whether what one has gained one has gained "graspingly" or in proportion to one's proper share.

Out of this distinction arises the further distinction between types of specific justice for which Aristotle is best known: the distributive and the corrective.<sup>31</sup> Distributive justice is "that which is manifested in distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution," which may be allotted among its members in equal or unequal shares.<sup>32</sup> This aspect of specific justice thus involves the division of social goods, of goods which can be divided

<sup>26</sup> See discussion *supra* note 21.

<sup>27</sup> See Alan Ryan, *Introduction* to JUSTICE 15 (Alan Ryan ed., 1993) (stating that, for Plato, Justice holds all the other virtues in place, and in this way is a mirror for reason itself).

<sup>28</sup> See *id.* at 7 (stating that, for Socrates, justice is inherent in the organization of the whole, whether the whole in question is the individual soul or society in general).

This discussion may have particular relevance in connection with the trade and environment debate. See *infra* notes 109-18 and accompanying text.

<sup>29</sup> Aristotle describes general justice, or justice in the broadest sense, as consisting of all aspects of one's relationship to one's fellows conducted according to virtue, and injustice, in this sense, as conducting such relationships in a manner contrary to virtue. See Aristotle, *Nicomachean Ethics*, in INTRODUCTION TO ARISTOTLE, 300, bk. V, ch. 1 (Richard McKeon ed., 1947) [hereinafter *Ethics*]. In this characterization of the concept of justice Aristotle is clearly reflecting Plato's views.

<sup>30</sup> See *id.* at 400-02, bk. V, ch. 2.

<sup>31</sup> Subsequent commentators on justice generally take this distinction as their starting point. See Ryan, *supra* note 27, at 9 (noting that most modern writers on justice begin with these two distinctions). It is less frequently recalled that this distinction follows the earlier distinction between general, or Platonic, justice and specific justice.

<sup>32</sup> See *Ethics*, *supra* note 29, at 402, bk. V, ch. 2.

or allocated, and which can be divided socially, by custom, opinion, informal decisions, and formal allocative mechanisms.<sup>33</sup> In order to evaluate a particular division, one need only identify the particular conception of justice, the substantive principle, which would guide such allocative decisions towards a just result.<sup>34</sup>

Corrective justice is a restorative form of justice; of putting into balance something that has come out of balance because of an injustice.<sup>35</sup> It could be considered the elimination of gain from acts of injustice.<sup>36</sup> If, as a result of voluntary or involuntary dealings with one's fellows, a party ends up with either more or less than what is properly its share of the subject of the transaction,<sup>37</sup> Aristotle would say that this is an injustice, and the solution to

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<sup>33</sup> The notion of division among members of a group or community, or those who "have a share in the constitution," *id.*, raises the question of whether this aspect of specific justice applies to any group in which allocation of social goods occurs, or if some particular type of social or political link, i.e., one that requires a shared constitution or membership in a polity, is a precondition to the claims of distributive justice. This issue arises again in the contention that distributive justice does not apply to trade agreements because, to the extent they affect such allocations, they do so across polities and do not affect members of the same polity. Of course, one can argue that trade agreements themselves form a sort of constitution, creating the relevant type of relationship among all individuals who are subject to their provisions. See discussion *infra* note 61.

<sup>34</sup> Aristotle's substantive principle of distributive justice is akin to our notion of equality or fairness, but like Plato's version, it is not an egalitarian fairness. Aristotle did not conceive of a society of equals, but one of proper shares, in which ability, economic status, and character should result in what we would consider an unequal distribution of goods; it could be called proportionate equality or proportionate fairness. See *Ethics*, *supra* note 29, at 402-04, bk. V, ch. 3.

<sup>35</sup> See *id.* at 404-07, bk. V, ch. 4. Corrective justice is often referred to as retributive, in that it is associated with criminal punishment, but it is not related to modern notions of retribution and is more properly concerned with correcting an injustice.

<sup>36</sup> Aristotle conceives of corrective justice as applying to what can be translated as "transactions," both voluntary and involuntary ones. See FRIEDRICH, *supra* note 9, at 22 (noting that this distinction roughly mirrors the distinction between contract and tort).

<sup>37</sup> The proper share here is not according to the merit-oriented proportions of distributive justice, but is more akin to the simple sum of the party's gain less loss at the start of the interaction, and the change envisioned by the terms of the interaction itself. See *Ethics*, *supra* note 29, at 404-07, bk. V, ch. 4.

Here again, it is useful to recall the distinction between the concept of corrective justice and Aristotle's substantive conception of what constituted corrective justice and injustice.

this injustice is to restore to each party the balance between loss and gain that was theirs before the transaction.<sup>38</sup>

Aristotle's two-fold characterization of justice has been enormously influential. Students of justice, since Aristotle, treat questions involving the allocation of social goods, such as wealth, advantage, and opportunity as issues of distributive justice,<sup>39</sup> and questions involving the propriety of gain as issues of corrective justice.<sup>40</sup> It can sometimes be forgotten that Aristotle himself acknowledged that he was working within a larger framework of justice as Right Order.<sup>41</sup> When considered in that context, Aristotle's categorizations can be seen as enabling us to more precisely apply the general concept of justice as Right Order to the evaluation of the justice of particular distributive or corrective situations.

The ensuing history of Western reflection on the problem of justice involves competing substantive answers to the basic question of what constitutes the Right Order, either generally or with respect to a particular area of social concern. A comprehensive survey of the dominant substantive theories of justice in the West, let alone the world, is beyond the scope of this Article, despite its undeniable relevance to any definitive account of the nature of justice in international economic law.<sup>42</sup> However, in order to carry out at least the suggestive tasks of the present work, some

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<sup>38</sup> See *id.* This applies even in the case of physical injury, where Aristotle acknowledges that it strains the metaphor to speak of the aggressor as gaining from the injury to the victim. See *id.*

<sup>39</sup> See, e.g., KOLM, *supra* note 15, at 4 ("[J]ustice is a central question of all life in society. . . . [I]t is by nature 'social' and 'distributive.'") (emphasis added).

<sup>40</sup> See, e.g., ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995) (elaborating an Aristotelian model of the corrective nature of private law).

<sup>41</sup> See *supra* text accompanying note 29. This aspect of Aristotle's analysis is often misunderstood or criticized. See CAMPBELL, *supra* note 21, at 5 ("[I]t is best to follow Aristotle . . . where, having distinguished between justice as the 'complete virtue' and justice as 'a part of virtue', he goes on to concentrate on the latter."); H.L.A. HART, *THE CONCEPT OF LAW* 157-58 (1961) (writing entirely of justice in the specific, Aristotelian sense and criticizing more general uses of the term).

<sup>42</sup> Such a survey is part of a larger project on the general question of justice in international economic law, from which this Article is drawn. The interested reader is directed to consult any of the several excellent surveys available. See generally BRIAN BARRY, *THE LIBERAL THEORY OF JUSTICE* (1973); CAMPBELL, *supra* note 21; JAMES P. STERBA, *HOW TO MAKE PEOPLE JUST* (1988); *WHAT IS JUSTICE?* (Robert C. Soloman & Mark C. Murphy eds., 1990).

general observations concerning Western theories of justice are in order.

To begin with, particular theories of justice, be they liberal or Marxist, individualistic or communitarian, contractarian or utilitarian, share several traits in common.<sup>43</sup> First, each theory must explicitly or implicitly account for the possibility of moral knowledge.<sup>44</sup> Second, each theory presents a certain account of the organization of social relations in terms of whatever moral principles are identified as most relevant. Third, and perhaps most important for the purposes of this Article, each theory must present an account of the sort of rationale one must have for any version of the organization of social relations. Restated in terms of the acceptability of outcomes, different philosophical theories of justice provide particular standards of justification or acceptability, by which outcomes can be evaluated and accepted or criticized.

Since the Enlightenment, if not the Protestant Reformation,<sup>45</sup> the dominant philosophical approach to matters of government and society in the West has been liberalism. Liberalism is a notoriously difficult term to define. For the purposes of this Article, I shall adopt the approach suggested by Jeremy Waldron and focus on liberalism as a theory of justice, a “view about the justification of social arrangements.”<sup>46</sup> In Waldron’s reconstruction of liberalism, the liberal commitment to freedom and to respect for individual human will and capacities generates a requirement that “all

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<sup>43</sup> Alasdair MacIntyre cautions that it is misleading to compare different philosophers’ substantive views, or conceptions, of justice, on the grounds that these conceptions are heavily dependent on their context, namely an underlying theory of political rationality and a socio-historic tradition. See ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 1-11, 389-92 (1988). However, I believe the discussion which follows evades this objection, in that the common traits identified are the sort of formal qualities of theories of justice which MacIntyre himself investigates and reports.

<sup>44</sup> Underlying the search for a persuasive conception of justice is a debate in moral epistemology. Moral philosophers have been preoccupied, throughout the last two centuries, with the possibility of moral knowledge. See Bernard Cullen, *Philosophical Theories of Justice*, in *JUSTICE: INTERDISCIPLINARY PERSPECTIVES*, *supra* note 12, at 17. In other words, a precondition for a persuasive theory of justice is the articulation of rationally convincing grounds for our knowledge of moral categories such as justice.

<sup>45</sup> See JOHN RAWLS, *POLITICAL LIBERALISM* xxiv (1993).

<sup>46</sup> Waldron, *supra* note 15, at 128; see also MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 1 (1982) (“[L]iberalism’ is above all a theory about justice . . .”).

aspects of the social should either be made acceptable or be capable of being made acceptable to every last individual."<sup>47</sup> In other words, it is a fundamental requirement of liberal theories of justice that the acceptability of outcomes be demonstrable to any and all affected individuals.

On this view, the differences among liberal theories of justice are disagreements over particular principles which claim the ability to meet this stringent test. Thus, for example, utilitarian,<sup>48</sup> egalitarian<sup>49</sup> and libertarian<sup>50</sup> theories of justice, while they each may differ in the *types* of justification they suggest for outcomes,<sup>51</sup>

<sup>47</sup> See Waldron, *supra* note 15, at 128.

<sup>48</sup> The utilitarian account of justice is generally traced to the writings of Mill and Bentham, see JOHN STUART MILL, *UTILITARIANISM* (1863) and JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1789), reprinted in *THE ENGLISH PHILOSOPHERS FROM BACON TO MILL* (Edwin A. Burt ed., 1967), and until the publication of John Rawls' *A THEORY OF JUSTICE*, was considered dominant in the field. See RAWLS, *supra* note 20, at 22-27. See generally *UTILITY AND RIGHTS* (R.G. Frey ed., 1984). Initially, utilitarianism conceived of the moral rightness of an act in terms of its capacity to produce happiness for the members of society. See MILL, *supra*, at 900. "Happiness" has since been generalized into the concept of "welfare" or "utility," variously conceived of as hedonic satisfaction, desirable mental states, simple preference satisfaction, or rational preference satisfaction. See generally KYMLICKA, *supra* note 20, at 12-18.

<sup>49</sup> Liberal egalitarianism, of which John Rawls' theory is the foremost example, considers justice to be a matter of the equitable distribution of basic social goods such as rights, resources, and opportunities according to some concept of "fair shares" that limits an otherwise unlimited utilitarian calculation. See, e.g., RAWLS, *supra* note 45, at 7-11; Ronald Dworkin, *What is Equality?*, 10 PHIL. & PUB. AFF. 185-246, 283-345 (1981). See generally KYMLICKA, *supra* note 20, at 50-55.

<sup>50</sup> Libertarians assert the fundamental primacy of individual rights, in particular rights to property—broadly conceived, and therefore see justice in terms of respect for these rights. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). See generally KYMLICKA, *supra* note 20, at 95-98.

<sup>51</sup> Utilitarianism would justify outcomes in terms of the degree to which they maximize utility, regardless of whose utility. In terms of the preference-satisfaction model of utility, a just outcome is one which satisfies the greatest number of informed preferences, even if that means that the preferences of some will go unsatisfied, and even if, more disturbingly, the inclusion of "illegitimate" preferences, or preferences for outcomes such as racial discrimination, which we might question on other moral grounds, means a denial to unpopular groups of what we would want to consider basic rights. See MILL, *supra* note 48, at 947 ("[j]ustice is [merely] a name for certain moral requirements which, [although high on] the scale of social utility, [may be 'overruled' in the utilitarian calculus]."). See generally KYMLICKA, *supra* note 20, at 18-30.

Egalitarian theories would justify outcomes with reference to the particular principle of distribution espoused by the theory. Thus, in a Rawlsian model,



are all liberal theories in that they claim to be able to justify outcomes to any and all affected individuals.<sup>52</sup> What is key in liberal theories of justice is the centrality of individual liberty and individual rights to the purpose and role of government and to the establishment of the social order generally. In other words, a precondition to justice is that the social order reflect and promote individual liberty and individual rights.<sup>53</sup> The extent to which each theory differs suggests the conflicts and contradictions within liberalism; which may also surface as liberal theories of justice are applied to international economic law.

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an outcome will be just if it is in accord with the dictates of the "difference principle," namely that "[a]ll social primary goods . . . are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored." RAWLS, *supra* note 45, at 303. Libertarianism would justify outcomes in terms of their degree of respect for fundamental property rights, thus objecting to any utilitarian calculus or egalitarian redistribution as unjust insofar as these treat rights as contingent or subject to state reallocation. For Nozick, social justice in the Rawlsian model is impossible, in that any redistributive mechanism contradicts the basic tenet of a free society and a free market, namely the primacy of individual choice and individual rights. See NOZICK, *supra* note 50, at ix, 155-60; KYMLICKA, *supra* note 20, 96-107.

<sup>52</sup> Despite the fact that some preferences will go unsatisfied and the problem of illegitimate preferences, utilitarianism is at least in principle a liberal theory in that, formally speaking, each person's preferences count, and count equally, in the utility-maximization calculus. See BENTHAM, *supra* note 48, at 804 (describing evaluation of merits of legislation in terms of aggregate of individual pain and pleasure); see also KYMLICKA, *supra* note 20, at 25-30.

Egalitarian theories are clearly liberal in that their basic premise is the moral equality of individuals; the justification for any distribution scheme involves individual rights and the individual economic effects of choices and circumstances and, in Rawls' case, the theory is based on the argument that any rational individual in the "Original Position" would choose his principle of justice. See RAWLS, *supra* note 45, at 19-21. See generally KYMLICKA, *supra* note 20, 58-66.

Libertarian theories are, of course, liberal, even if they oppose "liberal" redistributive policies, because they are based on the primacy of individual choice and individual rights. For Nozick, rights precede justice. See NOZICK, *supra* note 50, at ix ("Individuals have rights, and there are things no person or group may do to them.").

<sup>53</sup> In contrast, Marxist theories of justice—that accept the concept of justice at all—propose a radically different, communal measure of justice, as do communitarian theories, which are essentially non-Marxist critiques of liberal accounts of justice. See generally KYMLICKA, *supra* note 20, at 160-237; STEVEN LUKES, *MARXISM AND MORALITY* (1985); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982). In these approaches, outcomes are just if they can be made acceptable to certain groups, despite the fact that they may not be justifiable to certain affected individuals.

## 2.2. *Right Order and Social Allocation in International Economic Law*

The centrality of justice to the analysis and construction of international economic law is evident in the nature of the concept of justice itself. In the Platonic concept of justice as Right Order, whenever we consider the proper order of any aspect of social relations, we are considering a question of justice. In the Aristotelian elaboration of this concept, when law and public institutions affect the allocation of social benefits or the correction of improper gain, they are raising questions of distributive and corrective justice.

Therefore, it is necessarily true that every time the question of the proper order of a given aspect of international economic relations arises, one is considering a question of justice.<sup>54</sup> Moreover, where law is a primary tool for establishing the social order, questions of justice in international economic relations will arise as questions of international economic law. International economic law does indeed affect fundamental decisions about the allocation of social benefits among states and among their citizens, including benefits such as economic advantages, preferences, and opportunities;<sup>55</sup> wealth and property rights;<sup>56</sup> information;<sup>57</sup> and the protection of the law itself.<sup>58</sup> International economic law also involves mechanisms for the identification and correction of improper gain through dispute resolution mechanisms, on the interstate<sup>59</sup> and

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<sup>54</sup> This conclusion depends on the applicability of the concept of justice, first developed as Right Order *within* a political community, then as Right Order *between* political communities. See *infra* note 61.

<sup>55</sup> Such benefits include, for example, tariff rates, tariff preferences, rights of establishment, and provision of services.

<sup>56</sup> Among this category of rights are, for example, development assistance, trade finance, and intellectual property protection.

<sup>57</sup> Access to information is affected by transnational issues such as transparency requirements and technical assistance.

<sup>58</sup> Whether, for example, economic sanctions are available to increase the effectiveness of human rights protections, or whether countries can protect environmental resources through embargo statutes.

<sup>59</sup> For example, dispute settlement mechanisms such as NAFTA's chapter 20 and the WTO panel process can be understood as institutions for the application of corrective justice. See, e.g., *Trade Injustice*, N.Y. TIMES, Dec. 10, 1997, at A22 (criticizing WTO panel's failure to censure allegedly protectionist practices in the Japanese film industry as an example of "trade injustice").

private<sup>60</sup> levels. Such influence on the part of international economic law must therefore be evaluated in terms of theories of distributive and corrective justice.<sup>61</sup>

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<sup>60</sup> The case law of the European Court of Justice and NAFTA's investor arbitration provisions are examples of the international application of corrective justice to private party conduct.

<sup>61</sup> The fact that one is confronting justice issues in relations among states, and among disparate social systems and peoples, rather than within a single state or social system, raises important theoretical questions that can only be touched on in this Article. First, one might assert that obligations to do justice are, by their very nature, not suited to extension beyond the boundaries (presumed territorial) of a given political community. See, e.g., RAWLS, *supra* note 45, at 12, 272 n.9; RAWLS, *supra* note 21, at 7-8, 457 (noting that a theory of justice presupposes a closed society that seeks justice within a closed system, not including justice between nations). However, this view may be an artifact of social contractarian arguments for political morality, rather than a general limitation inherent to moral obligations by their very nature. See Anthony D'Amato & Kristen Engel, *State Responsibility for the Exportation of Nuclear Power Technology*, 74 VA. L. REV. 1011, 1043-46 (1988) (discussing tensions between universal and socially contingent aspects of social contractarian approaches to political philosophy). It has, in fact, been vigorously asserted that territorial boundaries are irrelevant to moral obligations. See Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 82-83 (1992) ("The contingent division of the world into discrete nation-states does not transform political freedom from an ethical imperative into a mere history."); D'Amato & Engel, *supra*, at 1042 ("[A] national boundary is an artificial, as well as a morally irrelevant, boundary with respect to moral obligations."). Moreover, Rawls has been criticized for failing to extend the original position to its logical transnational application. See CHRISTOPHER D. STONE, *THE GNAT IS OLDER THAN MAN* 253-62 (1993). Finally, to the extent that obligations of justice depend upon some form of shared political community, it may be that international economic relations, particularly economic integration systems, establish the requisite form or level of transnational community. See D'Amato & Engel, *supra* at 1046-47 ("The requirements of justice apply to institutions and practices . . . in which social activity produces relative or absolute benefits or burdens that would not exist if the social activity did not take place.") (quoting CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 131 (1979)); *supra* notes 55-60 and accompanying text.

It can also be argued that, in the international community, as it exists today, obligations of justice are tempered or superseded by some form of realpolitik, see Terry Nardin, *Realism, Cosmopolitanism, and the Rule of Law*, 81 AM. SOC'Y INT'L L. 415-16 (1987) (arguing that realism dictates that foreign policy be guided by prudent strategies for national survival, not morality), or that efforts at promoting justice will inevitably be perceived as "cultural imperialism, paternalism or worse." Alfred P. Rubin, *A Skeptical View*, 47 U. CHI. L. REV. 403, 405 (1980) (reviewing CHARLES R. BEITZ'S *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1979)). However, this sort of pragmatic or utilitarian reasoning can itself be criticized on moral grounds as treating absolute moral obligations as discretionary.

The importance of recognizing this link between trade and justice increases with the globalization of the world economy and the development of international economic law. The greater the scope and importance of international economic law as a feature of international economic relationships, and the deeper its impact throughout the societies of trading states beyond traditional economic issues such as tariff rates and investment rules, the more we must be concerned with its normative impact and implications. In other words, the broader the law's ordering power, and the more its "order" impinges on our attempts and our ability to "order" other aspects of our society, the more we must be concerned with the "Rightness" or the "justice" of the resulting international economic order.

In addition to the conceptual links discussed thus far between justice, international economic relations, and international economic law, there are very particular reasons why our jurisprudence requires us to consider, or at the very least does not *excuse* us from considering, what claims a concept of justice might make on the construction of international economic law. This assertion shall be explored in connection with the three principle accounts of the relationship between justice and law, which also apply to the question of the relationship between justice and international economic law: the traditional naturalist view, the modern naturalist view, and the positivist view.<sup>62</sup>

There are many forms of naturalism, from the classical naturalism of Greece and Rome<sup>63</sup> through the systematic, magisterial naturalism of Aquinas<sup>64</sup> and up to the various modern naturalisms of Fuller,<sup>65</sup> Finnis,<sup>66</sup> and even Dworkin.<sup>67</sup> In its strongest form,

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<sup>62</sup> There are, of course, other accounts of law and its relationship with morality, including legal realism, critical legal studies, and historical jurisprudence. The three accounts discussed in this Article were chosen because of their historic importance.

<sup>63</sup> See generally J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 19-21, 57-63 (1992).

<sup>64</sup> See St. Thomas Aquinas, *Summa Theologica*, questions 90-95, reprinted in INTRODUCTION TO ST. THOMAS AQUINAS 609-50 (Anton C. Pegis ed., 1948) [hereinafter AQUINAS].

<sup>65</sup> See LON L. FULLER, THE MORALITY OF LAW (1964).

<sup>66</sup> See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1988).

<sup>67</sup> In his Dunwoody lecture, Dworkin reluctantly accepts the label of "naturalist" insofar as that means his theory "makes the content of law sometimes depend on the correct answer to some moral question." Ronald A. Dworkin, *Natural Law Revisited*, in 2 NATURAL LAW 187 (John Finnis ed.,

of which Aquinas is the foremost medieval exponent<sup>68</sup> and Finnis the leading modern representative,<sup>69</sup> naturalism asserts two linked propositions: that knowledge of objective moral truth is possible,<sup>70</sup> and that humanly promulgated law must conform to the dictates or norms of this moral truth in order to be considered fully valid law.<sup>71</sup> While Aquinas and Finnis acknowledge the existence of morally questionable laws,<sup>72</sup> both Aquinas and Finnis would regard such “law” as fatally defective although Aquinas, and to a greater extent Finnis, might nevertheless acknowledge their status as law in some sense.<sup>73</sup>

In contrast, both Fuller and Dworkin conceive of the morality which they see as relevant to law as something less than the objective morality of traditional naturalism. Fuller’s morality is a limited one, confined to what he terms the morality of law itself,<sup>74</sup> and thus his naturalism could be called a “limited” naturalism. Dworkin, while seeking to express a link to broader moral principles, sees that morality as the morality of the relevant

1991). However, in important respects his stance is beyond the naturalist/positivist distinction. *See id.*

<sup>68</sup> See AQUINAS, *supra* note 64.

<sup>69</sup> On Finnis’ role as a leading modern exponent of traditional naturalism, see Neil MacCormick, *Natural Law and the Separation of Law and Morals*, in NATURAL LAW THEORY 105 (Robert P. George ed., 1992) (crediting Finnis with the powerful contemporary restatement of the classical tradition). Regarding Finnis’ own views, see FINNIS, *supra* note 66.

<sup>70</sup> See AQUINAS, *supra* note 64, at question 91, art. 2 (noting that natural law is rational human nature’s participation, through reason, in eternal truths); see also FINNIS, *supra* note 66, at 59-99 (arguing that the seven basic values of existence can be identified as self-evident through rational introspection).

<sup>71</sup> See AQUINAS, *supra* note 64, at question 91, art. 3 (noting that human laws proceed from practical reasoning upon the precepts of natural law); *id.* at question 95, art. 2 (“[E]very human law has just so much of the nature of law as it is derived from the law of nature.”); see also Hans Kelsen, *Foundation of the Natural Law Doctrine*, 1973 ANGLO-AM. L. REV. 2, 83-111 reprinted in 1 NATURAL LAW 125 (John Finnis ed., 1991).

<sup>72</sup> See AQUINAS, *supra* note 64, at question 93, art. 3 (recognizing existence of unjust or wicked laws); see also FINNIS, *supra* note 66.

<sup>73</sup> See AQUINAS, *supra* note 64, at question 93, art. 3 (noting that even an unjust law retains some appearance of law through its promulgation by one in authority, though its principal character is of violence, not law); FINNIS, *supra* note 66, at 363-66 (arguing that to say unjust laws are not laws distorts a complex relationship, as unjust law may still be law in a technical sense but not worthy of obedience as law).

<sup>74</sup> See FULLER, *supra* note 65, at 38-44 (reviewing the basic elements of law’s morality).

community, not a particular moral order based in God's will or an objective natural order.<sup>75</sup> This results in a sort of "open" naturalism, where what is necessary is a link to moral principles, and not the possibility of an objectively identifiable universal moral view.<sup>76</sup>

With respect to either form of naturalism, the demands of justice will be expressed as fundamental claims upon international economic law and its actors, insofar as international economic law claims to be law, and its actors attempt to operate within that law. The heart of the naturalist view of international economic law can be expressed syllogistically as follows:

- (1) international economic law consists of the regulation of international economic activity through law;
- (2) all law, insofar as it claims the status of law, must be just;
- (3) therefore, international economic law, insofar as it claims to be law, must be just.

The differences among the various naturalisms lies in their different versions of the minor premise, according to their definition of justice as it is relevant to law, and their account of the relationship.<sup>77</sup>

The distinctiveness of the modern positivist view lies in its substitution of an essentially formal description of the defining characteristic of law for what had heretofore been an essentially

<sup>75</sup> See Dworkin, *supra* note 67.

<sup>76</sup> "In principle, natural law theory may adopt any ethics." Deryck Beylerveld & Roger Brownsword, *The Practical Difference Between Natural-Law Theory and Legal Positivism*, in 2 NATURAL LAW, *supra* note 67, at 138.

<sup>77</sup> The traditional naturalist view would go beyond the bare assertion of the minor premise and assert a particular substantive standard of justice for international economic law, derived from a philosophical or theological account of objective morality. Modern naturalism would assert, in the limited naturalist version, that international economic law, as is required of all law, must conform to the basic morality of law in order to have such status. However, these claims are more limited than the moral claims which traditional naturalism might impose on international economic law. The open naturalist view would assert that international economic law, at least in the context of dispute resolution, must have recourse to some theory of justice, but would not specify or defend any particular theory, asserting rather the link itself. Thus, one could say that the McDougal/Lasswell approach to international law is a form of naturalism in that it does not attempt to argue for the key values of a universal order of human dignity as part of its theory of law, but does maintain that a link between law and these values, however established; accordingly it plays an essential role in the appraisal and critique of public order systems. See MYRES S. MCDUGAL & ASSOC., *STUDIES IN WORLD PUBLIC ORDER* 16, 21-22 (1960).

normative one.<sup>78</sup> In *The Concept of Law*, for example, H.L.A. Hart provides a sophisticated account of law as a system of primary and secondary rules.<sup>79</sup> The conflict between this view of law and naturalism lies not in any positivist account of the formal qualities of legal systems, but in the separability thesis: the assertion that such a view is a sufficient account of the nature and function of law, separate from any reference to the law's morality.<sup>80</sup>

Using Hart's theory as an example, the positivist view of international economic law can also be expressed syllogistically, illustrating the contrast to natural law as well:

(1) international economic law consists of the regulation of international economic activity through law;

(2) all law, insofar as it claims the status of law, must consist of a system of primary and secondary rules;

(3) therefore, international economic law, insofar as it claims to be law, must consist of a system of primary and secondary rules.

Any mention of justice is absent from the minor premise, and therefore necessarily absent from the conclusion.

What is particularly noteworthy for our purposes is that, in spite of his insistence on the formal independence of law and morality as a definitional and constitutive matter, Hart took great pains to point out that law in fact could not and should not be evaluated independently from morality. To begin with, Hart acknowledges a fundamental similarity between a narrowly defined version of justice as fairness and certain essential properties of law

<sup>78</sup> Law, in this view, is to be seen as "merely" or "essentially" certain types of statements, declarations, or rules that qualify as law because of their formal characteristics and not by reference to moral principles. Hart, for example, characterizes law's "essence" as the union of primary and secondary rules, and contrasts this to traditional naturalist accounts of this essence as consisting of the necessary link between law and morality. See HART, *supra* note 41, at 151-55.

<sup>79</sup> The "primary" rules of law governing behavior recognizable in primitive and modern legal systems are themselves established, administered, and changed through the application of "secondary" rules which characterize mature legal systems, chief among these being the rule of recognition. See *id.*

<sup>80</sup> See *id.* at 185-87; see, e.g., David Lyons, *Moral Aspects of Legal Theory*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 49 (Marshall Cohen ed., 1984).

as a rule system.<sup>81</sup> Moreover, of all the claims of morality, the claims of justice are privileged in their criticism of law, because justice, in the sense of treating like cases alike, is very much like the notion of proceeding by a rule.<sup>82</sup> However, in neither case does Hart admit the claim that legal systems and laws, in order to be so considered, must comply with the broader claims of natural law, or with the claims of justice more broadly defined, which are very distinct from the nature of law.<sup>83</sup> Law's morality, broadly speaking, is not rooted in law itself, but in the moral obligations we are subject to in private and public life on the basis of independent philosophical or theological commitments. Nevertheless, Hart does contemplate and indeed advocate the moral critique of substantive law. In fact, he considers the positivist definition of law to facilitate an accurate moral critique of law.<sup>84</sup>

From a positivist standpoint, therefore, the demands of justice on international economic law will take the form of policies to be pursued through such law, either as a matter of independent moral obligation or simple prudence. The positivist argument presupposes no necessary link between international economic law and justice, or any other value, at a definitional level, beyond a shared concern for the application of rules. To the extent international economic law is created or evaluated with reference to the substantive claims of justice, this may reflect simply the decision of the law-makers or analysts that it is prudent or useful for international economic law to be just. Alternatively, a positivist might conclude that international economic law must be just, but

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<sup>81</sup> In Hart's account of the relationship of justice to law, he admits a close link between the administration of law and Aristotelian notions of equality in distribution and correction. See HART, *supra* note 41, at 160-62.

<sup>82</sup> See *id.* at 161.

<sup>83</sup> Hart thus explicitly relies on a narrow Aristotelian concept of specific justice, distinguishing it from broader moral claims. This is vital for him because, as we have seen, he admits a special link between this sort of justice and law. See discussion *supra* Section 2.1. If he accepted the broader view of justice, it would both resemble less the administrative requirements of rule systems and in fact admit the entire naturalist argument.

<sup>84</sup> Hart contends that the naturalist assertion, that unjust laws are not laws, is muddled and merely confuses the issues at stake. He suggests, instead, that the conflict is precisely over obedience to a valid law that may nevertheless be "too iniquitous to obey or apply." See HART, *supra* note 41, at 205.

As Hart explains, a positivist analysis of law squarely presents us with the choice among greater and lesser evils and injustices involved when, for example, later courts are called upon to judge liability or guilt under Nazi statutes. See *id.* at 208-12.



for reasons of obligations rooted in political or moral philosophy, rather than its nature as law.<sup>85</sup> However, in neither case is there any sense in which positivism is an obstacle to or substitute for the normative evaluation of international economic law, nor does it diminish the importance of theories of justice to such an evaluation on independent moral or prudential grounds.<sup>86</sup>

### 2.3. *International Economic Law and the Claims of Justice*

One's view of the nature and force of the actual claims of justice on international economic law will differ according to one's position on the relation of law to morality generally, and according to one's substantive theory of justice.<sup>87</sup> It is beyond the scope of this Article to address all substantive theories of justice and the richness of their possible claims on international economic law, nor will this Article fully develop one substantive position on justice and apply it to the richness of issues in international economic law. Rather, what this Article will attempt in what follows is to suggest, in an illustrative manner, how theories of justice could entail particular claims on international economic law. In the section which follows, this type of general relationship will be explored in connection with the trade linkage issue.

First, and most importantly from a Western standpoint, the claims of justice will affect the threshold question of the rule of law in international economic relations, and on this there is wide agreement. Fundamental to any conception of Western justice is a commitment to the rule of law.<sup>88</sup> Such a commitment is also recognized by traditional trade theorists as a cornerstone of our attempts to regulate international economic relations through in-

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<sup>85</sup> Of course, a positivist's particular view of the requirements of justice in international economic law will depend on the substantive theory of justice to which that positivist is committed.

<sup>86</sup> In fact, one can extrapolate from Hart's writings that positivism facilitates the normative evaluation of international economic law, and might, in some limited way, even require it.

<sup>87</sup> There is, however, no view of international economic law that does not presuppose or entail some answer to the question of what constitutes the Right Order, with the possible exception of a chaotic one. Even an anarchic view of international law embodies one view of the Right Order.

<sup>88</sup> See Aristotle, *Politics*, in ARISTOTLE, *supra* note 29, at 598 ("[L]aws, when good, should be supreme."); CAMPBELL, *supra* note 21, at 23-27 (noting that the rule of law ideal is linked both to substantive justice—consistent application of just rules—and formal justice—consistency of rule application as an independent principle of justice).

ternational economic law.<sup>89</sup> This commitment to the rule of law as a principle of western justice necessarily implies that international economic law systems, in particular their institutional mechanisms, are subject to evaluation and critique according to how effectively they uphold, advance, or undercut the rule of law in international economic relations.<sup>90</sup>

Western theories of justice can also serve to justify, from a normative standpoint, the fundamental economic concept of liberalization of trade. The core trade and integration commitment to liberalize trade naturally reflects the principles of trade economics, in which liberalized trade contributes to increased welfare due to gains in efficiency and the unfettered operation of comparative advantage. In doing so, however, liberalized trade also contributes directly to the achievement of the core aim of liberal justice, in that such welfare increases are a necessary precondition to a more just distribution of wealth and an improved standard of living for the least advantaged.<sup>91</sup> Trade liberalization also directly reflects the fundamental commitment to individual liberty common to all Western theories of justice, in that it di-

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<sup>89</sup> JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 85-88 (1989) (arguing that a rule-oriented approach should predominate in international economic relations). *But see* Phillip R. Trimble, *International Trade and the "Rule of Law,"* 83 MICH. L. REV. 1016, 1030 (1984-85) (suggesting that GATT's major advantage lay in its ambiguous, flexible, and non-legal approach).

In fact, the modern international economic law movement has been at the forefront of the expansion of the rule of law in international relations generally. *See* John H. Jackson, *International Economic Law: Reflections on the "Boilerroom" of International Relations,* 10 AM. U. J. INT'L L. & POL'Y 595, 596 ("[I]t is plausible to suggest that ninety percent of international law work is in reality international economic law in some form or another."); Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations,* 17 NW. J. INT'L L. & BUS. 398, 399 (1996-97) ("[International economic law] has become one of the most important foreign policy instruments for promoting not only economic welfare but also individual freedom and rule of law.").

<sup>90</sup> *See generally* Petersmann, *supra* note 89, at 428-29, 431, 451 (evaluating rule of law aspects of select international economic law institutions).

<sup>91</sup> *See* Petersmann, *supra* note 89, at 400 (noting that "market institutions" regulated by economic law "are an indispensable complement of human rights for [the promotion of] human well-being"). *See generally* CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 8, 203-22 (1997) (noting that markets play an important, albeit limited role in a basic rights system, for example in the development of constitutional democracies in Eastern Europe). This assumes, of course, that the distributive justice issues are also addressed. *See infra* notes 105, 109, 128, 146.

rectly expands the scope for unfettered individual decision-making in economic activity.<sup>92</sup>

Justice also plays a central role in the evaluation of international economic law institutions. Institutions created through international economic agreements, such as the World Trade Organization (“WTO”) and the NAFTA Commission, can be analyzed from a variety of perspectives independent of moral and political philosophy. However, a justice perspective can clarify the implications of the design and operation of such institutions for the realization of our fundamental values, affecting for example how trade institutions reach decisions and resolve disputes.<sup>93</sup>

### 3. JUSTICE AND THE “TRADE AND” PHENOMENON

So far, the assertion that the claims of justice are essential to the analysis of international economic law is not likely to excite much controversy, even among those who maintain what one scholar has termed the “Efficiency Model” of trade law in which trade is strictly a matter of economic efficiency and welfare.<sup>94</sup> That is, in part, because the issues discussed thus far, such as the rule of law, elimination of trade barriers, and the construction and operation of trade institutions, can be seen from the vantage point of traditional economic theory as simply part of what trade is “about.”<sup>95</sup>

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<sup>92</sup> See Petersmann, *supra* note 89, at 400 (noting that properly functioning market institutions (i.e., markets regulated by economic law) are an indispensable complement of human rights for promoting individual autonomy). On this view government intervention in trade through tariffs and non-tariff barriers, for example, is inadvisable insofar as it reduces individual economic liberty.

<sup>93</sup> For example, Ernst-Ulrich Petersmann’s work applying constitutionalism theory to the WTO and other international economic law institutions points out several aspects of trade liberalization systems which advance or reflect fundamental liberal commitments to justice in social and economic relations, including: separation of powers, protection of fundamental rights, necessity and proportionality rules, and democratic participation. See *id.* at 429-32.

<sup>94</sup> See Jeffrey L. Dunoff, *Rethinking International Trade*, in Symposium, *Linkage as Phenomenon: An Interdisciplinary Approach*, 19 U. PA. J. INT’L ECON. L. 201 (1998); *infra* notes 130-31 and accompanying text.

<sup>95</sup> Of course, there may be some controversy about the precise outcomes that different normative theories may dictate. For example, to the extent constitutionalism theory suggests that binding dispute resolution is to be preferred on normative grounds over simple advisory opinions, this claim might be resisted by those who see the decision as a purely functional or political one. See *supra* notes 89-90.

However, the implications of justice for international economic law become more controversial when one moves beyond these sorts of issues to a consideration of other trade policy issues raised by the current "trade and" debate. This debate forces us to consider questions involving gross economic inequalities, conflicting concepts of human dignity and environmental protection, other heavily value-laden issues such as "culture" and "property," and the role of such questions in trade law at all. In discussing linkages such as "trade and development," "trade and labor," "trade and the environment," and "trade and human rights," we are delving more deeply and perhaps more problematically into the nature of the relationship between trade and justice.

### 3.1. *Recognizing the Linkage Between Justice and the "Trade and \_\_\_\_" Debate*

Each "trade and \_\_\_\_" debate has, at its root, a question or series of questions which are about justice. Perhaps the most fundamental question is this: Who shall we trade with, and on what terms? More particularly, we may ask the following: What are the moral implications for us if our trading partners are, as a whole, much poorer than ourselves?<sup>96</sup> What if our trading partner's society is highly stratified, such that the gains from trade only go to a few?<sup>97</sup> What if a trading partner has a different or no conception of environmental harm and environmental protection?<sup>98</sup> What if our trading partners have a radically different (or lack any) concept of human dignity?<sup>99</sup> Can we use the trading system to redistribute global wealth across states, encourage more equitable distributions of wealth within states, change or enforce human dignity laws, or protect the environment in such cases, even at some cost to liberal trading principles? Should we?

It is the main contention of this Article that these questions, and the similar questions underlying each of the major "trade and" debates, are inescapably moral questions, i.e., they are questions of justice. They are justice questions because they are questions of order, and they are inquiries into the Right Order for the

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<sup>96</sup> See *infra* notes 100-08 and accompanying text.

<sup>97</sup> See *infra* notes 109-14 and accompanying text.

<sup>98</sup> See *infra* notes 115-24 and accompanying text.

<sup>99</sup> See *infra* notes 125-31 and accompanying text.

given set of social relationships they presuppose or establish.<sup>100</sup> They are questions of justice because their resolution depends upon our making decisions as to the allocation of social goods and social burdens, and may involve an investigation into the propriety of certain gains and the correction of improper gain.<sup>101</sup>

The link between trade and the inequalities of various kinds that exist between trading states is a fitting place to begin exploring this contention, as the link is an ancient and perhaps constitutive one. On the one hand, the theory of comparative advantage suggests that certain inequalities are the *sine qua non* of trade, in that it is the disparity in resource distribution which offers trading states the key opportunity to specialize.<sup>102</sup> However, the more troublesome aspect of the link between trade and inequalities in levels of development among states has also been recognized since the early days of the study of trade itself, consisting of the manifold opportunities for outright predation and conquest,<sup>103</sup> as well as for the pursuit of other inherently self-serving policies such as mercantilism,<sup>104</sup> presented to developed states in their trade relations with the less-developed world.

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<sup>100</sup> That they involve relationships across societies and national boundaries, it is argued, need not alter the basis of moral obligation. See *supra* note 61.

<sup>101</sup> For example, Dunoff writes that trade and issues such as intellectual property highlight the fact that interstate, distributional questions are at the center of international trade policy, challenging one view common in the literature that cooperation or collaboration, rather than distribution, is the key issue. See Dunoff, *supra* note 94.

<sup>102</sup> See, e.g., PAUL A. SAMUELSON, *ECONOMICS* 668 (1973) (noting that the starting point for comparative advantage is diversity in conditions of production between different countries).

<sup>103</sup> In his seminal work, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS*, Adam Smith writes:

Folly and injustice seem to have been the principles which presided over and directed the first project of establishing [the American] colonies; the folly of hunting after gold and silver mines, and the injustice of coveting the possession of a country whose harmless natives, far from having ever injured the people of Europe, had received the first adventurers with every mark of kindness and hospitality. . . . [I]t was not the wisdom and policy, but the disorder and injustice of the European governments which peopled and cultivated America.

ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 350-51 (Kathryn Sutherland ed., 1993).

<sup>104</sup> See *id.* at 351-52.

When [the North and South American colonies] were effectuated, and had become so considerable as to attract the attention of the mother country, the first regulations which she made with regard to them had

The problem of trade and inequality is a paradigmatic case of the link between trade and justice. The distribution of social goods between the richer and the poorer is a central concern of theories of justice.<sup>105</sup> Public debate concerning the relations between richer and poorer states as a matter of justice peaked within international economic law with the birth and demise of the movement for a New International Economic Order ("NIEO").<sup>106</sup> While the NIEO may have failed as a political matter, this does not mean that the arguments asserted by NIEO advocates have been refuted.

One can discern in the debate over trade and development a range of positions traceable to the principal Western substantive theories of justice. Perhaps the most familiar reply to the question "What is our duty to developing states in structuring our trade relationships?" might consist of utilitarian justifications for various types of assistance to underdeveloped states, such as an appeal to increased stability in international relations or to the creation of larger and stronger markets of consumers for our products.<sup>107</sup> An egalitarian liberal approach, however, might reject such utilitarian reasoning despite an apparent agreement in outcomes, and argue instead for the existence of a moral duty to aid poorer states based on deontological moral principles. Rawls' difference principle, for example, could be extended to cover eco-

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always in view to secure to herself the monopoly of their commerce; to confine their market, and to enlarge her own at their expense, and, consequently, rather to damp and discourage, than to quicken and forward the course of their prosperity.

*Id.*

<sup>105</sup> This is certainly true as applied to domestic society, and, it is argued, would hold equally true where the richer and the poorer are states and not just individuals. See *supra* note 61.

<sup>106</sup> The New International Economic Order, or NIEO, was a movement among developing countries within the United Nations ("UN") to force a shift in international economic relations away from structurally disadvantageous policies towards a more equitable relationship between developed and developing countries. See *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201, U.N. GAOR, 6th Sess., Supp. No. 1, at 3, U.N. Doc. A/9559 (1974), reprinted in 13 I.L.M. 715. Despite the adoption of the founding resolution and the *Charter of Economic Rights and Duties of States*, G.A. Res. 3281, U.N. GAOR, Supp. No. 1, at 50, U.N. Doc. A/9631 (1975), the movement has been widely acknowledged as a failure. See generally Bartram S. Brown, *Developing Countries in the International Trade Order*, 14 N. ILL. U. L. REV. 347 (1994); Robert E. Hudec, *GATT and the Developing Countries*, 1992 COLUM. BUS. L. REV. 67.

<sup>107</sup> See SMITH, *supra* note 103, at 308-09.

conomic relations with less advantaged states, leading to a duty to effect wealth redistributions across national boundaries beyond those that are justifiable on utilitarian lines.<sup>108</sup> A libertarian view, in contrast, would question such principles and resist any such trans-boundary redistribution in favor of some minimal notion of procedural fairness or fairness of opportunity on the part of less advantaged states.<sup>109</sup>

Whatever one's view as to the appropriate answer to these questions, simply understanding the trade-development link as a justice issue involving the problem of inequality implies that we are not free to govern our economic relationships with poorer nations solely with regard to the politics of the moment. Moreover, viewing the trade and development linkage as a justice matter raises the question of how one can consistently be a redistributive egalitarian at home and a libertarian or political realist abroad.<sup>110</sup> Given the nature of our concept of justice, it becomes incumbent on those seeking to establish an economic order that does not consider the claims of less developed states to articulate a normative basis for this position. In other words, they must explain why such an order would be Right.

A related, and far more controversial, inequality problem involves the inequalities within the societies of trading states and whether, as a matter of distributive justice, trading states are obligated to take into account such inequalities in their trade and eco-

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<sup>108</sup> See D'Amato & Engel, *supra* note 61, at 1047; STONE, *supra* note 61, at 255-60.

<sup>109</sup> The classic libertarian-egalitarian conflict involves a fundamental disagreement over the moral legitimacy of state-effected wealth redistribution. In this context, the debate would be over the legitimacy of such redistributions effected through trade agreements between states. However, even if one concedes to the libertarian the assertion that the free market may be the best mechanism for basic distribution questions, the criticism can be made that the moral basis for this position is substantially undermined by the reality of inequality, particularly gross inequality, in natural "endowments." What is there to guarantee that the open market exchanges do not further erode or deny the basic rights of the weaker party? The liberal objection, that there can be no freedom where two sides are grossly unequal, emerged in the early nineteenth century in the work of T.H. Green and others. See KELLY, *supra* note 63, at 306. Therefore, the state has a role in setting the basic conditions for a meaningful exchange, a moral exchange. *Id.*

<sup>110</sup> I am not so much questioning the validity of a libertarian view, but the consistency of simultaneously holding both commitments.

conomic integration systems.<sup>111</sup> At a normative level, the assertion that distributive inequalities within a society are justice matters can scarcely be gainsaid. But do states have a duty to consider inequality problems within their trading partners? Moreover, at an empirical level, one can distinguish between the distributive inequalities which might exist in a state relatively independent of trade and its effects, and the well-recognized fact that the effects of trade itself can vary widely with regard to groups within trading states; some groups may suffer great harm while the state as a whole prospers.<sup>112</sup> Even if one were unwilling to recognize a duty to consider domestic inequalities generally, might not this empirical distinction between “types” or “sources” of inequality suggest a duty to consider trade-related inequalities?

From a utilitarian viewpoint, one might consider such concern useful or desirable but decide that the significant practical difficulties in responding to these trans-boundary concerns, and the potential friction from claims of meddling in internal affairs, would render the cost of such policies too high in relation to the benefit potentially to be achieved. A liberal Kantian analysis of international law, however, would suggest that recognition of such concerns and the ensuing responsibility are unavoidable as a matter of respect for individual rights.<sup>113</sup> A communitarian analysis would agree with the need to consider the effects of trade on the disadvantaged in a trading partner's society, but would suggest that the relevant unit of analysis is the group rather than

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<sup>111</sup> Traditionally, the economic disadvantages of individuals within their own states were not considered a legitimate subject for international law, which favored the black box or billiard ball approach to state relations. Recently, however, this view of international law has undergone significant criticism and modification from the human rights movement and particularly from feminist theorists of international law, who have attacked the public/private distinction as inimical to the rights of women within state societies. See Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 625-30 (1991).

<sup>112</sup> See JACKSON, *supra* note 89, at 16; see also Philip Alston, *International Trade as an Instrument of Positive Human Rights Policy*, 4 HUM. RTS. Q. 155, 177 (1982) (noting that the ILO advocates trade liberalization that addresses possible adverse labor and distribution effects); Enrique R. Carrasco, *Law, Hierarchy, and Vulnerable Groups in Latin America: Towards a Communal Model of Development in a Neoliberal World*, 30 STAN. J. INT'L L. 221, 275 (1994) (noting that economic neoliberalism has not addressed, and may have worsened, the condition of vulnerable groups).

<sup>113</sup> See Tesón, *supra* note 61, at 81-84 (arguing that human rights protections are fundamental to international law and the legitimacy of states).



the individual, and that trading states have an affirmative duty to act to improve the plight of vulnerable groups.<sup>114</sup> In contrast, a libertarian might limit a state's duty, both at home and abroad, to attempts to encourage policies in our trading partners that favor individual rights and the protection of private property.<sup>115</sup> In any event, the simple assertion that, whatever one's duty is to one's less fortunate fellows, that duty does not apply across national boundaries, is not likely to go unchallenged in contemporary debates over the justice of failing to consider the stratification of one's trading partners.<sup>116</sup>

The trade and environment linkage, by contrast, has been at the forefront of the linkage movement.<sup>117</sup> Environmentalists are

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<sup>114</sup> See Carrasco, *supra* note 112, at 305 (arguing that economic regulation must give priority to conditions affecting vulnerable groups).

<sup>115</sup> Alternatively, a libertarian might maintain that states have no role at all with respect to the domestic policies of other states, stemming from a view of states as "libertarian individuals" facing regulatory intervention both horizontally from one another and vertically from international regimes.

<sup>116</sup> From the perspective of one's moral obligation, why should our concern for those with an inequitable share of resources be affected by the intervening modality of a state? Sovereignty is the traditional answer, but it may not be an adequate one. Perhaps it is legitimate to assert that sovereignty prevents us from forcing our notion of equitable distributions on another trading partner. But might it not be the case that sovereignty is more likely to be raised by us, ourselves, to avoid the assertion that we have a duty, rather than by the intended beneficiaries of our concern? With respect to the collapse of the Mexican economy and the devaluation of the peso in 1994, Jorge Castaneda asserts the complicity of the United States in its decision to ignore the undemocratic politics and unequal wealth distribution accompanying Mexico's trade liberalization reforms. "[N]o one, it seems, was willing to analyze the overwhelming evidence of abuses and financial mismanagement in Mexico since 1988. . . . Those surprised by the economic collapse and the stench of it all had simply neglected to open their eyes." JORGE G. CASTANEDA, *THE MEXICAN SHOCK: ITS MEANING FOR THE UNITED STATES* 4-5 (1995).

<sup>117</sup> The trade and environment linkage has been actively in the public eye since the early 1990s. Thomas J. Schoenbaum notes that, while the GATT established a Group on Environmental Measures and International Trade in 1971, it did not meet until 1991. See Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 268 (1997). The early 1990's also saw the publication of path-breaking works such as Daniel Esty's *Greening the GATT: Trade, Environment and the Future*; see generally ESTY, *supra* note 2, and a series of GATT panel reports destined to have a significant impact on the trade and environment debate. See GATT Dispute Settlement Panel Report on U.S. Restrictions on Imports of Tuna, GATT Doc. DS20/R (1994), reprinted in 33 I.L.M. 839; GATT Dispute Settlement Panel Report on U.S. Restrictions on Imports of Tuna, Aug. 16, 1991 GATT B.I.S.D. (39th Supp.) at 155 (1993), reprinted in 30 I.L.M. 1594 (the Tuna/Dolphin decisions).

attracted to the possibility of putting the tremendous leverage afforded by the threat of trade sanctions in the service of ensuring compliance with environmental protection obligations,<sup>118</sup> and have concerns about the trade regulatory system adversely affecting their regulatory goals and systems.<sup>119</sup> In much the same way, the trade community fears the environmentalists' interference will undermine the trading system.<sup>120</sup>

It is not necessarily clear, at first blush, how the trade and environment linkage reflects a debate over justice. Even if one were to concede an ethical obligation to protect the natural world,<sup>121</sup> how does this come within that category of obligations we recognize as justice, for example, in the traditional Aristotelian sense of an allocation of social goods, since it involves obligations to non-human entities?<sup>122</sup>

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<sup>118</sup> This is evidenced by several recent treaties such as the Basel Convention and the Montreal Protocol. See, e.g., Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, S. TREATY DOC. NO. 5 (1991), 28 I.L.M. 657; Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (entered into force Jan. 1, 1989).

<sup>119</sup> Environmentalists' concerns include the fear that trade liberalization principles such as national treatment will be used to override conflicting provisions in statutory and treaty-based environmental protection measures, as in the Tuna/Dolphin example, and that the principle of comparative advantage will be used to legitimize a "race to the bottom" in terms of lax environmental protection laws. See Daniel C. Esty, *Unpacking the "Trade and Environment" Conflict*, 25 LAW & POL'Y INT'L BUS. 1259, 1260-61 (1994).

<sup>120</sup> This includes the threat that legitimate protective devices which constitute exceptions to trade disciplines can easily be deployed for illegitimate protectionist purposes. See JACKSON, *supra* note 89, at 201; Roessler, *supra* note 2, at 227. Additionally, there is a concern that permitting domestic measures designed to compensate for different levels of environmental regulations will undermine differences in comparative advantage resulting from sovereign policy choices and constitute a form of meddling in states' environmental policies. See generally Esty, *supra* note 119, at 1261-62 (providing a general summary of trade-oriented concerns about environmental regulation).

There is also a concern that trade related environmental protection is not the optimal tool for environmental protection, threatening to introduce new and unproductive sources of conflict into an already contentious trade community with little to show for it in either environmental protection or trade enhancement. See Roessler, *supra* note 2, at 228.

<sup>121</sup> Advocates of a human ethical obligation to protect the environment have done so on a variety of grounds. See generally RODERICK F. NASH, *THE RIGHTS OF NATURE* 121-60 (1989) (reviewing the historical development of ethical theories affording rights to non-humans and the natural world).

<sup>122</sup> The classical concept of justice employed here—justice as Right Order—typically envisions Right Order as right relationships among human beings.

The trade and environment debate does, in fact, raise issues which can be considered to be justice issues, or issues involving Right Order decisions. First, the broad Platonic vision of justice as Right Order could be construed to include efforts to order the relationships between human beings and the natural world according to what is Right.<sup>123</sup> Debates over the acceptable limits of accommodation of one's ethical obligation to the environment in the face of competing economic interests presuppose such an extension. These debates also reflect a divergence between consequentialist approaches to this issue, such as utilitarianism, which can justify no link at all or a weak or flexible one,<sup>124</sup> and non-consequentialist forms of moral reasoning, such as Kantian morality and other forms of egalitarian liberalism, which reject this sort of reasoning where ethical obligations to the environment are concerned. For example, Richard Stewart argues that in evaluating the competing interests at stake in the trade and environment linkage, a utilitarian analysis based on Mill is more effective rather than non-consequentialist forms of analysis, a position challenged by Robert Housman explicitly on Kantian grounds.<sup>125</sup>

Second, public decisions concerning environmental protection can be seen as Aristotelian allocations of social benefits and burdens, in that such decisions inevitably involve the allocation of rights and duties involving the scope of permitted environmental activity. The "Environmental Justice" movement adopts this approach, examining the extent to which the burdens of environmental regulation, and the costs of environmental degradation,

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One may well ask if our obligation to act justly embraces duties to non-human entities such as plant or animal species or ecosystems.

<sup>123</sup> The effort to structure the human-nature relationship according to a recognition or grant of legal rights in the natural world would be one example of this view. See generally CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING?* (1996).

<sup>124</sup> Consequentialist moral theories judge the morality of actions solely according to the nature of their consequences. See ALAN DONAGAN, *THE THEORY OF MORALITY* 190 (1977). Utilitarianism is its "most persuasive and most thoroughly investigated variety." *Id.* at 192.

<sup>125</sup> See Robert F. Housman, *A Kantian Approach to Trade and the Environment*, 49 WASH. & LEE L. REV. 1373, 1376-77 (1992); Richard B. Stewart, *International Trade and Environment: Lessons From the Federal Experience*, 49 WASH. & LEE L. REV. 1329, 1332 (1992). Cf. Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265, 275-81 (1991) (arguing that utilitarian and deontological arguments for preservation of biological diversity differ in the scope of effective protection they justify).

are disproportionately borne by the disadvantaged, and treating this as a problem of distributive justice.<sup>126</sup>

The trade and human rights debate also raises difficult justice problems. They are justice problems because they involve the allocation of basic social goods such as rights, which in our tradition are perhaps the most highly valued of all social goods. They are difficult because they arise in a context of conflict over fundamental values, as revealed by different states' conceptions of individual and group rights,<sup>127</sup> and different accounts of the place of such rights,<sup>128</sup> and the appropriate response to such conflicts,<sup>129</sup> within international economic law.

More specifically, the trade and human rights linkage involves a debate over the effects of trade and trade law on the allocation of human rights and on their effectiveness.<sup>130</sup> The most contro-

<sup>126</sup> See generally Gerald Torres, *Environmental Justice: The Legal Meaning of a Social Movement*, 15 J.L. & COM. 597 (1996) (surveying history of and objections to the environmental justice concept).

<sup>127</sup> A key aspect of Western conceptions of justice is respect for fundamental human rights. This commitment is the basis for the tremendous post-war development of human rights protection within public international law. But not all trading states share the same conception of human rights, whether within the Western tradition or outside of it, and not all trading states share the same view of how differences in human rights and the values they reflect should be ignored, accommodated or challenged in international economic relations.

<sup>128</sup> There is some consensus concerning a core of individual economic rights such as labor and employment rights, but no consensus as to how such rights should be taken into account in trade relationships. See *WTO Singapore Ministerial Declaration*, WT/MIN(96)/DEC/W (Dec. 13, 1996); 36 I.L.M. 218 (1997) (providing that the WTO affirms commitment to international labor standards but eschews jurisdiction over trade and labor issues, suggesting ILO as forum). There is even less consensus with respect to non-economic human rights and how such rights should figure into trade and integration systems. See Stirling, *supra* note 2, at 1, 8-13, 39-40.

<sup>129</sup> Stirling notes that trade sanctions, paradoxically, are in principle the most effective, and, in practice, often the least effective means of enforcing human rights, as their use is often resented by the target state and is at the same time the subject of political manipulation by interest groups in sanctioning states. See *id.* at 2-3.

<sup>130</sup> Trade agreements can require as a precondition a strengthened rule of law within the trading partners' society, which can have an indirect systemic effect on improving rights protection. Second, specific economically-related rights such as the property rights of innovators can be linked to trade concessions. Third, trade concessions can be used as incentives to reward progressive democratic governments, which can secure human rights reforms and even create more of a ground-swell for further reform. Fourth, trade sanctions can be used as a weapon for ensuring compliance with human rights obligations stemming from other non-economic agreements. Finally, the juridical aspect of

versial form of trade-human rights linkage is the use of trade sanctions as a weapon for ensuring compliance with human rights obligations stemming from other non-economic agreements.<sup>131</sup> Are we morally obligated to use trade agreements or trade concessions to punish human rights violators through economic sanctions for noncompliance with human rights conventions? At a minimum, are we obligated to refrain from granting them trade concessions? Is this a right use of trade?

First, consider the position against linkage, namely that trade relationships with human rights violators ought to continue unabated. It is not difficult to see why this course of conduct would be considered morally questionable on its face, in that continued trade has at least the appearance of contributing to the wealth and economic power of the violators and, in fact, may lead directly to their ability to carry out their repressive practices.<sup>132</sup> This view, however, can be justified on several grounds. A utilitarian has no difficulty in supporting relatively unrestricted trade, if he or she is convinced that the best road towards fuller rights protection in the future is a moderately repressive open market regime in the short term, or a policy of constructive engagement, as the Clinton administration adopted in its China decision.<sup>133</sup> A utilitarian can also justify completely unrestricted trade, on the grounds that trade flows best when it flows freest, and future general welfare increases are the best road to human rights.

In contrast, both egalitarian and libertarian approaches would be opposed to a utilitarian analysis, measuring as it does the utility of rights protection abroad, and our trade-related measures for enhancing it, against the utility of permitting or ignoring rights violations abroad, or of refraining from the potential domestic

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trade agreements and integration systems, to the extent they themselves reflect fundamental concepts of justice such as democratic participation and the rule of law, can also strengthen the human rights climate in international law.

<sup>131</sup> See *id.* at 42-45 (noting that a properly designed sanctions regime can be an effective human rights tool); Alston, *supra* note 112, at 168-69 (noting that the relative inefficacy of sanctions argues for more constructive system of *ex ante* incentives).

<sup>132</sup> Witness the speed with which military equipment and military-oriented exports are suspended even where the general link to human rights is resisted.

<sup>133</sup> See Randall Green, *Human Rights and Most-Favored-Nation Tariff Rates for Product from the People's Republic of China*, 17 U. PUGET SOUND L. REV. 611 (1994) (arguing that supporting economic development in China through MFN and other policies is the best way to promote human rights in China).

trade-related costs of trade-oriented rights measures.<sup>134</sup> As with the trade and environment linkage, the struggle underlying the trade-human rights linkage may be between utilitarian approaches to this issue, which can justify no link at all or a weak or flexible one, and non-consequentialist forms of moral reasoning, such as Kantian morality and other forms of egalitarian liberalism, which reject this sort of reasoning where human rights are concerned.<sup>135</sup> As with the trade and inequality link, the trade and human rights link forces us to consider the consistency of our commitments, specifically whether one can be an egalitarian liberal or libertarian as far as rights issues at home go, and a utilitarian on rights issues abroad.

### 3.2. *Changing the Linkage Discourse*

Despite the justice implications of the linkages discussed above, linkage issues may not always be approached or even recognized as justice questions. The dominant perspective of both sides to any linkage issues tends towards what can be characterized as the External View, in which each opposing camp on the linkage issue views the other camps' claims and modes of analysis as external to its own concerns and commitments. Within the trade policy side, the External View is best represented by those adhering to the Efficiency Model, trade theorists who view trade law principally in economic terms as a matter of enhancing efficiency and the general welfare.<sup>136</sup> From the viewpoint of Efficiency Model adherents, the non-trade camp is seen as trying to get in the way or "gum up the works" with what are at best extraneous concerns such as human rights or environmental protec-

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<sup>134</sup> One might even see a curious alignment between egalitarian and libertarian views on this point, as both theories place a fundamental emphasis on individual rights and their protection as a cornerstone of a just society.

<sup>135</sup> See Tesón, *supra* note 61, at 64-65.

<sup>136</sup> Adam Smith is the classical exponent of the view that the unimpeded free market is the best guarantor of ultimate economic well-being. See KELLY, *supra* note 63, at 303; SMITH, *supra* note 103; see also JACKSON, *supra* note 89, at 8-9 (naming efficiency-based increases in general welfare as the pre-eminent goal of trade law); Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices*, in 2 FAIR TRADE AND HARMONIZATION, *supra* note 2, at 95, 108 ("The GATT's economic goal is to promote, through liberal international trade policies, the greater effectiveness of national economies.").

tion,<sup>137</sup> and what may be at worst simple protectionism.<sup>138</sup> The non-trade side of the External View can be represented by the "Green" movement in international trade, for whom the international economic law regime is seen as adversely affecting its efforts to establish their vision of a just order with regard to the environment.<sup>139</sup>

Recognizing trade linkage questions as justice questions inevitably changes our approach to the trade linkage debates. First of all, regarding the framework of the debate, the External view becomes ultimately untenable, because trade policy cannot be considered as independent of the concerns raised by the various trade linkage debates. The alternative, or "Integrated View," suggested by a justice perspective requires recognition of the fact that conflicts between traditional trade policy and other areas of social policy involve branches of the same tree, and that this tree is the construction of a just society.<sup>140</sup> Environmental and human rights advocates, for example, cannot be viewed as bounders or gate crashers at the trade policy party. Rather, they raise fundamental questions that are inescapable within trade policy, for they raise questions of justice, and trade policy exists and operates within the larger inquiry as to justice.

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<sup>137</sup> See Charnovitz, *supra* note 3, at 23 (citing objection by GATT and WTO members to efforts in 1991 and 1994 to begin work on labor and environment issues, on the basis that such issues were not "trade issue[s]"); Hudec, *supra* note 136 (arguing that GATT has a good reason to be skeptical of linkage claims).

<sup>138</sup> See Charnovitz, *supra* note 3, at 32 ("Simplistic demands for drastic trade remedies against so-called eco-dumping or social dumping sometimes bear a striking similarity to more conventional forms of protectionist rhetoric . . .") (citing then-GATT Director General, Peter Sutherland).

<sup>139</sup> The outcry over the GATT Tuna-Dolphin dispute is a classic example of this framework, in which the trade community's rules and fora are viewed by the environmentalists as serious obstacles to the accomplishment of their objectives, in that case the protection of dolphins through the United States Marine Mammal Protection Act. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-3, 55 U.N.T.S. 187; *GATT Dispute Settlement Panel Report on U.S. Restrictions on Imports of Tuna*, *supra* note 117. See generally James Cameron, *The GATT and the Environment*, in PHILLIPE SANDS, GREENING INTERNATIONAL LAW 100, 100-21 (1994).

<sup>140</sup> Recognizing the link between trade and justice means a recognition by linkage partisans that their common search for justice binds them far more than their different views divide them, and that each side is engaged in a search for justice, and seeks to enact their vision of it in a given area of social concern. The problem, of course, is that those areas of social concern, in fact, overlap, and each community may have conflicting visions of the Right Order and conflicting criteria of justification of justice.

Second, in answering linkage questions, we must consider the implications of our various substantive theories of justice on each of these issues. The fact that they are justice questions means that the debate and resolution of trade linkage issues must include comprehensive and systematic normative analysis, which is an essential part of how we answer any question involving social goals and social values.<sup>141</sup> From a justice perspective, linkage debates are not merely disputes over the accommodation by trade policy of exogenous priorities, but rather involve disagreements at the level of normative theory, over the proper construction of a just society. Particular linkages such as “trade and inequality,” “trade and human rights,” and “trade and the environment” present a series of debates within and among substantive theories of justice, and concerning the relationship of international economic law to justice. The fact that there is disagreement reveals that, with regard to each particular area of social concern, we lack consensus as to what, precisely, the Right Order should be.<sup>142</sup>

Rendering such normative conflicts more transparent is all the more critical in view of the fact that the Efficiency Model would, at first glance, seem to stand outside the Justice question, suggesting explicitly or implicitly that it takes no position on justice questions, and that considerations of justice (often read as distributional equity) have no place in trade law so understood.<sup>143</sup> This Article has argued that trade linkage questions cannot be definitively resolved a-normatively, and that it is an error of the Effi-

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<sup>141</sup> See Charnovitz, *supra* note 3, at 21 (noting that one similarity between environmental and labor issues in trade is that “[m]orality has always been a concern with labour[sic] and is becoming increasingly so with the environment”). There are, of course, other ways of analyzing these issues which are equally important, such as the descriptive and prescriptive modes of the social scientific tradition, which can complement, but not replace, a normative analysis or a normative answer.

<sup>142</sup> Circumstances have changed; technology has advanced; international economic law has developed; fundamental values are in conflict; and the range of options for “rightly ordering” each of these corners of society is represented more fully by the views of the trade and non-trade partisans taken together, than by either side separately.

<sup>143</sup> Trade law, on this view, is about comparative advantage, efficiency, and welfare. See, e.g., Ronald Brand, *Sustaining the Development of International Trade Law*, 21 VT. L. REV. 823, 842 (1997) (“The fundamental goal of the WTO system is the reduction of trade barriers through rules consistent with the underlying theory of comparative advantage.”).



ciency Model to consider itself a convenient, neutral manner in which to resolve these issues. There is no such stance.<sup>144</sup>

In fact, when one considers the question of justice and its relation to international economic law, as outlined above, one is immediately struck by the fact that the Efficiency Model of international economic law is actually one response to the question of what constitutes the Right Order.<sup>145</sup> On this view of international economic relations, justice is best served through a system of international economic law that promotes free market exchanges among private parties and within the state "market" for trade agreements. Such market exchanges will promote efficiency, enable comparative advantage to operate, and enhance the general welfare of the market participants.<sup>146</sup> Neoliberal economic arguments against linkages thus presuppose a substantive theory of justice. They are not neutral arguments to preserve trade policy from unwarranted normative baggage, but rather normative arguments towards a different vision of the Right Order.<sup>147</sup>

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<sup>144</sup> Trade linkage issues thus flush the neo-liberal economic trade viewpoint out of its assumed neutrality and into the mudpit of normative brawling, where it belongs.

<sup>145</sup> Put another way, Efficiency Model advocates rely on the positive analysis of economists while ignoring the normative aspects of economic theory, which modern economists themselves take little cognizance of despite a historical tradition of theorizing as to the proper ends of economic activity. See EDW. E. ZAJAC, *THE POLITICAL ECONOMY OF FAIRNESS* 69-78 (1995); Daniel M. Hausman & Michael S. McPherson, *Taking Ethics Seriously: Economics and Contemporary Moral Philosophy*, 31 J. ECON. LIT. 671, 675-76, 677-78 (citing the moral presuppositions and implications of welfare economics, and the intermingling of positive and normative analysis in such economics).

<sup>146</sup> This view may reflect the conclusion that the only professional contribution economists can make to the justice debate is analysis of what contributes to these modest but necessary ingredients in a just society. In that case, the position is consistent with modern economics' eschewal of ethical theory beyond their own methodological limits. See ZAJAC, *supra* note 145, at 76-77; Hausman & McPherson, *supra* note 145, at 671-78 (citing modern economists' relative ignorance of moral theory, and arguing for the importance of moral theory to effective economic analysis). However, it must be recognized that efficiency and welfare, while arguably necessary, are not sufficient, in themselves, to express all our intuitions about just outcomes.

Alternatively, to the extent that this view is an assertion that efficiency is a sufficient justification of outcomes, it runs counter to most liberal theory and ignores the significant distributional issues raised by economic activity. See ZAJAC, *supra* note 145, at 77.

<sup>147</sup> The claims of justice, be it libertarian justice or utilitarian justice, are satisfied on this view solely through maximizing individual economic liberty

Finally, the articulation of trade linkage positions, in terms of substantive theories of justice, makes it possible to recognize potentially useful areas of agreement on a normative level among differing linkage views. At its most basic level, international economic law and policy can be seen as committed to and advancing key tenets of Western theories of justice in the area of economic relations. For example, the core values of free trade and economic integration (increases in general welfare through trade liberalization, nondiscrimination, and the implementation of treaty-based regulatory schemes) reflect core principles of a liberal theory of justice such as liberty, equality of opportunity, and the rule of law.<sup>148</sup> Thus, Efficiency Paradigm advocates and those with other linkage viewpoints can find common ground, for example, in trade linkage approaches that advocate measures which strengthen the rule of law and the effectiveness of institutions in international economic relations as part of a linkage scheme.

### 3.3. *Towards a Just Resolution of Trade Linkage Issues*

Recognizing the link between trade linkage issues and justice can also contribute to a more just resolution of those linkage issues. It becomes possible to evaluate techniques and options for resolving linkage conflicts in an analytic framework that draws out their underlying normative commitments and implications. Various trade policy mechanisms have been developed by states and international economic institutions for managing conflicts among linkage areas.<sup>149</sup> Efficiency alone is an inadequate basis on which to formulate policy in areas which involve so many interests, costs, risks, and opportunities.<sup>150</sup> Furthermore, trade linkage

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and minimizing governmental interference with market decisions, eschewing the distributive or social justice contentions of liberal egalitarian justice.

<sup>148</sup> Cf. Petersmann, *supra* note 89, at 406 (“[I]ndividual liberties and actionable property rights are preconditions for the proper functioning of economic . . . markets, and for maximization of individual autonomy, human well-being, economic efficiency and social welfare in a free society.”).

<sup>149</sup> The current trade linkage debate is dominated by a bewildering variety of issues and techniques, including rule-making issues such as harmonization, domestic versus multilateral standards, and priority schemes for rule conflicts; enforcement issues such as admission criteria, conditionality, suspension of concessions and trade sanctions; and institutional issues including jurisdiction, competence, participation by NGOs, debates over decision-making criteria.

<sup>150</sup> See Dunoff, *supra* note 94; Nichols, *supra* note 7, at 707 (“[T]he multitude of efficient states cannot be narrowed to one by excising all goals except maximization of monetary wealth.”).

issues can not be resolved solely at the level of a choice of technical or doctrinal tools. Techniques to manage these issues involve prioritizing between certain trade liberalization values and other aspects of the liberal view of justice, such as human rights. As such, they contain deeply embedded normative assumptions, which must be addressed as such.<sup>151</sup> A justice perspective may thus serve both to put the quest for efficiency within a larger normative context and to supplement this line of inquiry with a more adequate framework for policy formulation.

One principal practical implication of a normative analysis of trade linkage techniques would be that certain existing policies or practices now considered to be discretionary on the part of the implementing state could come to be seen as in fact obligatory, on the basis of that state's moral obligations to its trading partners. For example, in the trade and development area the principle of asymmetry or preferential treatment for developing countries is a principal instrument in managing inequality problems, and is as old as the GATT system.<sup>152</sup> However, much of the trade between developed and developing countries is conducted under some form of unilateral trade preference program<sup>153</sup> which disfavors to some degree exports of manufactured goods which are directly competitive with the manufactured goods of developed states.<sup>154</sup>

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<sup>151</sup> What is lacking today is a comprehensive analysis from the perspective of the developed states of the ethical relationship between developed and developing states, and the articulation of the implications of such an analysis for the current trading system. This lack of consensus reflects debates, within the West, on justice itself, as well as the debate within trade law between the Efficiency Model and other models of economic justice.

<sup>152</sup> The Havana Charter contained extensive provisions detailing preferential treatment for industrializing developing countries. See Brown, *supra* note 2, at 358-59. Unfortunately, the Havana Charter never went into force; the resulting GATT had a much weaker regime for developing countries; and the amendments adding part IV, in 1966, did not fully remedy the situation. See *id.* at 359.

<sup>153</sup> In 1971, the GATT Contracting Parties approved a waiver authorizing, but not requiring, developed states to extend preferential tariff rates to developing country exports on a non-reciprocal basis for ten years. In 1979, the waiver for the resulting Generalized System of Preferences ("GSP") was made permanent. See *id.* at 362-63. Most developed countries have some form of GSP program, including members of the European Community and the United States. See, e.g., 19 U.S.C. § 2461 (1994).

<sup>154</sup> Despite its widespread implementation, the GSP effort is widely judged a failure, as most often the exports of greatest interest to developing countries are not covered, and the complexity and discretionary nature of the program undermine its utility. See generally Brown, *supra* note 2, at 362-63.

It may be that under some form of redistributive or feminist theory of justice one could articulate a moral obligation to permit the preferential export of competitive goods.<sup>155</sup> Justice may also require that such discretionary unilateral preferences be supplanted by nondiscretionary bilateral treaty commitments for preferential treatment,<sup>156</sup> together with non-discretionary trade-related development aid,<sup>157</sup> and other ways of recognizing inequality in trade relationships.

A second, related effect would be that certain existing linkage tools now considered legitimate, even attractive, might come to be seen as unattractive or even unjust if normatively reevaluated.<sup>158</sup> For example, one linkage tool often employed and advocated in the human rights and environment debates is the practice of trade conditionality, which in this context means linking trade preferences and other advantageous trade treatment with adherence to certain values as reflected in appropriate treaties involving the environment, human rights, etc.<sup>159</sup> This approach is popular

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<sup>155</sup> For example, under the Rawlsian difference principle inequalities are to be justified by their working to the advantage of the least favored, which would mean, in this instance, that preferential or unequal trade treatment must be structured to favor the interests of developing country exporters over developed country competitors.

The ethic of care articulated by feminist philosophers, as applied to international relations, might require a similar result. See Charlesworth et al., *supra* note 111, at 615-16.

<sup>156</sup> Such a transition can play an important interim role in an evolving process of regional integration. See Frank J. Garcia, "America's Agreements"—*An Interim Stage in Building the Free Trade Area of the Americas*, 35 COLUM. J. TRANSNAT'L L. 63, at 98-106 (1997).

<sup>157</sup> See Bernard Cullen, *Philosophical Theories of Justice*, in JUSTICE: INTERDISCIPLINARY PERSPECTIVES, *supra* note 12, at 28 (describing Barry's notion that justice might require a non-discretionary system of interstate development aid).

<sup>158</sup> One broad, systemic effect of a justice perspective on linkage issues might be the elimination of certain options on the basis of a widespread rejection of utilitarianism or consequentialism generally.

<sup>159</sup> One example of this practice is the requirement that EC member and associated states be parties to the European Convention for the Protection of Human Rights and Fundamental Freedom. See Smith, *supra* note 2, at 808-09. Therefore, if a state is to participate in European integration, it must recognize certain human rights norms. The China MFN debate is a key example of this issue, and of the failure of the Clinton administration to follow through on its initial impetus to recognize and respect this link. See Robert S. Greenberger, *Restraint of Trade: Cacophony of Voices Drowns Out Message From U.S. to China*, WALL ST. J., Mar. 22, 1994, at A1. As a result, the liberal view of a just society becomes further fragmented.

with non-trade interest groups, as it suggests in the strongest possible terms the conditioning state's commitment to the relevant aspect of justice linked to the trade benefits in question.<sup>160</sup> This approach is equally unpopular with the neoliberally-oriented trade community, which sees such efforts as a serious threat to the fundamental economic principles of trade theory and a stalking horse for arbitrary discrimination.

The issue of trade conditionality is ideally suited for analysis from a justice perspective. On this issue, the neoliberal economic view of justice militates against conditionality on trade economic grounds, but has no answer when faced with the assertion that such a position undermines other commitments stemming equally from a liberal view of justice, in that it enriches states pursuing values contrary to our own. However, the facially liberal argument in favor of conditionality seems to ignore that, at least with respect to developing countries (often the most popular targets for conditionality due to their relative vulnerability), a wealthy state might be under a moral duty to give preferential trade treatment and even direct aid that might preclude conditionality altogether. In other words, if justice requires that wealthy states assist the development of poorer states through trade preferences and outright wealth transfers, then conditionality would be a violation of that moral duty, regardless of its possible advantages in the pursuit of other aims.<sup>161</sup>

The trade and environment link in particular has highlighted a third area in which a justice perspective may have practical implications, namely the issue of determining the proper forum and decisional criteria for the institutional resolution of trade linkage conflicts.<sup>162</sup> Institutional dispute settlement bodies confronted

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<sup>160</sup> See, e.g., Charnovitz, *supra* note 3, at 22 (citing conditionality practices with approval).

<sup>161</sup> Certain conditions tied to ensuring that the aid go where it is intended, i.e., to benefit the lot of the poorest, might, of course, be justifiable. However, links to rights not implicated in the subject of the aid (free speech or free emigration rights, for example) would not be justifiable, because they presume discretion over the grant of assistance where that grant might, in fact, be a moral obligation.

<sup>162</sup> Environmentalists roundly criticized the GATT decision-making process in the first Tuna-Dolphin case, *United States—Restrictions on Imports of Tuna*, 30 I.L.M. 1594 (1991), in which the first explicit trade linkage issues was resolved in an international legal forum, for failing to take cognizance of environmental policy issues and for clumsily handling these matters in a piecemeal

with linkage issues must be capable of making decisions that address the wide range of social values at stake.<sup>163</sup> To date, the GATT, as a principal trade-based forum for handling linkage issues, has not passed the test, at least in the view of non-trade linkage interest groups.<sup>164</sup>

As a threshold matter, justice might require for example that the forum chosen be one which most closely embodies our procedural standards for just decision making and dispute resolution.<sup>165</sup> In this respect, one key aspect already prominent in trade policy debates is participation by interest groups, an issue with clear overtones of democratic theory.<sup>166</sup> Once such institutions are chosen, a justice perspective requires a careful analysis of the principles and criteria employed in making decisions involving linkage issues.<sup>167</sup> Normative preferences which may well predetermine the outcome of linkage decisions are likely to be embedded

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fashion. See, e.g., Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT'L L.J. 459 (1994).

<sup>163</sup> As Joel Trachtman writes, "[N]o society can afford to make decisions in an unintegrated fashion." Trachtman, *supra* note 5, at 57. The risks for institutions such as the WTO in ignoring the fundamental values at stake in their decisions are highlighted by Philip Nichols in *Trade Without Values*. See Nichols, *supra* note 7, at 702-07.

<sup>164</sup> See, e.g., ESTY, *supra* note 2, at 1268.

[T]he GATT stands as one of the most successful international organizations ever created. But the GATT's legitimacy does not translate out of the trade context, and the organization has little credibility in environmental matters. When a case involves mixed issues of 'trade and environment,' the GATT does not offer a suitable forum for resolution of the dispute, as the institution lacks the expertise and neutrality to balance trade and environmental policies. The GATT's perceived lack of technical capacity and neutrality, and therefore legitimacy, as a decision-making body in the environmental realm presents a nearly insurmountable obstacle to peace in the war between environmentalists and free traders.

*Id.* But see Stewart, *supra* note 125, at 1349 ("While amendments to the GATT to deal more specifically with trade and environment issues may well be desirable, the current GATT text provides sufficient flexibility to afford environmental values equal footing with free trade values.").

<sup>165</sup> See Petersmann, *supra* note 89.

<sup>166</sup> See Robert F. Housman, *Democratizing International Trade Decision-Making*, 27 CORNELL INT'L L.J. 699 (1994).

<sup>167</sup> See generally Joel P. Trachtman, "Trade and . . ." *Problems, Cost-Benefit Analysis and Subsidiarity*, 9 EUR. J. INT'L L. 32 (1997).

in such criteria.<sup>168</sup> For example, it has been argued that in the analysis of GATT dispute settlement involving trade-environment issues, certain criteria such as “proof of endangerment” mask utilitarian assumptions tending to favor pro-trade outcomes to such disputes.<sup>169</sup>

#### 4. CONCLUSION

In any successful revolution, there comes a moment of truth when the former revolutionaries must finally confront the challenge of governance, and the international economic law revolution is no different. The trade linkage phenomenon, in particular, is forcing international economic law to wrestle with its own normative assumptions and implications across a broad range of issues. One should expect no less of a system of governance that so promises to affect all aspects of global social policy.

Successfully managing trade linkage issues means, for the trade policy community, accepting that the linkages come from within and not from without. Even if one maintains the neoliberal economic view of justice in international economic law, it must at least be conceded that advocates of linkage issues are acting from other answers to the same question, the question of justice, and that it is a shared question.

Furthermore, the resolution of linkage issues cannot be sought exclusively on the doctrinal level. The resolution needs to be articulated normatively, as an attempt to resolve dilemmas and tensions within the liberal vision, and between liberalism and other candidates for Right Order. From the perspective of justice, the debate within international economic law over linkage issues reflects debates within various aspects of Western moral and political theory, and especially within liberalism itself. It reflects tensions between the liberalization of individual choice through free trade and investment, and the commitment to individual rights and other fundamental moral obligations expressed in other as-

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<sup>168</sup> See Nichols, *supra* note 7, at 700-01 (reviewing factors in GATT dispute settlement panel doctrine giving primacy to trade in conflicts with other values).

<sup>169</sup> “Endangerment” implies that there is no harm short of dire peril that could justify interference with economically lucrative activity, ignoring the possibility that *any* harm, for example, justifies such interference. See Housman, *supra* note 125, at 1376-77 (challenging Stewart).

pects of liberalism, such as human rights and environmental protection.

The ideal solution would be consensus on the question of what justice demands in the case of international economic law generally, and for each linkage area in question. Absent that, one must resort to legal techniques for managing linkages where consensus is not achieved, but always with the understanding that one is mediating local conflicts within an overall search for justice.



# GLOBALIZING INTELLECTUAL PROPERTY: LINKAGE AND THE CHALLENGE OF A JUSTICE-CONSTITUENCY

SAMUEL K. MURUMBA\*

## 1. INTRODUCTION

There are historical moments in which invisible forces take a perfectly good idea and turn it into an ideology or even an idol. Such seems to be the case with intellectual property. Twenty years ago, intellectual property hardly existed *as such*. Its individual components—copyrights, patents, trademarks, etc.—had been around for a long time, of course, but they had not coalesced into anything comparable to the unified body of law we have today. Nor were they central to legal practice or significant to law school curriculum. Indeed, as recently as the beginning of the 1980s, debate was still raging over the appropriate name to give to this emerging field (“industrial property” or “intellectual property”) and over its precise boundaries. Almost overnight, however, intellectual property has changed from a complex and generally esoteric body of law—the preserve of specialists in technology and entertainment law—to the stuff of folklore and conversation at cocktail parties, and for some, almost an object of worship. Intellectual property now frequently appears in the company of such lofty notions as freedom and democracy, and has even been hailed as a more potent weapon than bombs and missiles for use against dictators!\*\*\*

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\*\*\*Rebecca Mead expressed this point stating:

As with all such things, several historical factors are responsible for this transformation, but the most significant is, I think, evolution in the economic value behind property interests generally. The common law concept of property inaugurated by William the Conqueror, following his spectacular victory at the Battle of Hastings in 1066, saw the subject matter of property almost exclusively in terms of land—*real* property—the foundation of both political power and family wealth. With the Industrial Revolution, the focus of property in the West shifted somewhat to encompass not only land but manufactured goods as well. The latter part of the twentieth century has seen another shift of emphasis from manufactured goods to ideas, information, and images—the subject matter of intellectual property—and it is this shift that is largely responsible for the current elevation of intellectual property to its present lofty status.

The impetus for globalizing intellectual property laws, however, comes from the bewilderingly global nature of intellectual property's subject matter, nicely illustrated by the country music singer Johnny Cash's tale of woe before a Congressional subcommittee last fall. The source of Cash's anguish was that his hit song, "Ring of Fire," had appeared on a website in Slovenia: "Maybe I should be flattered that someone in Slovenia likes my song, but when he or she makes it available to millions of people,

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Saddam Hussein may have brought us back from the brink of war by deciding to allow United Nations weapons inspectors access to his contested presidential sites, but there are other violations that the Iraqi premier has yet to rectify. That screening on Iraqi television of a bootleg copy of the movie "Wag the Dog," for a start: a few weeks ago, the Iraqi public was treated to a grainy version of Barry Levinson's film, presumably to illustrate that it is in the nature of an American President caught in a sex scandal to decide that a war overseas is exactly the kind of distraction his country needs. Which raises the following question: If we are not going to war with Iraq, could Saddam Hussein nonetheless be nabbed on copyright law, just as Al Capone was caught on tax evasion?

"This whole piracy situation is serious, because it represents a violation of property," Levinson said by telephone from Hollywood, though he added that he would probably not be pressuring New Line Cinema to take action against Saddam . . .

Rebecca Mead, *A New Plan to Take Out Saddam Hussein, Courtesy of Hollywood*, NEW YORKER, Mar. 16, 1998, at 26-27.

this hardly seems fair.”<sup>1</sup> Cash told attentive members of the House Subcommittee on Courts and Intellectual Property, “[In real life], [o]ur laws respect what we create with our heads as much as what we create with our hands,” and “[that] ought to be true [of] cyberspace too.”<sup>2</sup> Globalization of intellectual property’s subject matter is, of course, a product of the electronic revolution which makes it possible for one to convert every kind of information—words, pictures, sounds—into the ones and zeros of digital code,<sup>3</sup> compress it, and transmit it to the ends of the earth with only a few clicks of the mouse.

Information which has thus burst out of traditional territorial confines can only be protected by rules which are similarly unconstrained, whose reach does not stop at the border. It requires, some suggest, a system of *global* intellectual property as distinct from the traditional *international* intellectual property. International intellectual property is a superstructure of norms that govern the relationship between autonomous, self-contained, and essentially territorial national intellectual property systems. A global intellectual property system, by contrast, is one which brings about *deep integration*<sup>4</sup> of the various national systems into a single, unified, global network. In this Article, I argue that a global intellectual property of this kind is desirable, but that it involves a socio-ethical examination of near-Herculean proportions into what would make such intellectual property laws work. I shall suggest in Part 2 of this paper, however, that idolatry has set in early and sabotaged that process: The result is not deep integration at all, but a hurriedly constructed system whose only foundation is a thin bargain linkage between trade and intellectual property. In Parts 3 and 4, I shall probe the competing theoretical challenges that I have called “glib universalism” and “postmodern culturalism” which a system of deep integration needs to confront. In Part 5, I suggest that the answer to the challenge of

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<sup>1</sup> Rebecca Vesely, *Johnny Cash Talks the Line on Copyright Law*, WIRED NEWS (visited May 5, 1998) <<http://www.wired.com/news/politcs/story/6971.html>>.

<sup>2</sup> *Id.*

<sup>3</sup> See generally ESTHER DYSON, *RELEASE 2.0*, 133-34 (1997); PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 196, 196-236 (3d ed. 1994) (stating that “[o]ne of the transforming scientific revolutions of the twentieth century has been to capture words, sounds, and images in digital form”).

<sup>4</sup> See *infra* notes 5-13 and accompanying text.

global intellectual property is neither disembodied universal norms applied in the same way everywhere and without regard for context or local circumstance, nor the construction of a global culture, but lies in the more modest concept of a "justice constituency."

## 2. GLOBALIZING INTELLECTUAL PROPERTY: IS ANYTHING NEW?

As I use the term in this paper, *globalization* in relation to the subject matter of intellectual property means instantaneous projection of information all over the globe. In relation to the law, it means the deep integration necessary for a unified global normative system. In both cases, *globalization* is, in my view, qualitatively different from *internationalization*, a term I use here for the occasional traversing of state borders by essentially territorial information, and the relatively modest laws designed to accommodate such modest border-crossings.

Internationalization is no stranger to intellectual property. From earliest times, the kind of information protected by intellectual property—for instance, works of literature and patented inventions—has always had an international dimension in the sense of crossing national borders. The international intellectual property law designed for this process is also of venerable origin, dating back to the nineteenth century. It is found in treaties such as the Paris Convention, created in 1883 to deal with patents, trademarks and industrial designs, and the premier copyright treaty, the Berne Convention for the Protection of Artistic and Literary Works, established six years later in 1889. With a few exceptions, however, these treaties did not create substantive universal intellectual property rules. They were content, for the most part, to prescribe the more modest principle of "national treatment"—the requirement that each member state accord works of nationals of other member states the same rights as those accorded the works of its own nationals. The substantive standards of protection and the procedures for effecting that protection were, largely, left to the autonomy of each member state. National treatment means that an author who is a national of one member country must not be treated any worse in another member country than authors who are nationals of that other country; but this does not mean that authors must receive identical treatment in each member country. *International* intellectual property

law is thus not incompatible with the territorial nature of traditional intellectual property laws.

It is in the context of truly global norms, however, that Johnny Cash's complaint about the fate of his song in Slovenia could be vindicated. What would such territory-transcending rules look like? Although there are modest universal minimum standards in international treaties, such as the Berne Convention, there are really two kinds of territory-transcending intellectual property laws, and both are of recent origin.

### 2.1. *Super 301: The Realist Option*

The first kind is the "realist" one. It involves the unilateral, extra-territorial enforcement of one nation's laws—for instance the laws of the United States—against countries that do not respect the intellectual property of its nationals. This option is often invoked as a measure of last resort against the most egregious offenders, such as those sometimes described as "one-copy countries"—countries where piracy is so rampant that a single legitimate copy of a computer program or a musical CD is all it takes to satisfy the needs of the entire population! An example of such unilateral measures is the United States' "Super (or Special) 301"—§ 301 of the Omnibus Trade and Competitiveness Act of 1988<sup>5</sup>—which enables the United States to take retaliatory action against countries with inadequate intellectual property laws. Since one nation's laws have no normative force beyond its territory, the external shape of "Super 301" is that of sheer economic muscle. That is the sense in which it might be called "realist." But it might have venerable philosophical roots in the claim of all states to protect the interests of their nationals abroad. Unilateral measures of this sort are built on what we might call a retaliatory linkage: "Protect our national's intellectual property or else." Since Johnny Cash's complaint was made to a Congressional Subcommittee, it could indeed be perceived as an aggrieved citizen's invocation of the realist option. Cash, however, wanted this done through the mediation of recent WIPO treaties.<sup>6</sup> He was lending

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<sup>5</sup> Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2901 (1998).

<sup>6</sup> See World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 65; World Intellectual Property Organization Performance and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76.

his voice not to a powerful state's unilateral commands against an offending weaker one, but to the creation of overarching global rules of the kind Kratochwil describes as rules in the "third party mode."<sup>7</sup> These global rules are the second option for a territory-transcending intellectual property system and it is to them that I turn.

## 2.2. *Rules in the "Third Party Mode": TRIPS and the Road Toward Deep Integration*

Intellectual property's most dramatic step from its *international* phase towards the *global* one came with the TRIPS Agreement that was part of the GATT Uruguay Round. The TRIPS Agreement did this, in the first instance, by "legislating" beyond the traditional notions of national treatment (albeit with some modest minimum standards) to strong substantive as well as procedural norms; in the second instance, by making such "legislation" *universal* using a linkage to trade to ensure that everyone is either on board or soon will be; and in the third instance by creating an institutional structure in the World Trade Organization ("WTO") to ensure compliance with these norms. The substantive norms create a variety of universal minimum standards of protection, such as those requiring computer programs to be protected as literary works under the Berne Convention, or provisions relating to rental rights, performers' rights, well-known marks or the patent term; procedural norms ensure their enforcement through such mechanisms as injunctions, seizure, and, in some cases, even criminal penalties; and the WTO superimposes upon these a transcendent institutional structure.

We have already noted that one of the causes of the shift from *international* to *global* intellectual property is the electronic revolution mentioned earlier; in addition, this shift is also attributable both to the progressive transfer of autonomy from states to markets, as well as to the world's industrial leaders' desire to sustain high-cost labor economies through the sales of their advanced ideas.<sup>8</sup> What may not be so well known, however, are the pro-

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<sup>7</sup> See FRIEDRICH KRATOCHWIL, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS 13 (1989).

<sup>8</sup> See W.R. Cornish, *Judicial Legislation*, in LAW, SOCIETY, AND ECONOMY: CENTENARY ESSAYS FOR THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE 1895-1995 359, 371 (Richard Rawlings ed., 1997).

found implications of this shift, including for instance the spectacular measures of harmonization a treaty like the TRIPS Agreement has imposed upon its 120-odd member states,<sup>9</sup> nor the way this treaty may give a foreigner a second chance at litigation—in the form of international litigation—as a means of procuring private rights that could not be procured through direct negotiation.<sup>10</sup> As a keen observer further notes:

The particular point to be made in today's context is that the dispute will be settled by a tribunal of three, of suitably balanced composition. In the early years the panel members are likely to be drawn from those government

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<sup>9</sup> *See id.*

<sup>10</sup> An interesting scenario is sketched out by Cornish:

Imagine for instance a dispute over whether a copyright computer program can be the subject of reverse engineering by "decompilation" in order to produce a compatible, non-infringing program. This will first be litigated through the instances of the country where infringement is alleged. If it is an EC country there will doubtless be a cassational side-trip to the European Court of Justice in order to determine the meaning of the ludicrously complicated Directive on the subject. If it all goes against the plaintiff, that claimant may cause its government to institute proceedings against the refusing State, claiming that under TRIPS no exception is permissible because the reverse engineering prejudices the interests of the right-owner. If the outcome is in favour of the plaintiff's State, it may in its turn insist upon the withdrawal of trade concessions under the GATT which will hurt enough to induce a change in the copyright law.

Indeed after five years it will be possible to raise such a dispute on the basis of prejudicial conduct which escapes violating the actual terms of TRIPS. I have even seen it suggested that, if a country (such as France) chooses to impose a quota on the television showing of foreign films (inevitably American), the copyright owners of the latter will be able to argue from TRIPS that the embargo is impermissible. Forget the fact that copyright itself is a negative right designed to prevent others from using pirated or unlicensed copies for sales or performances; it is not concerned with the copyright owner's or licensee's exploitation of its own material. Forget the fact that negotiations on quotas in the audio-visual sector broke down and nothing was included in the new GATT on the provision of material for broadcasting. It would be enough that some essential spirit of TRIPS had been dishonoured.

Whether such a claim would ever finally be sustained in a WTO dispute settlement claim is wholly speculative. It is the possibility that it can even be contemplated which should be a cause of considerable concern in the new world of trade collaboration.

*Id.* at 372-73.

negotiators who generated the TRIPs in midnight enclaves, people steeped in the esoteric power-politics of that process, rather than philosophers of the role and purpose of the rights. The Dispute Settlement Panels will work at a total remove from the political institutions of either the State under attack or the attacking State. The settlement could well adopt an activist approach to interpretation of the TRIPs text. It could perhaps rely on some common heritage of international customary law in intellectual property matters, for which certain high-thinking groups are even now seeking recognition. Whatever the outcome, a settlement will have immense influence: it will establish the essential content of the laws on the subject in well-nigh all States.<sup>11</sup>

Such are the profound implications of a global intellectual property system, and at the formal rule-making level this edifice is a formidable achievement.<sup>12</sup> The tough terrain, however, lies ahead, for the degree of harmonization which this formal set of rules, along with the exigencies of their interpretation by a single body requires, may turn out to be far more than most parties bargained for. It is the kind of deep integration which rides roughshod over not only the strong dualism that seeks to keep treaties and domestic law separate in countries such as Great Britain and Scandinavia, but also in those such as the United States where the legislature plays some role in the treaty-making process and where many intellectual property rules may differ from those of other countries. My principal point is that a deep integration of this kind cannot be sustained by idolatry, or by bargain linkage. Can such an integration be built on a firmer foundation? Possibly yes, but only after one has dealt with the intractable problems raised by two warring camps that inhabit the treacherous conceptual terrain just below the surface of formal rules. I have called the first, "glib universalism." Despite the use of the adjective "glib" to describe this position, mine is really an attempt to put some theoretical flesh on the bare bones of the current system; it is an at-

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<sup>11</sup> *Id.* at 373.

<sup>12</sup> For an overview of the implementation of the Uruguay Round see generally, JOHN H. JACKSON & ALAN O. SYKES, *IMPLEMENTING THE URUGUAY ROUND* (1997).



tempt to give the most sympathetic account of the quest for universal rules that have no regard for context or circumstance. Moreover, for the most part, these rules are simply national ones shorn of their domestic socio-ethical roots—disembodied norms orbiting in global space. The second camp, the exact opposite of “glib universalism,” is postmodernity’s “vision of a cultural ‘heterotopia’ which has no edges, hierarchies or centre”<sup>13</sup> and which is anathema to the very possibility of universal norms. I suggest, however, that there is a way out of the unpalatable choice between the tyranny of disembodied norms and the intransigence of postmodern culturalism. That way out, I suggest, lies in the notion of a “justice-constituency” which I shall sketch in the latter part of this Article. But first, let us elaborate on the rival visions of glib universalism and postmodern culturalism.

### 3. GLOBAL INTELLECTUAL PROPERTY AND GLIB UNIVERSALISM

I have attributed the factual globalization of intellectual property to three causal factors: the electronic revolution, the triumph of the market, and the perceived interests of industrialized nations. The phenomenon I have called glib universalism is an attempt to put some normative foundations underneath this process. The glib universalist camp draws its strength from a curious collusion of two old enemies: naturalism and legal positivism. Let us look at the contributions of each to their joint venture of providing a normative foundation for global intellectual property.

#### 3.1. *Naturalism*

As already mentioned, intellectual property rights may acquire both a canonical status and presumptive universality by donning the garb of natural or human rights. Human rights are universal because they are rights which all human beings everywhere have by virtue of their humanity. As Professor Henkin reminds us:

[Such rights] do not differ with geography or history, culture or ideology, political or economic system, or stage of societal development. To call them “human” implies that

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<sup>13</sup> STEVEN CONNOR, *POSTMODERN CULTURE: AN INTRODUCTION TO THEORIES OF THE CONTEMPORARY* 19 (1989).

all human beings have them, equally and in equal measure, by virtue of their humanity—regardless of sex, race, age; regardless of high or low “birth,” social class, national origin, ethnic or tribal affiliation; regardless of wealth or poverty, occupation, talent, merit, religion, ideology, or other commitment.<sup>14</sup>

The view of intellectual property rights as fundamental human rights is, of course, no idle curiosity. Although this may not be widely known, Article 27(2) of the Universal Declaration of Human Rights—that central pillar of the International Bill of Rights whose fiftieth anniversary we celebrate this year—affirms the right of everyone “to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author.”<sup>15</sup> Moreover, while the general right of property did not make it to the subsequent treaties, intellectual property rights did find their way into the International Covenant on Economic, Social and Cultural Rights which contains a similar provision.<sup>16</sup>

This naturalistic elevation of intellectual property rights to the status of universal human rights has reached new and surprising heights in the oft-repeated description of unauthorized copying and distribution of the protected works as “piracy,” for pirates, along with torturers and slave traders, are among the most egregious violators of human rights. As Judge Kaufman of the United States Court of Appeals for the Second Circuit described them, the torturer, the pirate, and the slave trader are each *hostis humani generis*, an enemy of all humankind.<sup>17</sup> Yet, despite its superficial rhetorical value which thrives on hyperbolic inflation of intellectual property’s universal moral claims, the naturalistic view is unlikely to provide an enduring normative foundation for global in-

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<sup>14</sup> LOUIS HENKIN, *THE AGE OF RIGHTS* 2-3 (1990).

<sup>15</sup> Universal Declaration of Human Rights, G.A. Res. 217A, art. 27(2), U.N. Doc. A/810 (1948).

<sup>16</sup> Article 15(1)(c) provides that “[t]he States Parties . . . recognise the right of everyone . . . to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 15(1)(c), 993 U.N.T.S. 3; see also American Declaration of the Rights and Duties of Man, art. 13, at 19, OAS Doc. OEA/Ser. L/V/II. Doc. 6 (May 2, 1948), available in 9 I.L.M. 673.

<sup>17</sup> See *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

lectual property. For a start, no one is likely to mistake Judge Kaufman's characterization of the "pirate" as *hostis humani generis* for a reference to purveyors of bootleg compact discs or computer programs. But more importantly, intellectual property has another handicap, not shared by tangible property, which makes its status as the subject of fundamental human rights more tenuous: The case for its protection is notoriously counterintuitive. This is due, in turn, to what one may call intellectual property's "double intangibility."

For instance, although both lawyers and lay persons habitually draw a distinction between tangible and intangible property, and between corporeal and incorporeal hereditaments, *all* property is in truth intangible. This is because by "property," we really mean "proprietary interests." These are complex socio-legal constructs involving relationships between "persons" (natural, corporate, etc.) and "objects" (tangible or intangible) giving rise to a particular kind of rights (rights *in rem* whose content is typically exclusive use and alienation). In this regard, the distinction between tangible and intangible property, or the historical one between corporeal and incorporeal hereditaments, is, in terms of their "propertyness," conceptually erroneous; for every proprietary interest—whether it be a fee simple, a lease, an easement, a mortgage—is *ex hypothesi intangible*. Now within the general category of proprietary interests, there are some that have as their subject matter, tangible "things" such as houses, automobiles, or furniture; their case for the protection is intuitively self-evident because they are prototypical property in the sense that they can be possessed. Other proprietary interests, however, are saddled with the further intangibility of their subject matter; such is the case with intellectual property whose subject matter consists of literary works, music, inventions—namely, information. Intellectual property is thus doubly intangible: First, by virtue of its "propertyness," and second, because its subject matter is also intangible.

This curse of double intangibility makes the case for the protection of intellectual property counterintuitive for two reasons. The first reason is that it makes them "inappropriable." Basic proprietary interests in tangible objects are intuitively underwritten by their amenability to appropriation: They can be removed from the public domain for all to see, possessed—and possession in all its many-splendoured complexity is a prototypical defining

attribute of ownership both in the law and in the mind. As one writer has put it:

We cannot have our fish both loose and fast, as Melville might have said, and the common law of first possession makes a choice. The common law gives preference to those who convince the world that they have caught the fish and hold it fast. This may be a reward to useful labor, but it is more precisely the articulation of a specific vocabulary within a structure of symbols approved and understood by a commercial people. It is this commonly understood and shared set of symbols that gives significance and form to what might seem the quintessential individualist act: the claim that one has, by "possession," separated for oneself property from the great commons of unowned things.<sup>18</sup>

Information, the subject matter of intellectual property, however, is not appropriable in this way. It is only of value in the marketplace, but once released there, it can easily be replicated and used by the whole world. Although this "inappropriability" is normally worked into a utilitarian reason for legal protection of intellectual property,<sup>19</sup> it does render the naturalistic claim hopelessly counterintuitive. Appropriability is not just a fetish of human intuition. It also serves the valuable function of defining the boundaries of each person's private domain. For this reason, a distinction is often made between "choses in possession" (i.e. chattels) and "choses in action" (e.g. a patent, copyright, or debt). The general idea is that choses in possession can be possessed and enjoyed without more ado, whereas enjoyment of choses in action may require the assistance of some further legal action.

The second reason for the counterintuitiveness of protecting intellectual property is what has been called "non-rivalrous" consumption.<sup>20</sup> The consumption of a tangible thing deprives others

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<sup>18</sup> Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 88 (1985).

<sup>19</sup> See PAUL GOLDSTEIN, *COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES: CASES AND MATERIALS ON THE LAW OF INTELLECTUAL PROPERTY* 6-7 (4th ed. 1997).

<sup>20</sup> See CRAIG JOYCE ET AL., *COPYRIGHT LAW* 18 n.28 (2d ed. 1991).

of it, but the use or enjoyment of information, ideas, and works of art does not deprive anyone else. For instance, a television signal carrying a musical work can be broadcast to the whole world and “consumed” by everyone who has the equipment to receive it, without anyone getting any less of it. Like inappropriability, this unique characteristic of informational goods—that anyone can use them without diminishing their availability to anyone else—leads to a powerful moral intuition against intellectual property law.<sup>21</sup>

In addition to inappropriability and non-rivalrous consumption, there are also counterintuitive reasons of a more cultural kind against intellectual property. For instance, understandings of notions such as authorship and the construction of the public domain provide an example. All these make it doubtful that the naturalistic exaltation of intellectual property claims to the status of fundamental human rights can settle any significant normative issues between Johnny Cash and the inhabitants of Slovenia. Let us turn then to the positivist component of glib universalism.

### 3.2. *The Positivist Component*

The positivist element of this duo consists of excessive faith in the formal rules of law, separate and apart from law’s socio-ethical ecology. I call this one positivist because it has its roots in legal positivism’s obsession with the “separability” thesis, which insists that law can and should be separable from its social context. The positivist’s misplaced faith in legal rules divorced from context is, in part, a consequence of law’s effectiveness in the domestic sphere. We observe that in the domestic sphere, intellectual property law generally works quite well, and from this observation we intuitively extrapolate that a set of formal rules would work just as well at the global level. Most of the rules of the emerging global system are, indeed, directly transposed from national legal systems.

But we delude ourselves. There is no easy correlation between law’s effectiveness in the domestic sphere and its chances of success in the global arena. Whatever critical legal scholars<sup>22</sup> and

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<sup>21</sup> See GOLDSTEIN, *supra* note 19, at 7.

<sup>22</sup> For a liberal critique of this movement, see ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990); a broader account of all such movements is discussed and chronicled in GARY MINDA, *POST-*

other anti-formalists might say, formal intellectual property rules have worked pretty well in the domestic sphere. But law's success in the domestic sphere, far from predicting its effectiveness at the universal level, augers ill for universality since both law's domestic success and its floundering at the universal level may be due to the common feature of embeddedness at the heart of law's ontology.

At the national level, formal rules work because they are part of a complex web of social conventions and practices. These social conventions and practices in which law is embedded are for the most part invisible; that may be why positivism tends to pay scant attention to them. In everyday life, we are oblivious to them the way we are oblivious to other aspects of our ecology, until something disturbs them. But these social practices exist and without them formal rules would be well nigh impossible. This embeddedness is not unique to law; it pervades all institutional facts of which law is only one kind. In his book which explores the ontology of such institutional facts, John Searle uses a simple scene to illustrate the immense complexity of the web of social facts I talk about here.<sup>23</sup> The scene involves a visit to a café in Paris where he utters a fragment of a French sentence by which he orders a beer. The waiter brings him the beer, he drinks it, leaves some money on the table, and departs. But, as Searle remarks, the sheer simplicity of this scene belies the fact that "its metaphysical complexity is truly staggering"<sup>24</sup> (Searle believes that its "complexity would have taken Kant's breath away if he had bothered to think about such things").<sup>25</sup> In particular, this simple transaction is embedded in a bewildering web of social facts. There is hardly anything in this scene which can be adequately described in the language of physics or chemistry—not "restaurant," "waiter," "sentence of French," "money," nor even "chair" and "table." Moreover, beyond these things that have some physical existence, the scene is brimming with what Searle

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MODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END (1995).

<sup>23</sup> See JOHN SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 3-4 (1995).

<sup>24</sup> *Id.* at 3.

<sup>25</sup> *Id.*

describes as “a huge, invisible ontology.”<sup>26</sup> He outlines this ontology as follows:

The waiter did not actually own the beer he gave me, but he is employed by the restaurant which owned it. The restaurant is required to post a list of the prices of all the *boissons*, and even if I never see such a list, I am required to pay only the listed price. The owner of the restaurant is licensed by the French government to operate it. As such, he is subject to a thousand rules and regulations I know nothing about.<sup>27</sup>

Yet, as Searle points out, we can bear the staggering metaphysical burden of this social reality because it is largely “weightless and invisible.”<sup>28</sup> Once we are brought up in a particular culture, its web of social reality seems no less natural than physical trees or water. It is this complex web of social reality in which domestic rules of law are embedded.

There is, however, hardly any corresponding set of social reality to underwrite the proliferating rules of intellectual property we are sending into global orbit. For the most part these are disembodied domestic norms, unhinged from their socio-ethical context, floating in space. It is a mistake to believe that since they worked so well in the domestic sphere, they will work well at the global level too, for the socio-ethical reality they have left behind is essential to both their meaning and effectiveness.

The universalist sub-component is intertwined with both the naturalist and the legal positivist ones just discussed, but its main flaw is not so much the former’s claim of intuitive self-evidence nor the latter’s excessive faith in formal rules severed from their socio-ethical context. Its particular sin is that of succumbing to the seduction of easy universality. The point here is not that universal norms are altogether unattainable.<sup>29</sup> It is rather that out-

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 4.

<sup>29</sup> In matters of human rights generally, I am an unrepentant universalist myself. See, e.g., Samuel K. Murumba, *Cross-Cultural Dimensions of Human Rights in the Twenty-First Century*, in *LEGAL VISIONS OF THE TWENTY-FIRST CENTURY: ESSAYS IN HONOR OF CHRISTOPHER WEERAMANTRY* (forthcoming May 1998) (manuscript on file with author); Samuel K. Mu-

side certain contexts, universality is extremely difficult to attain, and without satisfying some rigorous pre-conditions, a complete impossibility.

The allure of universal intellectual property norms that do not vary with change in place or local circumstance is, in the final analysis, the seduction of what Sir Isaiah Berlin once referred to as "a system of propositions so general, so clear, so comprehensive, connected with each other with logical links so unambiguous and direct that the result resembles as closely as possible a deductive system."<sup>30</sup> It is at bottom a utopian aspiration, though the world of markets in which intellectual property rights operate is a rather curious abode for utopian ideas. Nevertheless, the "global market" and its accouterments, including intellectual property rights, has been invested with some utopian characteristics by those who see in it the panacea for all the ills of the post-cold war world.<sup>31</sup> Indeed, it is not unusual these days to encounter discussions linking intellectual property, especially copyright, with "democracy,"<sup>32</sup> and global copyright with "a vision of global de-

rumba, *The Cultural and Conceptual Basis of Human Rights in International Law* (1986) (Unpublished Ph.D. thesis, Monash University (Melbourne, Australia) on file with the Monash University Library).

<sup>30</sup> ISAAH BERLIN, *THE SENSE OF REALITY* 21 (Henry Hardy ed., 1996).

<sup>31</sup> The kind of utopianism associated with the global market is sometimes referred to as a version of "high modernism" which previously used to idolize the state. See JAMES C. SCOTT, *SEEING LIKE THE STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (1998); John Gray, *The Best-Laid Plans*, N.Y. TIMES BOOK REV., Apr. 19, 1998, at 36.

As I finished this book, I realized that its critique of certain forms of state action might seem, from the post-1989 perspective of capitalist triumphalism, like a kind of quaint archaeology. States with the pretensions and power that I criticize have for the most part vanished or have drastically curbed their ambitions. And yet, as I make clear . . . large-scale capitalism is just as much an agency of homogenization, uniformity, grids, and heroic simplification as the state is . . . As we shall see, the conclusions that can be drawn from failures of modern projects of social engineering are *as applicable to market-driven standardization as they are to bureaucratic homogeneity*.

SCOTT, *supra*, at 7-8 (emphasis added).

<sup>32</sup> See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996) (arguing that "copyright is in essence a state measure that uses market institutions to enhance the democratic character of civil society"); see also Neil Weinstock Netanel, *Asserting Copyright's Democratic Principals in the Global Arena*, 51 VAND. L. REV. 217, 220 (1998) [hereinafter



mocracy, not merely global markets,<sup>33</sup> or with what sounds like an oxymoron, “freedom imperialism.”<sup>34</sup>

Whether a global intellectual property system can have such profound socio-political implications remains to be seen. What that lofty inquiry should not obscure, however, is the more modest question of whether such a global system is capable of achieving the more traditional goal of all intellectual property systems—the balancing of incentives and rewards to authors and inventors against the public’s right of free access to works and information.

We have seen that global intellectual property rules are generally abstracted from domestic spheres, leaving behind their sustaining contextual information. In place of these sustaining contexts, the global system of rules has relied more and more on linkages in order to persuade countries that would otherwise be reluctant to protect intellectual property (because such a protection is a net loss to them) to come on board. For instance, a country may accede to the global intellectual property system because that is a condition of its obtaining access to markets for its manufactured products. Bargain linkages of this sort may create a system of rules, but they are unlikely to sustain it. Moreover, such bargain linkages tell us nothing about the content of the global rules they helped create. They do not tell us much, for instance, about the meaning of “weasel” words like “fair use” and “originality” in copyright law, “novelty” and “non-obviousness” in patent law, or “distinctiveness” and “deceptive similarity” in trademark law. They are, in other words, only creating what Neil MacCormick calls “rule-texts,” but hardly any “rule-content.”<sup>35</sup> The trouble lies in the content of all these expansively indeterminate terms. For global intellectual property, the devil lurks in the details.

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Netanel, *Democratic Principals*] (“Copyright law serves fundamentally to un-  
derwrite a democratic culture.”).

<sup>33</sup> Netanel, *Democratic Principals*, *supra* note 32, at 221.

<sup>34</sup> See Marci A. Hamilton, *The TRIPs Agreement: Imperialistic, Outdated, and Overprotective*, 20 VAND. J. TRANSNAT’L L. 613, 615-20 (1996).

<sup>35</sup> See Neil MacCormick, *On “Open Texture” in Law*, in *CONTROVERSIES ABOUT LAW’S ONTOLOGY* 72, 79-82 (Paul Amserek & Neil MacCormick eds., 1991).

#### 4. GLOBAL INTELLECTUAL PROPERTY AND POSTMODERN CULTURISM

Glib universalism, as just observed, involves the use of controversial naturalist or positivist-universalist foundations to underwrite a global intellectual property system. Its nemesis, the postmodern-culturalist camp, holds that the universality of norms espoused in the global law-making enterprise is, at best, an exercise in futility, and at worst, a fraud.

The basis for this rather startling claim can be found in a complex arsenal of ontological, epistemological, and ethical tenets of various strengths. The general target of this arsenal is a set of related notions generally attributed to the Enlightenment, the most important of which are: rationality, objectivity and universality. Postmodern culturalism insists that these notions are implausible because there is no Archimedian perspective—no view from above, or from the sidelines, that transcends the particularities of culture, space, and history. Rather, this camp insists that every perspective is made from *within* some cultural perspective. Instead of pretensions of rationality, universality, objectivity, (for some even philosophy itself) this movement proposes that we substitute the language of emotions and poetry.<sup>36</sup> These claims have profound implications for the whole project of creating a system of global intellectual property rules. Without rationality, we could not have any rules or principles at all,<sup>37</sup> or at any rate, rules and principles that are not simply “resources and instruments that individuals manipulate to get what they want or think good” or that “exert no power . . . of their own over individual thought, desire, and action”—in other words, rules that are not “mere words,” as one strand of postmodernism, the Critical Legal Studies Movement, might regard them.<sup>38</sup> Without objectivity, we would have trouble talking about the ontology of law as a set of social practices that do really exist in the way illustrated earlier with the example of Searle’s visit to a French café.<sup>39</sup> Without universality, we could not talk about the possibility of having a

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<sup>36</sup> See RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 373-94 (1979).

<sup>37</sup> See ROBERT NOZICK, *THE NATURE OF RATIONALITY* 40 (1993) (discussing the role of principles in rationality and arguing that “to act and think rationally, one must do so in accordance with principles”).

<sup>38</sup> ALTMAN, *supra* note 22, at 151.

<sup>39</sup> See SEARLE, *supra* note 23, at 3-4.

system of universal intellectual property at all. So if postmodern claims about rationality, objectivity, or universality are true, then those trying to globalize intellectual property are truly whistling in the wind.

That seems bad enough. The postmodern project, however, is not simply about ontology (or what exists) nor simply about epistemology. It is, above all, about ethics in the broadest sense. It tells the story of what ought to be done, and much of the attack on the rationality, objectivity, and universality that it has attributed to the Enlightenment is really strategic. The ethical claim here is that these lofty Enlightenment notions are really the building blocks of an ideology that makes injustice invisible and thus allows it to thrive by masking endemic inequality in the general allocation of burdens and benefits. In the present context there is a growing body of literature known as anti-colonial scholarship<sup>40</sup> which sees the global economy, and everything from global intellectual property rules to global human rights principles, as a neo-liberal attempt to adapt the traditional colonial legacy of North-South inequality to the Information Age, a role previously performed by the notion of an international division of labor in the Industrial Age.

As a counter to this perceived deleterious import of an absolute, monistic system of norms, postmodernism proposes the competing vision of "legal polycentricity" which rejects the single value approach to questions of law and morals.<sup>41</sup> Legal polycentricity is predicated upon an acceptance, indeed a celebration, of cultural pluralism.

Like the universalist one, the postmodern vision contains valuable lessons for the global law-making enterprise. Most of these lessons can be gleaned from some of the deficiencies of the universalist vision already observed. However, the postmodern vision has some serious problems. One of these is that its anti-universalist stance glosses over the reality of the increasing proximity among cultures at the end of the twentieth century. With proximity comes cross-cultural exchange, a routine feature of all cultures and value-systems, which tends to homogenize the landscape. It has been suggested that, historically, this proximity be-

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<sup>40</sup> For an excellent review of this scholarship see James Thuo Gathii, *International Law and Eurocentricity*, 9 EUR. J. INT'L L. 182-209 (1998).

<sup>41</sup> See SURYA PRAKASH SINHA, *LEGAL POLYCENTRICITY AND INTERNATIONAL LAW* 1-14 (1996).

tween cultures has tended to lead to the dominant culture seeking to swallow up the minority cultures.<sup>42</sup> In response to this threat, the minority cultures developed, as a defensive mechanism, a deliberate "counter identity" that resists translation. This defensive non-translatability is sometimes referred to as "secondary pseudo-speciation" and results in an identity based on normative self-definition. But today, mutual translation among cultures into larger networks of communication is inevitable. In any event, the cultural "heterotopia," which some versions of postmodernism espouse, is implausible because it is predicated upon strong pluralism which entails the very overarching normative universe that postmodernist culturalism had initially hoped to repudiate. Consequently, postmodern culturalism does not, in the end, negate the possibility of global intellectual property, though it does alert us to some pitfalls we might be able to avoid along the way.

##### 5. A JUSTICE-CONSTITUENCY FOR GLOBAL INTELLECTUAL PROPERTY?

We have just described two rival visions fighting for control over the project of globalizing intellectual property: The positivist-universalist vision of disembodied, *sui generis* norms floating awkwardly in global space; and the postmodern-culturalist vision of a "heterotopia" of cultures that is anathema to the very possibility of a universal law. I suggested that both are delusions: the first because of its naturalistic intuitionism or excessive faith in legalism without regard to the context that makes law possible; the second because of what we might call a kind of cultural solipsism.

Both visions are flawed for another reason. They are predicated upon a world that is rapidly unraveling, a world of autonomous, discrete entities, whether one calls these states or cultures. The universalist vision derives global rules from "a trade paradigm," the language of trade being a kind of "pidgin" that makes communication across the void between sovereign states possible. It is this paradigm which makes excessive reliance on legal rules so attractive. The postmodern-culturalist vision speaks the language of cultures rather than states, but it also relies upon statism more than it realizes: For, in practice, the constructs of states and cul-

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<sup>42</sup> See Jan Assman, *Translating Gods: Religion as a Factor of Cultural (Un)Translatability*, in *THE TRANSLATABILITY OF CULTURES: FIGURATIONS OF THE SPACE BETWEEN* 25, 29 (Sanford Budick & Wolfgang Iser eds., 1996).

tures tend to collapse into each other. Thus both universalist and culturalist visions share a common premise of global law as *international* law—as law *between* nations—and more specifically as public international law. In this paradigm, the only other version of a global order would be that of a supra-national order in the form of a world government. Although states have not withered away, their influence has diminished considerably while the private sphere's influence continues to expand. This is the globalization of the market, of the private sector, for which states increasingly only play the role of facilitator.

Within national jurisdictions, linkages between law and other disciplines, such as economics or psychology or sociology, operate upon a pre-existing sub-stratum of socio-ethical facts. Since there is no corresponding contextual equivalent of these at the global level, linkages here cannot play this (their usual) role. At the global level, linkages, instead, tend to play the role of bargaining tools as in the case of the linkage between trade and intellectual property epitomized by the TRIPS Agreement. Or, they play the role of surrogate “contexts” for global intellectual property, precariously inhabiting the intermediate space between the two rival visions above.

I suggest, however, that this is not the most profitable role for linkages. First, whatever little “context” linkages might give global laws here occurs at the same delirious level of abstraction as to be of little practical value. Second, they share most of the pathologies of the rational choice theories in which they are grounded.<sup>43</sup> But in any event their role here is premised upon a false dilemma: The view that we are doomed to choose between the futility of disembodied norms and the intransigence of post-modern culturalism. I suggest that the contextual problem for global intellectual property norms, however, is really that of a “justice-constituency.”<sup>44</sup> As I use it here, the phrase “justice-constituency” signifies something more “contextual” than natural-

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<sup>43</sup> See DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* (1994); see also CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 3-8 (1997).

<sup>44</sup> See JULIUS STONE, *VISIONS OF WORLD ORDER: BETWEEN STATE POWER AND HUMAN JUSTICE* 95-101 (1984). On Stone's general approach to international law, see generally James Crawford, *Realism, Scepticism and the Future World Order: Some Thoughts on Julius Stone's Contribution to International Law*, 13 SYDNEY L. REV. 475 (1991).

ist or legalist universalism but less all-embracing than culture. It refers to that consensus and those articulated or implicit understandings that make law's allocation of benefits and burdens, as well as its designation of claimants and beneficiaries, acceptable, or at least tolerable. Delineating and articulating a justice-constituency for world-wide intellectual property laws is admittedly no easy task: It is indisputably harder than the currently popular game of launching into orbit de-contextualized norms strung on thin bargain linkages; but it is also much less daunting than a complete creation of an all-embracing global culture. A global justice-constituency recognizes the embeddedness of law without engaging in all-embracing models of such embeddedness.

A few short years ago, the possibility of a global justice-constituency might have, with good reason, been described as the craziest delusion of them all. A world of private rights and duties stretching across state boundaries, rights, and duties not belonging to states would have been almost inconceivable. This is because barriers to "communication across state frontiers and the related operations of the state entity in inhibiting, molding, and distorting the formation and articulation of human claims, aspirations, and expectations as well as the transmission and reception of communications"<sup>45</sup> would have made the sociological and other inquiries necessary for articulating such a global justice constituency impossible. But the world on the threshold of the twenty-first century looks increasingly different. It is a world where state boundaries, though by no means non-existent, have lost much of their effectiveness across a wide-range of human communication, especially trade and the movement of capital. It is also a world which is ripe for the principled construction of a justice-constituency. This is a pre-condition for the kind of "deep integration" which notions such as a "global market" entail.

The first step in the construction of that justice-constituency is the abandonment of "naturalistic" language now predominant in universal intellectual property discussions. As we saw at the beginning, naturalistic claims ultimately rest on the grounds of intuition or self-evidence. But as already mentioned, protection of intellectual property is notoriously counterintuitive, especially because it involves non-rivalrous consumption. When use or "consumption" of a novel or song by one person, or a billion

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<sup>45</sup> STONE, *supra* note 44, at 41; Crawford, *supra* note 44, at 487.

people does not leave any less novel or song for the enjoyment of the other four billion people on the planet, intellectual property protection looks suspiciously like depriving people of something to which they should have unfettered access. As Justice Brandeis said, in his dissenting opinion, in *International News Service v. Associated Press*, “The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use.”<sup>46</sup> But no one could say it more eloquently than Thomas Jefferson:

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possess the less, because every other possess the whole of it. He who receives an idea from me, receives instructions himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move and have our physical being, incapable of confinement or exclusive appropriation.<sup>47</sup>

Yet, as already mentioned, it is equally true that the subject matter of intellectual property is plagued by “inappropriability” by its author: The author needs to disseminate her work in order to profit from it, but once released, she cannot control its exploi-

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<sup>46</sup> *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918).

<sup>47</sup> THIRTEEN WRITINGS OF THOMAS JEFFERSON 333-34 (Lipscomb ed., 1904) (Letter to I. McPherson, Aug. 13, 1813), quoted in RALPH BROWN & ROBERT DENICOLA, COPYRIGHT 9 (6th ed. 1995).

tation. Moreover, with the advent of modern technology, duplication produces copies of perfect quality at almost no cost; there now exists the means to distribute them to the whole world at the click of a mouse. There is thus little economic incentive for authors to take the trouble to create works, and every incentive to wait and duplicate those created by others. An intellectual property system is needed to strike a careful balance between the public's rights of access to works and the intellectual property owner's incentive and reward for giving society something of value. This is the utilitarian or economic basis for our intellectual property law mentioned earlier. The utilitarian basis is memorably enshrined in the United States Constitution which gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>48</sup> This provision provides the back-drop for our elaborate system of copyright and patent concepts—such as originality, idea-expression dichotomy, and “fair use” in copyright laws, and “novelty” and “non-obviousness” in patent law, as well as an array of limitations on the scope of rights and compulsory licenses. The same balance between private rights and public benefits is struck in a different way for trademarks using such notions as deception and distinctiveness—which reflect the nature of the trademark as an information device—but that also rests principally on a utilitarian premise, not a natural rights one. The economic or utilitarian rationale has often been reiterated by the courts at the highest level as in *Sony Corp. of America v. Universal Studios, Inc.*:

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward . . . .<sup>49</sup>

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<sup>48</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>49</sup> *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984).



The first challenge for a global justice-constituency is to clearly articulate what that public purpose is at the global level, instead of simply transposing ready-made purposes and rules from national jurisdictions; the second is to formulate rules, norms, and concepts that are carefully calibrated to achieve that public purpose.

It is quite conceivable that both the goals and the rules may, with appropriate modification, be closer to the traditional ones of increasing production of valued works. For developing intellectual property importing countries, however, it is equally plausible that the public purpose may also embrace encouragement of importation of appropriate technology.<sup>50</sup> This, for instance, was the principal role of the English patent system at its inception. It was designed to encourage importation of crafts from overseas, and the teaching of these to the locals; under both early English and Venetian patents, validity of the patent was premised on the condition that the patented invention be worked in the country and taught to local workmen. Indeed, the original patent term consisted of the normal period of apprenticeship—seven years—or multiples of that period.<sup>51</sup>

## 6. CONCLUSION

The formulation of global intellectual property goals suggested here—namely, the articulation of a justice-constituency—should be a top priority for rule makers. It is a project uniquely amenable to multiple linkages. Once the basic structure is in place, invisible hand effects<sup>52</sup> may well step-in and configure the deep integration, founded upon the concept of a justice constituency, into the greater complexity required of a modern global market in products and information.

I do not remember all the stories from my Sunday school class, but one that left an indelible impression on my mind is the parable of the two builders: one wise, the other foolish. The wise

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<sup>50</sup> See, e.g., UN TRANSNATIONAL CORPORATIONS AND MANAGEMENT DIVISION OF THE DEPARTMENT OF ECONOMIC AND SOCIAL DEVELOPMENT, INTELLECTUAL PROPERTY RIGHTS AND FOREIGN DIRECT INVESTMENT (New York: United Nations, 1993) (documenting an apparent positive link between effective intellectual property laws and the flow of foreign investment).

<sup>51</sup> See STANFORTH RICKETSON, *THE LAW OF INTELLECTUAL PROPERTY* 861 (1984).

<sup>52</sup> As to the invisible hand effects, see the interesting account in ROBERT NOZICK, *SOCRATIC PUZZLES* 191 (1997).

builder labored long and hard to build a foundation for his house on a rock. Not so the foolish one: Wanting to build quickly and with minimum effort, he built his house on the sand, and for a moment seemed the wiser of the two. But then the rain came down, the streams rose and the winds blew and beat against the houses. The wise man's house remained standing, but the foolish man's fell and great was the fall of it. In building a global system of intellectual property law, we might want to heed the parable of the builders. We should not be afraid to engage in a little map-making, to stand back from the breathtaking manufacture of global intellectual property rules in order to get a sense of perspective of the landscape upon which these rules are being planted. A preliminary map-making of this kind is the only assurance that the global legal structure, now going up at such a brisk pace, will have a firm foundation.

FORGOTTEN LINKAGES—HISTORICAL  
INSTITUTIONALISM AND SOCIOLOGICAL  
INSTITUTIONALISM AND ANALYSIS OF THE WORLD  
TRADE ORGANIZATION

PHILIP M. NICHOLS\*

Institutionalism has become firmly entrenched in legal scholarship.<sup>1</sup> In particular, institutionalism has become a powerful and alluring theoretic for international law scholarship.<sup>2</sup> Given the use of institutionalism in international law scholarship, and the importance of international economic organizations to theory and practice, it is natural that institutionalism has been prominently used to scrutinize international economic organizations, including the World Trade Organization.

When international law scholars utilize the tools of institutionalism, however, they tend to draw only from two sources. International relations' regime theory<sup>3</sup> has entered the mainstream of international law discourse, and has been applied directly to the World Trade Organization. Institutional economics,<sup>4</sup> particularly transaction cost analysis, has also appeared in international law discourse, and has been directly applied to organizations that include the World Trade Organization.

Regime theory and institutional economics, however, do not exhaust the universe of sources of institutional analysis. Virtually

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<sup>1</sup> See Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1393 (1996) (predicting that institutionalism may bring a rapprochement between law and economics and "outsider" schools such as feminist legal theory, which will create a unified theory for legal scholarship).

<sup>2</sup> See William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U. J. INT'L L. & POL'Y 227, 229 (noting the increasing use of institutionalism in international law scholarship); see also *infra* notes 9-60 and accompanying text (discussing the use of institutionalism in international law scholarship).

<sup>3</sup> See discussion *infra* notes 9-36 and accompanying text.

<sup>4</sup> See discussion *infra* notes 36-60 and accompanying text.

all of the social sciences are experiencing a revival in institutionalism.<sup>5</sup> In particular, this Article examines two schools of institutionalism: historical institutionalism,<sup>6</sup> which is a product of political science; and sociological institutionalism,<sup>7</sup> which is a product of sociology. Each of these iterations of institutionalism differs in critical ways from regime theory or institutional economics. Each also provides a rigorous framework for analyzing international law and for scrutinizing the World Trade Organization. To date, however, neither international law scholars nor trade scholars have availed themselves of these two means of inquiry.

This lack of use raises an interesting question, which is analyzed in this Article: why have international law scholars and trade scholars not utilized historical institutionalism or sociological institutionalism? Ironically, historical and sociological institutionalism themselves provide insights. Historical institutionalism emphasizes path dependency: a brief review of the unfolding of institutional thought in international law scholarship reveals how regime theory and institutional economics obtained an advantage over rival schools. Similarly, sociological institutionalism emphasizes cultural factors in the creation or alteration of institutions: the culture of legal scholarship may not be conducive to these versions of institutionalism.

The implications for both trade scholarship and the World Trade Organization as institutions are significant. Understanding why trade scholarship has not incorporated historical and sociological institutionalism may explain why trade scholarship has not established linkages with other potentially instructive schools of thought, such as business ethics. Moreover, understanding the World Trade Organization as an institution<sup>8</sup> with a history and embedded in culture may explain why practical linkages, such as

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<sup>5</sup> See Vivien Lowndes, *Varieties of New Institutionalism: A Critical Appraisal*, 74 PUB. ADMIN. 181, 181-82 (1996) (noting the revival in and plethora of institutionalisms).

<sup>6</sup> See discussion *infra* notes 62-90 and accompanying text.

<sup>7</sup> See discussion *infra* notes 91-120 and accompanying text.

<sup>8</sup> An institution not in the sense of an institute but rather as a bundle of rules and procedures. See Douglass C. North, *Institutional Change: A Framework for Analysis*, in SOCIAL RULES: ORIGIN; CHARACTER; LOGIC; CHANGE 189, 190 (David Braybrooke ed., 1996) (distinguishing institutions—"the rules of the game" from organizations—"the players").

the linkage between trade and human rights, are difficult to accomplish.

Before discussing the possibilities that accrue from understanding the relationship between trade scholarship and historical and sociological institutionalism, the current linkage between trade scholarship and institutionalism must be explained. This article begins with a discussion of institutionalisms that have been used to analyze the World Trade Organization.

## 1. INSTITUTIONALISM AND ANALYSIS OF THE WORLD TRADE ORGANIZATION

Two iterations of institutionalism predominate in international law scholarship, and these two have resulted in the only significant institutional analysis of international economic organizations such as the World Trade Organization. These two are regime theory and institutional economics. Each is distinct from the other, and each shall be discussed in turn.

### 1.1. *Regime Theory*

Kenneth Abbott introduced the international relations school of regime theory<sup>9</sup> to international law scholarship in an article published in the *Yale Journal of International Law* in 1989.<sup>10</sup> Abbott noted the schism between international relations theory and international law theory, and attributed this schism to differences in the theoretical approaches dominating each discipline.<sup>11</sup> International relations theory was, at that time, dominated by the school of realism, which “see[s] a world of states obsessed with

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<sup>9</sup> Regime theory sometimes also uses the appellation “institutionalism.” John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT’L L.J. 139, 140 (1997). Given the number of different types of institutionalism that are discussed in this Article, this Article will use the older appellation “regime theory” when discussing international relations theory, so as to avoid confusion with other types of institutionalism.

<sup>10</sup> Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT’L L. 335 (1989); see Anne-Marie Slaughter [Burley], Book Review, 89 AM J. INT’L L. 454, 454 (1995) (reviewing VOLKES RITTBERGER, REGIME THEORY AND INTERNATIONAL RELATIONS (1993)) (stating that Kenneth Abbott “first broached the connection between regime theory and international law”).

<sup>11</sup> See Abbott, *supra* note 10, at 337-38; see also FRANCIS ANTHONY BOYLE, WORLD POLITICS AND INTERNATIONAL LAW 58-60 (1985) (discussing the schism and criticizing international law scholarship).

their power vis-à-vis other states,” and in which international law is mere “window dressing.”<sup>12</sup> International law, on the other hand, was dominated by a rather moribund positivism, with a goal to describe international law as it is rather than as a theoretical construct.<sup>13</sup>

Abbott perceived the possibility of rapprochement between international relations theory and international legal scholarship in a new school of thought within the discipline of international

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<sup>12</sup> Abbott, *supra* note 10, at 337-38; see HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 4-5 (4th ed. 1967) (arguing that the only relevant law is the “law of politics”); Richard A. Falk, *The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View*, in *THE RELEVANCE OF INTERNATIONAL LAW* 133, 138 (Karl W. Deutsch & Stanley Hoffman eds., 1968) (criticizing international law as a “repository of legal rationalizations”); see also Ann-Marie Slaughter [Burley], *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT’L L. & POL’Y 717, 721-22 (1995) (noting that the realist school dominated international relations theory for “virtually the past two millennia, from Thucydides to Machiavelli to Morgenthau”).

Slaughter [Burley] summarizes realism in three principles: states are the pertinent actors in international relations, states are rational actors who seek power, and the organizing principle of international relations is anarchy. *Id.* at 722. She cautions, however, that this simple summary does not fully capture the complexities or varieties of the school of realism. *Id.* at 727. More fulsome discussions can be found in classic realist texts such as GEORGE KENNAN, *AMERICAN DIPLOMACY, 1900-1950* (1951) or MORGENTHAU, *supra*.

<sup>13</sup> Positivism in international law posits three principles: all sovereign states are equal and independent, international law consists only of those rules that states have consented to follow, and states are the only actors in the international arena. See L. OPPENHEIMER, *INTERNATIONAL LAW* 20-21 (4th ed. 1928) (setting out the principles of positivism in international legal scholarship); H. Lauterpacht, *Spinoza and International Law*, 8 BRIT. Y.B. INT’L L. 89, 106-07 (1927) (same); see also Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemma of Neo-Liberalism*, 17 J. INT’L L. & BUS. 1014, 1018 (1996) (noting that both legal positivism and international relations theory realism are state centered). Positivism has long been castigated for its detrimental effect on international legal theory. See, e.g., Roscoe Pound, *Philosophical Theory and International Law*, I BIBLIOTECA VISSERIANA 73, 87-88 (1923) (launching a blistering attack on positivism in international legal scholarship); Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 819 (1990) (decrying “sterile positivism” in international law scholarship). Nonetheless, positivism “still dominates the profession.” BOYLE, *supra* note 11, at 18. David Kennedy notes the predominance of positivism, but also calls attention to “new streams” of international law scholarship. David Kennedy & Chris Tennant, *New Approaches to International Law: A Bibliography*, 35 HARV. INT’L L.J. 417, 418 (1994) (noting “a dramatic increase during the past two decades in the volume of scholarly work that aims to rethink the foundations of international law and to respond to recent trends in political, social, and legal theory”).

relations theory. That school of thought is regime theory. Regime theory originated as a reaction to an explanatory failure of realism. Realism posits a chaotic and competitive world.<sup>14</sup> The realist explanation for the existence of international organizations in such a hostile environment is that such organizations are imposed on other states by the most powerful states.<sup>15</sup> Under such a construct, however, the decline of U.S. hegemony in the 1970s and 1980s should have meant the end of international organizations. However, it did not.<sup>16</sup> This explanatory gap was filled by a subgroup of international relations theorists who study international organizations.<sup>17</sup> These subspecialists recognized that it is not simply states that determine international outcomes; states operate and interact through the rules and procedures of regimes. These regimes are maintained by the states because they are valuable to the states. They reduce the costs of making transactions among states, increase the quality and availability of information, legitimize and delegitimize behaviors of states, and facilitate reciprocity among states.<sup>18</sup> In short, regimes matter, and offer an analytic through which international behavior can be studied.

Abbott saw in regime theory "a long-overdue opportunity to re-integrate [international legal scholarship] and [international relations theory]."<sup>19</sup> International legal scholarship brings to the relationship its experience in rules and institutions. International relations theory, on the other hand, offers international legal scholarship an analytic by which it can escape the "narrow posi-

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<sup>14</sup> See MORGENTHAU, *supra* note 12, at 25-26 (describing international politics as "a struggle for power").

<sup>15</sup> ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 8-10 (1984) ("[F]or Realists . . . the early postwar regimes rested on the *political hegemony* of the United States."); see also Duncan Snidal, *The Limits of Hegemonic Stability Theory*, 39 INT'L ORG. 579 (1985) (setting out and refuting the realist hegemony explanation).

<sup>16</sup> See G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 859 (1995) (pointing out that the GATT and IMF continued to exert great influence after the decline of U.S. hegemony).

<sup>17</sup> See Friedrich Kratochwil & John Gerard Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 INT'L ORG. 753 (1986) (recounting a history of the study of international organizations).

<sup>18</sup> KEOHANE, *supra* note 15, at 244 (attributing accord to "complementary interests, which make certain forms of cooperation potentially beneficial").

<sup>19</sup> Abbott, *supra* note 10, at 338.

tivism” in which it is trapped.<sup>20</sup> Each school obviously has potential benefits for the other.

Anne-Marie Slaughter Burley amplified Abbott’s ideas in an article published in 1993.<sup>21</sup> Burley’s approach is much different than Abbott’s. Abbott explains, in extreme detail, the concept and mechanics of regime theory.<sup>22</sup> Burley, on the other hand, concentrates on a detailed intellectual history of the relationship between international relations theory and international law scholarship.<sup>23</sup> Burley reaches two conclusions. First, she notes that the convergence of regime theory and international law scholarship creates opportunities for interdisciplinary collaboration.<sup>24</sup> Second, Burley concludes that regime theory “remains theoretically inadequate in many ways.”<sup>25</sup> Specifically, she faults regime theory for its inability to explain the creation of regimes, and for its failure to account for the relationship between the individual and the state.<sup>26</sup> She offers the “Liberal Theory” as a doctrinal alternative to both realism/positivism and regime theory.<sup>27</sup>

<sup>20</sup> *Id.* at 339-40.

<sup>21</sup> See Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205 (1993). Burley’s article evokes a reaction similar to that elicited by Abbott’s article. See, e.g., Setear, *supra* note 9, at 139 n.1 (1997) (noting that Burley’s article represents “the best summary of the trends and counter-trends in the relationship between international relations theory and international legal scholarship”); Richard L. Williamson, Jr., *Law and the H-Bomb: Strengthening the Nonproliferation Regime to Impede Advanced Proliferation*, 28 CORNELL INT’L L.J. 71, 76 n.8 (1995) (discussing Burley’s article as “an excellent analysis of contemporary international relations theory”).

<sup>22</sup> See Abbott, *supra* note 10, at 342-404.

<sup>23</sup> See Burley, *supra* note 21, at 207-20 (describing the ‘postwar trajectory’ of international relations theory).

<sup>24</sup> See *id.* at 222. Specifically, Burley suggests collaboration on distinguishing legal regimes from nonlegal regimes, studying organizational design, studying the phenomenon of compliance with international rules, and undertaking a normative inquiry into international ethics. See *id.* at 222-24.

<sup>25</sup> *Id.* at 225.

<sup>26</sup> See *id.* at 225-26. Burley also specifically faults regime theory for its failure to explain peace among democratic nations; this, however, is more an example of regime theory’s weakness than a general criticism. See *id.*; see also Bruce Russett, *Politics and Alternative Security: Toward a More Democratic, Therefore More Peaceful, World*, in ALTERNATIVE SECURITY: LIVING WITHOUT NUCLEAR DETERRENCE 107, 111 (Burns H. Weston ed., 1990) (discussing a number of studies that show that democratic nations rarely go to war with one another).

<sup>27</sup> Burley, *supra* note 21, at 227. Burley recognizes that the school of liberalism encompasses a number of constructs, but suggests that three core assump-



Notwithstanding Burley's criticism, Abbott's suggestion that international legal scholarship borrow from regime theory has created a cottage industry in institutionalism. Scholars such as Abbott, Burley, Jutta Brunnée and Stephen Toope, Frank Garcia, John Setear, and Edwin Smith have used institutionalism to explain and analyze a variety of public international law issues.<sup>28</sup> Indeed, Michael Reisman has characterized institutionalism as "the current rage in the United States."<sup>29</sup> It is important to note, however, that although many legal scholars use the broad term institutionalism, the roots of their analyses lie in the regime theory of international relations.<sup>30</sup>

Regime theory has also been used to analyze the World Trade Organization. In an article published in 1995, Richard Shell extensively utilizes realism, regime theory and liberalism to scrutinize the World Trade Organization.<sup>31</sup> In particular, Shell uses re-

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tions are common to the school: the fundamental actors in politics are members of society (whether individuals are privately constituted groups), all governments represent some segment of domestic society, and the behavior of states depends not on power relationships or institutional constraints but instead on what the state wants. See *id.* at 227-28. Burley relies heavily on an unpublished manuscript by Andrew Moravcsik. For accessible versions of Moravcsik's writing, see Andrew Moravcsik, *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*, 31 J. COMMON MKT. STUD. 473 (1993), in which Moravcsik particularly applies the concept that a state's actions are determined more by its goals and preferences than by relative power distributions among states or by institutional constraints upon them, and Andrew Moravcsik, *Liberal Intergovernmentalism and Integration: A Rejoinder*, 33 J. COMMON MKT. STUD. 611 (1995), in which Moravcsik defends liberalism as a theory, and posits that it is necessary for understanding European integration.

<sup>28</sup> See Kenneth W. Abbott, "Trust But Verify": *The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT'L L.J. 1 (1993); Jutta Brunnée & Stephen J. Toope, *Environmental Security and Freshwater Resources: Ecosystem Regime Building*, 91 AM. J. INT'L L. 26 (1997); Frank J. Garcia, *Decisionmaking and Dispute Resolution in the Free Trade Area of the Americas: An Essay in Trade Governance*, 18 MICH. J. INT'L L. 357 (1997); Setear, *supra* note 9; Edwin M. Smith, *Understanding Dynamic Obligations: Arms Control Agreements*, 64 S. CAL. L. REV. 1549 (1991). The writings of Abbott, Burley and Smith are summarized in Setear, *supra* note 9, at 142-47.

<sup>29</sup> W. Michael Reisman, Book Review, 85 AM. J. INT'L L. 205, 206 (1991).

<sup>30</sup> Each of the scholars discussed in footnote 28 mention Abbott's 1989 article as a starting point for institutional analysis. See Brunnée & Toope, *supra* note 28, at 33 n.43; Garcia, *supra* note 28, at 361 n.15, Setear, *supra* note 9, at 140 n.1; Smith, *supra* note 28, at 1584 n.156.

<sup>31</sup> G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995). Shell makes explicit the lineage of his analysis by acknowledging his article's "particular

gime theory to explain one of the most intriguing aspects of the World Trade Organization: the potential legalism of its dispute settlement process.<sup>32</sup> In an interesting comparison and application of both realism and regime theory, Shell explains the transformation of dispute settlement in the global body as a paradigm shift from realism to regime theory. He convincingly demonstrates how this paradigm shift reflected real world changes that caused states to transform the dispute settlement process into a more legalistic institution.<sup>33</sup> Shell is not, however, completely satisfied with regime theory as an explanation for the World Trade Organization, because he finds regime theory lacking in its ability to explain the relationship between institutions and the preferences of individuals.<sup>34</sup> Therefore, he accepts regime theory as an explanation of the World Trade Organization as it is but turns to liberalism for an explanation of the World Trade Organization as he predicts, and hopes, that it will become.<sup>35</sup> Shell's facile use of the

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debt to the work of Kenneth Abbott and Ann-Marie Slaughter [Burley].<sup>9</sup> *Id.* at 834 n.21.

<sup>32</sup> The dispute settlement process of the World Trade Organization has evoked a significant amount of scholarly attention. See, e.g., Kenneth W. Abbott, *The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice*, 1992 COLUM. BUS. L. REV. 111; Claudio Cocuzza & Andrea Forabosco, *Are States Relinquishing Their Sovereign Rights? The GATT Dispute Settlement Process in a Globalized Economy*, 4 TUL. J. INT'L & COMP. L. 161 (1996); Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193 (1996); Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L L. 349 (1995); Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ, & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043 (1994); David A. Gantz, *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 ARIZ. J. INT'L & COMP. L. 7, 129 (1995); David W. Leeborn, *An Overview of the Uruguay Round Results*, 34 COLUM. J. TRANSNAT'L L. 11, 14-16 (1995); Andreas F. Lowenfeld, *Remedies Along With Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 479 (1994); Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658 (1996); Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555 (1996); Matthew Schaefer, *National Review of WTO Dispute Settlement Reports: In the Name of Sovereignty or Enhanced WTO Rule Compliance?*, 11 ST. JOHN'S J. LEGAL COMMENT. 307 (1996); C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT'L L. 209 (1997).

<sup>33</sup> See Shell, *supra* note 31, at 895-98. Shell also discusses an efficient market model, which he discards in favor of regime theory. See *id.* at 897.

<sup>34</sup> *Id.* at 901-903; cf. *supra* notes 25-27 and accompanying text (relating to Slaughter [Burley]'s criticism of regime theory).

three schools is an excellent example of theoretical international law scholarship, and also demonstrates the value of a regime theory based analysis of the World Trade Organization.

In short, the essence of regime theory is that in international or transnational<sup>36</sup> relations, regimes matter. Institutions facilitate the prediction, planning and execution of international actions and form the basis on which states or other international actors may cooperate. They constrain the actions of international actors, who voluntarily adhere to institutions because it is easier or more effective to do so than not to do so. Institutions persist in a self-interested world because they have value to international actors. As a theoretic framework, international law scholars have borrowed from the regime theory. The use of regime theory has included analysis of the World Trade Organization, where regime theory has been used productively and plausibly, but not to the complete satisfaction of the scholar who first applied it as an analytical tool.

## 1.2. *Institutional Economics*

The second form of institutionalism that has worked its way into legal scholarship is institutional economics. Given the predominance of law and economics and the nominal fealty paid by most legal scholars to efficiency,<sup>37</sup> it may not seem surprising that economic institutionalism has found a niche in legal scholarship. However, in the realm of international law, this development is actually noteworthy. Unlike other branches of legal scholarship,

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<sup>35</sup> Shell, *supra* note 31, at 911-15 (explaining an international law developed by "citizen-sponsored, nongovernmental organizations").

<sup>36</sup> A small number of regime theorists argue that the theory is applicable to non-state as well as state actors. See, e.g., SUSAN STRANGE, *STATES AND MARKETS* 200 (1988); Virginia Haufler, *Crossing the Boundary Between Public and Private International Regimes and Non-State Actors*, in *REGIME THEORY AND INTERNATIONAL RELATIONS* 94 (Volker Rittberger ed., 1993); see also Philip M. Nichols, *Realism, Liberalism, Values, and the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 851, 876-77 (1996) (suggesting that international legal scholarship does not need to limit itself in the application of regime theory to state actors).

<sup>37</sup> See Richard A. Westin, *When One-Eyed Accountants are Kings: A Primer on Microeconomics, Income Taxes and the Shibboleth of Efficiency*, 69 MINN. L. REV. 1099 (1985) (noting the use and overuse of economic concepts in legal scholarship).

international law scholarship has not been the subject of large amounts of economic analysis.<sup>38</sup>

Institutional economics<sup>39</sup> is a response to a perceived flaw in neo-classical economics. Neo-classical economics bases its theoretical models on the actions of rational individuals who act to maximize their own well-being (often spoken of as wealth).<sup>40</sup> In reality, however, consumption decisions are usually made by households and production decisions are usually made by firms.<sup>41</sup>

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<sup>38</sup> See Abbott, *supra* note 10, at 337. Abbott attributes this to the predominance of positivism in international legal analysis and the corresponding lack of interest in explanatory models. *Id.* Of course, the analytical landscape is not as bleak as Abbott depicts. In addition to the use of institutional economic analysis, others have explored the usefulness of economic analysis of international law. See, for example, the essays collected in *ECONOMIC DIMENSIONS ON INTERNATIONAL LAW* (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997).

<sup>39</sup> Institutional economics is sometimes referred to as "neo-institutional economics" in order to distinguish it from the earlier works of Thorstein Veblen and John R. Commons. See Douglass C. North, *The New Institutional Economics*, 142 J. INSTITUTIONAL & THEORETICAL ECON. 230 (1986). Ironically, the earlier institutional economics also had a powerful influence on contemporary legal theory. See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* 19 (1986) (discussing the influence of institutional economics, and of Veblen in particular, on legal realism).

<sup>40</sup> See Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071, 2115 (1996). These assumptions, of course, have been criticized as inaccurate, unverified, or unverifiable. See, e.g., *id.* at 2117-18 (stating that the assumptions made by the law and economic movement are unverifiable and unfalsifiable); John J. Donahue III & Ian Ayres, *Posner's Symphony No. 3: Thinking About the Unthinkable*, 39 STAN. L. REV. 791, 812 (1987) (criticizing law and economic's "clean assumptions"); John J. Flynn, *The "Is" and the "Ought" of the Vertical Restraints After Monsanto Co. v. Spray-Rite Service Corp.*, 71 CORNELL L. REV. 1095, 1128-29 (1986) (stating that law and economics "patterns its methodology after an outmoded notion of 'scientific analysis'" and is based "upon a series of unrealistic notions"); Judith Schenck Koffler, *Forged Alliances: Law and Literature*, 89 COLUM. L. REV. 1374, 1382 (1989) (book review) ("law and economics rests on assumptions about human nature that many, especially trained humanists, find disturbing"); Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 FORDHAM L. REV. 263, 285 (1989) ("Many assumptions of normative law and economics are either untested or called into doubt by empirical testing."). *But see* Herbert Hovenkamp, *Rationality in Law and Economics*, 60 GEO. WASH. L. REV. 293, 293 (1992) (responding to some of the criticisms of law and economics' assumptions). Radical individualism has also been the target of criticism by legal ethicists. See, e.g., Thomas Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987) (arguing that the organic community has priority over individuality).

<sup>41</sup> See Robert B. Bates, *Social Dilemmas and Rational Individuals*, in *ANTHROPOLOGY AND INSTITUTIONAL ECONOMICS* 43, 44 (James M. Acheson ed., 1994) ("Given the centrality of radical individualism, it has been pro-

Neo-classical economics is forced to treat these collectives as if they were individuals and to ignore the process that occurs within the collective.<sup>42</sup> Ultimately, such “black box” treatment is theoretically unsatisfying. Institutional economics is one aspect of the resulting interest in how individual choices are made.<sup>43</sup>

The school of institutional economics has not yet sorted out its principles.<sup>44</sup> Nonetheless, its basic assumptions and theory can be described. Institutional economics begins with the individual, whose behavior is opportunistically rational—“rational” meaning that the individual seeks to maximize his or her wealth and to minimize costs. Rationality, however, is bounded by the information that is available.<sup>45</sup> Obtaining information imposes transaction costs on actors.<sup>46</sup> Institutions facilitate the gathering and communication of information, thereby reducing transaction costs.<sup>47</sup> Indeed, “[t]he discriminating alignment hypothesis to which transaction cost economics owes much of its predictive content holds that transactions, which differ in their attributes, are aligned with governance structures, which differ in their costs and competencies, in a discriminating (mainly, transaction cost economizing) way.”<sup>48</sup>

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foundly embarrassing to modern economics that in its models market forces did not rest on the choice of individuals.”).

<sup>42</sup> See Milton Friedman, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3, 15 (1953) (defending “as if” arguments).

<sup>43</sup> Bates, *supra* note 41, at 45.

<sup>44</sup> See James M. Acheson, *Introduction*, in *ANTHROPOLOGY AND INSTITUTIONAL ECONOMICS*, *supra* note 41, at 1, 6 (“Institutional economics is moving so rapidly that no commonly agreed set of principles has emerged.”).

<sup>45</sup> See MARY DOUGLAS, *RISK AND BLAME: ESSAYS IN CULTURAL THEORY* 198 (1992) (stating that institutional economics “characterizes individuals in the marketplace as weakly rational and weakly moral”).

<sup>46</sup> See OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 31-32 (1975) (stating that obtaining information is one of the most important transaction costs). Carl Dahlman identifies the time, effort and expense of obtaining the “information necessary to make an exchange, negotiate the exchange and enforce the exchange” as transaction costs. See Carl Dahlman, *The Problems of Externality*, 22 *J. L. & ECON.* 141, 149 (1979).

<sup>47</sup> Anthony Obershall & Eric M. Leifer, *Efficiency and Social Institutions: Uses and Misuses of Economic Reasoning in Sociology*, 12 *ANN. REV. SOC.* 233, 237 (1986).

<sup>48</sup> Oliver E. Williamson, *Comparative Economic Organization: The Analysis of Discrete Structural Alternatives*, 36 *ADMIN. SCI. Q.* 269, 277 (1991).

Thus, an understanding of the relationship between transaction costs and institutions is thought to be critical to an understanding of economic exchange, the existence of institutions, and the existence of international institutions.<sup>49</sup> Moreover, institutional economics predicts that individuals will seek out and utilize institutions that minimize transaction costs, and may endeavor to create alternative institutions if suitable institutions do not exist.<sup>50</sup>

Institutional economics has been criticized in a number of ways.<sup>51</sup> One criticism deals with the assumption that rational behavior is self-centered. In his writing, Amartya Sen has noted that "[t]he economic man is a social moron."<sup>52</sup> Other social scientists also criticize institutional economics' humans as "under socialized" and point out that economic relations are shaped by a multitude of cultural interests that have nothing to do with self-interest.<sup>53</sup> Indeed, some institutional economists feel that their

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<sup>49</sup> See THRÁIN EGGERTSSON, *ECONOMIC BEHAVIOR AND INSTITUTIONS: PRINCIPALS OF NEO-INSTITUTIONAL ECONOMICS* (1990); NEIL KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY* (1994); Bruno Frey, *The Economic Approach to Institutions: Institutions Matter: The Comparative Analysis of Institutions*, 34 EUR. ECON. REV. 443 (1990); Werner Pommerehne, *The Empirical Relevance of Comparative Institutional Analysis*, 34 EUR. ECON. REV. 458 (1990); Beth V. Yarbrough & Robert M. Yarbrough, *International Organizations and the New Economics of Organizations*, 44 INT'L ORG. 235 (1990) (book review).

<sup>50</sup> See Douglass C. North, *Institutional Change: A Framework of Analysis*, in *INSTITUTIONAL CHANGE: THEORY AND EMPIRICAL FINDINGS* 35, 35-46 (Sven-Erik Sjöstrand ed., 1993) (discussing theory of institutional change); Andrew Stone et al., *Public Institutions and Private Transactions: A Comparative Analysis of the Legal and Regulatory Environment for Business Transactions in Brazil and Chile*, in *EMPIRICAL STUDIES IN INSTITUTIONAL CHANGE* 95, 98-100 (Lee Alston et al. eds., 1996) (discussing and applying theory of institutional change).

<sup>51</sup> An emotional response to the general criticism is found in WILLIAM M. DUGGER, *UNDERGROUND ECONOMICS: A DECADE OF INSTITUTIONALIST DISSENT* xviii (1992) ("So our realism will continue to be a threat to academic complacency as long as the real world exists, for the real world is insistent and can push its surprises into the most cloistered of academic sanctuaries."). The responses of Ronald Coase (1991), Gary Becker (1992) and Douglass C. North (1993) to general critics of institutional economics were less emotional but probably more effective: each of these institutional economists won the Nobel prize.

<sup>52</sup> Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 336, 336 (1977).

<sup>53</sup> Mark Granovetter, *Economic Action and Social Structure: A Theory of Embeddedness*, 91 AM. J. SOC. 481, 502-05 (1985).

discipline can only overcome these barriers by borrowing from other social sciences.<sup>54</sup>

Despite these criticisms, many social sciences have found the transaction cost analysis contained in institutional economics to be valuable. The law and economics movement has an obvious interest in this school of thought.<sup>55</sup> Indeed, Ronald Coase's transaction cost explanation for the existence of firms has become the dominant paradigm in corporate legal theory.<sup>56</sup>

<sup>54</sup> See Bates, *supra* note 41, at 54-59 (calling for a "new anthropology"); see also Christian Knudsen, *Equilibrium, Perfect Rationality and the Problem of Self-Reference in Economics*, in RATIONALITY, INSTITUTIONS AND ECONOMIC METHODOLOGY 133, 134 (Uskali Mäki et al. eds., 1993) (arguing that solving basic problems in institutional economics "seems to require a broadening of the behavioural foundation of economics insofar as one has to emphasize not only the substantive, but also the procedural and the epistemic aspects of rationality"). But see Thráin Eggerston, *A Note on the Economics of Institutions*, in EMPIRICAL STUDIES IN INSTITUTIONAL CHANGE, *supra* note 50, at 6, 17-20 (defending the assumption of self-interested, rational behavior).

<sup>55</sup> See generally Steven G. Medema, *Discourse and the Institutional Approach to Law and Economics: Factors that Separate the Institutional Approach to Law and Economics from Alternative Approaches*, 23 J. ECON. ISSUES 417 (1989); Richard Posner, *The New Institutional Economics Meets Law and Economics*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 73 (1993).

<sup>56</sup> See Stephen M. Bainbridge, *Participatory Management within a Theory of the Firm*, 21 J. CORP. L. 657, 659 (1996) (stating that economic theories are "now the dominant paradigm in corporate law"); Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937), reprinted in RONALD H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 33 (1988); Aleta G. Estreicher, *Beyond Agency Costs: Managing the Corporation for the Long Term*, 45 RUTGERS L. REV. 513, 515 (1993) (stating that offspring of Coase's analysis "still reigns supreme in the academic literature"); Jason S. Johnston, *The Influence of the Nature of the Firm on the Theory of Corporate Law*, 18 J. CORP. L. 213, 213 (1993) (stating that Coase's theory dominates theoretical work in corporate law). Oliver Williamson has expanded Coase's original theory in a manner that has particular application to institutional economics. See OLIVER E. WILLIAMSON, *ECONOMIC ORGANIZATION: FIRMS, MARKETS AND POLICY CONTROL* (1986); Oliver E. Williamson, *Economics and Organizations: A Primer*, 38 CAL. MGMT. REV. 131 (1996).

It should be noted that the dominance of Coase's theory of firms does not mean that there is only one economic model of firms. Michael Jensen and William Meckling, for example, define a firm not in terms of agency costs but instead as a "nexus for contracting relationships." Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976). But see William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 415 (1989) (criticizing Jensen and Meckling's and related theories). Oliver Hart, on the other hand, emphasizes not contracts but instead the ownership of property by the firm. See OLIVER HART, *FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE* 57 (1995). Other economists proffer an employment

Joel Trachtman has used institutional economics as the foundation for comparison of international economic organizations, including the World Trade Organization. Trachtman hypothesizes that "states use and design international institutions to maximize the members' net gains," which are the gains from a transaction minus the losses from and costs of that transaction.<sup>57</sup> Trachtman makes the important distinction between the markets to which institutional economics is usually applied<sup>58</sup> and the international arena: the commodities exchanged in the international arena are "agreements regarding the allocation of power."<sup>59</sup> After thoroughly working through the details of institutional economic theory and applying them to international economic organizations, Trachtman concludes that, although additional theoretical and empirical work needs to be done, institutional economics provides a useful means of scrutinizing and comparing international economic organizations. The metric for scrutiny and comparison, in Trachtman's theory, is how efficient an international economic organization is in maximizing states' preferences.<sup>60</sup> Trachtman's excellent analysis illustrates the potential of an institutional economic analysis of the World Trade Organization.

In short, institutional economics uses institutions to explain the actions of rational, self-interested actors. These actors create or modify institutions on the basis of the extent to which the institutions enhance efficiency in obtaining the actors' preferences. Institutional economics has influenced legal scholarship, and will probably make inroads in international law scholarship. Indeed, it has been used as an analytic for the comparison of international economic organizations such as the World Trade Organization.

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theory of the firm. See, e.g., Samuel Bowles & Herbert Gintis, *Contested Exchange: New Microfoundations for the Political Economy of Capitalism*, 18 POL. & SOC. 165 (1990); Bengt Holstrom & Paul Milgrom, *The Firm as an Incentive System*, 84 AM. ECON. REV. 972 (1994); Louis Putterman, *Ownership and the Nature of the Firm*, 17 J. COMP. ECON. 243 (1993).

<sup>57</sup> Joel P. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 17 NW. J. INT'L L. & BUS. 470, 473-74 (1997). The statement obviously resonates with aspects of regime theory in that institutions are designed by their users and serve rational, means-end utilities.

<sup>58</sup> That is, the market for goods or services.

<sup>59</sup> Trachtman, *supra* note 57, at 487. Trachtman notes that in legal analysis power is called jurisdiction. See *id.* at 498.

<sup>60</sup> See *id.* at 555.



## 2. ALTERNATIVE INSTITUTIONALISMS: HISTORICAL INSTITUTIONALISM AND SOCIOLOGICAL INSTITUTIONALISM

To label historical institutionalism and sociological institutionalism as “alternative” forms of institutionalism may be somewhat misleading. Both are firmly established schools of thought in other disciplines: historical institutionalism has been a part of political science since the 1960s and sociological institutionalism has been a growing part of sociology for almost as long.<sup>61</sup> The term “alternative” is used in this Article only to emphasize that these schools of thought have not yet been mined by international legal scholarship.

Because some legal scholars may be unfamiliar with either historical or sociological institutionalism, each is briefly discussed in the following subsections.

### 2.1. *Historical Institutionalism and Sociological Institutionalism*

#### 2.1.1. *Historical Institutionalism*

Historical institutionalism<sup>62</sup> is a reaction to and extension of the group theory and structural functionalist approaches to political science that dominated the 1960s and 1970s. Group theory emphasizes power and conflict, arguing that politics is a balancing “of various forces contending for power and the making of decisions.”<sup>63</sup> Structural functionalism compares social entities to or-

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<sup>61</sup> An especially informative discussion of historical and sociological institutionalism from which this Article benefits substantially is Peter A. Hall & Rosemary C. R. Taylor, *Political Science and the Three New Institutionalisms*, 49 *POL. STUD.* 936 (1996).

<sup>62</sup> Kathleen Thelen and Sven Steinmo use the appellation “historical institutionalism.” See Kathleen Thelen & Sven Steinmo, *Historical Institutionalism in Comparative Politics*, in *STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS* 1, 2 (Kathleen Thelen & Sven Steinmo eds., 1992). They, in turn, attribute the phrase to Theda Skocpol. See *id.* at 28 n.4. It is not always identified as such by members of the school.

<sup>63</sup> RONALD H. CHILCOTE, *THEORIES OF COMPARATIVE POLITICS: THE SEARCH FOR A PARADIGM* 35 (1981). Obviously, group theory cannot be summarized in one sentence. A chapter length explanation of group theory can be found in JAMES A. BILL & ROBERT L. HARDGRAVE, JR., *COMPARATIVE POLITICS: THE QUEST FOR THEORY* 117-141 (1973). In particular, “[g]roup scholars view the political system as a gigantic network of groups in a constant state of interaction with one another. This interaction takes the form of pressures and counterpressures, the outcome of which defines the state of the politi-

ganic entities,<sup>64</sup> and by studying how structures work together, tries "to provide a consistent and integrated theory from which can be derived explanatory hypotheses relevant to all aspects" of a given system.<sup>65</sup> From group theory, historical institutionalism

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cal system at any given time." *Id.* at 120. Moreover, "[i]n an attempt to uncover the 'real' or 'basic' forces of political life, group scholars ruthlessly cut through the formal and institutional trappings of government and focus[] their attention upon structures of competition." *Id.* at 134. Bill and Hardgrave attribute the introduction of concepts such as "power," "interest," and "conflict" into mainstream political science to group theorists. *Id.* at 134-35; see John G. Gunnell, *The Genealogy of American Pluralism: From Madison to Behavioralism*, 13 INT'L POL. SCI. REV. 253 (1997) (discussing the influence of group theory on political science); cf. CHILCOTE, *supra*, at 350 (giving John Locke, Jeremy Bentham, and James Madison credit for providing the intellectual basis for group theory). Group theory continues to dominate American political science. See Paul H. Brietzke, *Administrative Law and Development: The American "Model" Evaluated*, 26 HOW. L. J. 645, 659 (1983); see, e.g., Marie Hojnacki, *Interest Groups' Decisions to Join Alliances or Work Alone*, 41 AM. J. POL. SCI. 61 (1997) (using group theory concepts).

<sup>64</sup> Cf. A.R. RADCLIFFE-BROWN, *STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETY* 178 (1952) (stating that the understanding of social function is based on "an analogy between social life and organic life").

<sup>65</sup> William Flanigan & Edwin Fogelman, *Functional Analysis, in CONTEMPORARY POLITICAL ANALYSIS* 72, 76 (James C. Charlesworth ed., 1967). Again, this school of thought cannot be fully explicated in one sentence. For a longer treatment, see BILL & HARDGRAVE, *supra* note 63, at 201-17; see also CHILCOTE, *supra* note 63, at 162-82 (analyzing the work of Gabriel Almond, an important early figure in structural functionalism). In particular, structural functionalists perceive society as "a tightly integrated system of inter-related elements or structures. These structures exist because they perform functions: one can explain various structures . . . by discovering their function." David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 4, 32 (1990). Analytically, "[t]he principal objective of functional analysis is to determine the contribution which a social item (a structure or process) makes to the persistence of the system in which it occurs, that is, the role it plays in maintaining the system within specified limits." BILL & HARDGRAVE, *supra* note 63, at 203. The most glaring weakness of structural functionalism is its requirement that all systems perform functions: in reality there are many dysfunctional systems. See John H. Schlegel, *The Ten Thousand Dollar Question*, 41 STAN. L. REV. 435, 445 (1989) (book review) (attributing the demise of structural functionalism to the discovery of dysfunctional systems). Given these and other explanatory weaknesses, the predominance of structural functionalism has waned. See NICHOLAS C. MULLINS, *THEORIES AND THEORY GROUPS IN CONTEMPORARY AMERICAN SOCIOLOGY* 66-67 (1973) (stating that structural functionalism stopped being the majority view in 1968). Nonetheless, structural functionalism continues to exert influence on political science. See Ruth Lane, *Structural-Functionalism Reconsidered: A Proposed Research Model*, 26 COMP. POL. 461 (1994) (advocating use of the structural functionalist model for theoretical research); Susan A. Mann et al., *Paradigm Shifts in Family Sociology? Evidence from Three Decades of Family Textbooks*, 18 J. FAM. ISSUES 31 (1997) (arguing

draws the concept of rivalry; from structural functionalism, historical institutionalism draws an image of the polity as an integrated system. The primary difference between historical institutionalism and its intellectual forebears is that while structural functionalists often argued that external factors drive the functioning of a system, historical institutionalists hold that the system structures collective behavior and thus shapes external events.<sup>66</sup>

Historical institutionalists perceive institutions as the formal or informal rules or procedures embedded in a formal organization. Peter Hall defines institutions as

the formal rules, compliance procedures, and standard operating practices that structure the relationship between individuals in various units of the polity and economy. As such, they have a more formal status than cultural norms but one that does not necessarily derive from legal, as opposed to conventional, standing. . . . [T]he term "organization" will be used here as a virtual synonym for "institution."<sup>67</sup>

Because historical institutionalism has not yet coalesced as a doctrinal school, it is difficult to summarize in a few short paragraphs; nonetheless, some of the basic characteristics of historical institutionalism can be highlighted. The most striking, and perhaps definitive, characteristic of this school of thought is its emphasis on the historical "path" taken by an institution in its creation and development.<sup>68</sup> These pathways are marked by critical

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that structural functionalism is so deeply embedded in political science discourse that it continues to govern significant issues and debates).

<sup>66</sup> Hall & Taylor, *supra* note 61, at 937.

<sup>67</sup> PETER A. HALL, *GOVERNING THE ECONOMY: THE POLITICS OF STATE INTERVENTION IN BRITAIN AND FRANCE* 19 (1986).

<sup>68</sup> See Seymour M. Lipset & Stein Rokkan, *Cleavage Structures, Party Systems, and Voter Alignments: An Introduction, in PARTY SYSTEMS AND VOTER ALIGNMENTS: CROSS-NATIONAL PERSPECTIVES* 1, 37 (Seymour M. Lipset & Stein Rokkan eds., 1967). Paul David refers to this as "path dependent" change. Paul A. David, *Clio and the Economics of QWERTY*, 75 AM. ECON. REV. PAPERS & PROC. 332, 332 (1985). Path dependency, of course, has become an analytical tool used by other social sciences, albeit in slightly different forms. Path dependency has even been used in purely legal analysis. See Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309

junctures, or cleavages, which present new paths or opportunities for change. "A critical juncture may be defined as a period of significant change, which typically occurs in distinct ways in different countries and which is hypothesized to produce distinct legacies."<sup>69</sup> A critical juncture is measured against a baseline of antecedent conditions. Ruth Collier and David Collier explain that there are three claims made of a purported critical juncture: that significant change took place, that the change took place in a distinct way, and that the change produced a legacy.<sup>70</sup> The legacy is critical to historical institutionalism because it becomes the new antecedent condition, conditions what choices can be made at future critical junctures, and determines the range of choices that can be made on a day to day basis.<sup>71</sup> Stephen Krasner makes explicit this core assumption of historical institutionalists:

Historical developments are path dependent; once certain choices are made, they constrain future possibilities. The range of options available to policymakers at any given point in time is a function of institutional capabilities that were put in place at some earlier period, possibly in response to very different environmental pressures.<sup>72</sup>

Historical institutionalists emphasize the role of power, competition, and coalitions in analyzing how an institution operates. This, of course, is a legacy of historical institutionalism's group theory roots. Margaret Weir's discussion of U.S. economic policy

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(1995) (using path dependency to analyze standing); Maxwell L. Stearns, *Standing Back From the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 (1995) (using path dependency to analyze justiciability).

<sup>69</sup> RUTH BERINS COLLIER & DAVID COLLIER, SHAPING THE POLITICAL ARENA: CRITICAL JUNCTURES, THE LABOR MOVEMENT, AND REGIME DYNAMICS IN LATIN AMERICA 29 (1991) (footnote omitted).

<sup>70</sup> See *id.* at 30. Collier and Collier also break the legacy down into three components: "mechanisms of production of the legacy," "[m]echanisms of reproduction of the legacy," and "stability of the core attributes of the legacy." *Id.* at 30-31. Each of these attributes bears directly on whether the purported legacy is in fact a legacy, that is, whether the critical juncture effectuated a real and lasting change in extant conditions. See *id.*

<sup>71</sup> Cf. JAMES GLICK, CHAOS 8 (1987) (emphasizing the "sensitive dependence on initial conditions").

<sup>72</sup> Stephen D. Krasner, *Sovereignty: An Institutional Perspective*, 21 COMP. POL. STUD. 66, 67 (1988).

is a striking example of this preoccupation. She demonstrates that the structure of the political system leads to certain types of coalitions and precludes others.<sup>73</sup>

Historical institutionalism exhibits a nonparochial approach to the causal forces in politics. Although the role of institutions is emphasized and thoroughly explored, it is not given an exclusive role. "They typically seek to locate institutions in a causal chain that accommodates a role for other factors, notably socioeconomic development and the diffusion of ideas. In this respect, they posit a world that is more complex than the world of tastes and institutions often postulated by" self-interest based theories.<sup>74</sup> An example that is of particular pertinence to this Article is an analysis by Judith Goldstein, in which she demonstrates that the structure for formulating trade policy in the United States reinforces the influence of certain types of ideas and diminishes the influence of others; the ideas themselves are significant factors in producing the outcome.<sup>75</sup>

Similarly, historical institutionalism does not posit one exclusive means by which institutions affect individual behavior.<sup>76</sup> Hall and Taylor set out two competing theories of how institutions affect behavior: the calculus approach and the cultural approach.<sup>77</sup> The calculus approach assumes that behavior is strategic. According to the calculus approach, institutions "provide information relevant to the behavior of others, enforcement mechanisms for agreements, penalties for defection, and the

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<sup>73</sup> See Margaret Weir, *Ideas and the Politics of Bounded Innovation, in STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS*, *supra* note 62, at 188; see also SVEN STEINMO, *TAXATION AND DEMOCRACY: SWEDISH, BRITISH AND AMERICAN APPROACHES TO FINANCING THE MODERN STATE* (1993) (explaining cross-country differences in tax systems by examining the way that political structure affects access to—and therefore power over—the political decisionmaking system).

<sup>74</sup> Hall & Taylor, *supra* note 61, at 942.

<sup>75</sup> See Judith Goldstein, *Ideas, Institutions and American Trade Policy*, 42 INT'L ORG. (1988).

<sup>76</sup> Hall and Taylor state: "Central to any institutional analysis is the question: how do institutions affect the behaviour of individuals? After all, it is through the action of individuals that institutions have an effect on political questions." Hall & Taylor, *supra* note 61, at 939. It should be recalled that both Burley and Shell criticize regime theory for its inability to explain how institutions relate to individuals. See *supra* notes 26 & 33 and accompanying text.

<sup>77</sup> See Hall & Taylor, *supra* note 61, at 939.

like.”<sup>78</sup> Institutions, therefore, allow individuals to calculate rationally and persist because they are useful to individual actors.<sup>79</sup>

The cultural approach recognizes that behavior is purposeful, but emphasizes the fact that it is bounded by established routines, existing patterns, and worldviews.<sup>80</sup> According to the cultural approach, institutions “provide moral or cognitive templates for interpretation and action.”<sup>81</sup> Institutions thus allow an individual to filter and make meaningful the morass of information not only concerning the situation, but also concerning the individual himself or herself.<sup>82</sup> Institutions persist because they are deeply ingrained and because they shape the choices that an individual makes about reforming institutions.<sup>83</sup>

<sup>78</sup> *Id.*

<sup>79</sup> See Randall L. Calvert, *The Rational Choice Theory of Social Institutions*, in MODERN POLITICAL ECONOMY 216, 216 (Jeffrey S. Banks & Eric A. Hanushek eds., 1995); see also Kenneth A. Shepsle, *Institutional Equilibrium and Equilibrium Institutions*, in POLITICAL SCIENCE: THE SCIENCE OF POLITICS 51, 74-75 (Herbert F. Weisberg ed., 1986) (arguing that individuals are hesitant to alter institutions even for short term gain because change creates a great deal of future uncertainty). This analysis is similar to that of the institutional economist Douglass C. North. See North, *supra* note 8, at 189.

<sup>80</sup> See, e.g., John L. Campbell, *The State and Fiscal Sociology*, 19 ANN. REV. SOC. 163, 164 (1993) (acknowledging that rational incentives are important but stating that cultural restraints are equally important).

<sup>81</sup> Hall & Taylor, *supra* note 61, at 939.

<sup>82</sup> See James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734, 738 (1984). A study conducted in Hungary provides interesting, and unintentional, empirical verification of this construct. The study found that a change in institutions, specifically, the advent of advertising, changed the manner in which individual Hungarians expressed their cultural identity. See Beverly James, *Learning to Consume: An Ethnographic Study of Cultural Change in Hungary*, 12 CRITICAL STUD. MASS COMM. 287 (1995).

<sup>83</sup> See ROBERT GRAFSTEIN, INSTITUTIONAL REALISM: SOCIAL AND POLITICAL CONSTRAINTS ON RATIONAL ACTORS (1992). Interestingly, some legal scholars have made the same observation about the relationship between law and society: that law is defined by, but at the same time defines, society. Mary Ann Glendon, in particular, has explored this aspect of law. See MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 311 (1989) (“A country’s law . . . both affects and is affected by the culture in which it arises . . .”); see also Kristian Miccio, *In the Name of Mothers and Children: Deconstructing the Myth of the Passive Battered Mother and the “Protected Child” in Child Neglect Proceedings*, 58 ALB. L. REV. 1087, 1087 (1995) (“Law shapes and defines who we are as a culture while reinforcing the belief system that undergirds it.”); Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 83 (1993) (“The law is a powerful conceptual—rhetorical, discursive—force. It expresses conventional understandings of value, and at the same time influences conventional understandings of value.”); Lawrence Rosen, *A Con-*

Regime theory and institutional economics both clearly postulate a calculus approach to explore the relationship between individuals and institutions. Historical institutionalists, on the other hand, have used both of these approaches.<sup>84</sup> A striking example is Victoria Hattam's analysis of labor movements. In discussing the U.S. labor movement, she speaks of the movement analyzing and adopting or avoiding certain strategies—in particular, moving away from strategies that were susceptible to review by the entrenched judiciary.<sup>85</sup> On the other hand, when comparing the U.S. labor movement to the British labor movement, she contrasts the different institutions available to each movement, and discusses how these institutions created different worldviews that led to different actions.<sup>86</sup>

Historical institutionalism *qua* historical institutionalism<sup>87</sup> has made virtually no inroads into legal scholarship. Ronald Kahn, who is educated as a political scientist rather than as a lawyer, recently published an article on presidential appointment power that explicitly suggests historical institutionalism as a valuable model for legal scholarship.<sup>88</sup> Kahn particularly emphasizes historical institutionalism's ability to describe and interpret the roles of power, conflict, and cooperation.<sup>89</sup> Kahn's admonition, however, has not been heeded by legal scholarship. In fact, Kahn chided his fellow panelists in the symposium from which his article was published for not taking advantage of historical institutionalism.<sup>90</sup>

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*sumer's Guide to Law and the Social Sciences*, 100 YALE L.J. 531, 542 (1990) (book review) (“[L]aw is preeminently an artifact of culture: it is influenced by and constitutive of the way in which the members of a society comprehend their actions towards one another and infuse those actions with an air of immanent and superordinate worth.”).

<sup>84</sup> See Hall & Taylor, *supra* note 61, at 940.

<sup>85</sup> See VICTORIA C. HATTAM, *LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES* (1993).

<sup>86</sup> See *id.* at 180-203.

<sup>87</sup> That is, historical institutionalism as a school of thought rather than the simple concept of path dependency.

<sup>88</sup> See Ronald C. Kahn, *Presidential Power and the Appointments Process: Structuralism, Legal Scholarship, and the New Historical Institutionalism*, 47 CASE W. RES. L. REV. 1419, 1449-50 (1997).

<sup>89</sup> See *id.* at 1446. Kahn relies heavily on Stephen Skowronek, *Order and Change*, 28 POLITY 91 (1995).

<sup>90</sup> See Kahn, *supra* note 88, at 1445.

In short, historical institutionalism is a vibrant school of thought within the realm of political science. The definitive characteristic of historical institutionalism—an attenuated path dependency—has been used in other social sciences, including legal scholarship. Historical institutionalism as a whole, however, has not been imported into legal scholarship or international law scholarship in the manner of regime theory or institutional economics. In particular, no legal scholar has used historical institutionalism as a model for critically analyzing the World Trade Organization.

### 2.1.2. *Sociological Institutionalism*

Just as in international relations theory, economics, political science, and so many other of the social sciences, a new institutional school has appeared in sociology. Hall and Taylor label this school “sociological institutionalism.”<sup>91</sup> The school of sociological institutionalism first appeared within the subspecialty of organization theory.<sup>92</sup> The impetus for the creation of this school was discomfort with a distinction—drawn since the time of Max Weber—between rational, formal, modern organizations (such as bureaucracy) and the parts of social life associated with culture.<sup>93</sup> Some sociologists found this distinction to be artificial, and argued against the notion that a certain class of institutions are chosen or created simply because they are the most effective at accomplishing a desired end. Rather, they argued, institutions are chosen, created and transmitted in the same manner as any other cultural artifact, such as ritual or myth.<sup>94</sup> Thus, the underlying

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<sup>91</sup> Sociologists themselves seem to refer to this school of thought simply as “institutionalism.” See, e.g., Paul J. DiMaggio & Walter W. Powell, *Introduction*, in *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 1, 1 (Walter W. Powell & Paul J. DiMaggio eds., 1991). This is similar to legal scholars who refer to their theory simply as institutionalism.

<sup>92</sup> This resulted in important works such as *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS*, *supra* note 91, and JOHN W. MEYER & W. RICHARD SCOTT, *ORGANIZATIONAL ENVIRONMENTS: RITUAL AND RATIONALITY* (1983); *INSTITUTIONAL ENVIRONMENTS AND ORGANIZATIONS* (W. Richard Scott & John W. Meyer eds., 1994).

<sup>93</sup> This distinction is drawn and emphasized in Frank R. Dobbin, *Cultural Models of Organization: The Social Construction of Rational Organizing Principles*, in *THE SOCIOLOGY OF CULTURE* 117 (Diana Crane ed., 1994).

<sup>94</sup> See John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 *AM. J. SOC.* 340 (1977); see also MEYER & SCOTT, *supra* note 92. Niel Fligstein particularly argues that markets



question for sociological institutionalists asks not what utilities caused an institution to be created, but instead what cultural factors led to its creation.<sup>95</sup> Indeed, Neil Fligstein and Robert Freeland argue that theories that take into account political, institutional and cultural factors as causal elements explain empirical data better than do economic theories.<sup>96</sup>

Sociological institutionalists may have the broadest definition of institutions of any of the social sciences. Institutions, to a sociological institutionalist, include not only formal and informal rules and procedures, but also symbols, cognitions, norms, and any other templates that organize or give meaning to the human condition.<sup>97</sup> This definition explicitly blurs the distinction between culture and institutions; in fact, under such a definition, culture itself may be an institution.<sup>98</sup> The definition is broad, however, only in terms of what *types* of structures it will include; it is quite rigorous in terms of what *qualities* are required of these structures. A rule or pattern is only considered an institution by sociological institutionalists if there is an unspoken sense that the rule or pattern must be followed or adhered to.<sup>99</sup> In this sense,

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and culture are inseparable. See Neil Fligstein, *Markets as Politics: A Political-Cultural Approach to Market Institutions*, 61 AM. SOC. REV. 656 (1996).

<sup>95</sup> See Hall & Taylor, *supra* note 61, at 947. Thus, John Campbell differentiates sociological institutionalism from other approaches by focusing explicitly on "the complex social interactions and institutional and historical contexts that link state and society in ways that shape fiscal policy and their effects." Campbell, *supra* note 80, at 164; see also Paul J. DiMaggio & Helmut K. Anheir, *The Sociology of Nonprofit Organizations and Sectors*, 16 ANN. REV. SOC. 137 (1990) (stating that the emergence of nonprofit organizations is caused by institutional factors as well as the individual utility functions emphasized by economists, and that to understand nonprofit organizations one must use an industry level ecological perspective).

<sup>96</sup> See Neil Fligstein & Robert Freeland, *Theoretical and Comparative Perspectives on Corporate Organization*, 21 ANN. REV. SOC. 21, 40 (1995).

<sup>97</sup> See W. Richard Scott, *Institutions and Organization: Toward a Theoretical Synthesis*, in INSTITUTIONAL ENVIRONMENTS AND ORGANIZATIONS, *supra* note 92, at 55, 56.

<sup>98</sup> See Ronald L. Jepperson, *Institutions, Institutional Effects, and Institutionalism*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra* note 91, at 86, 143, 150-51; John Meyer et al., *Ontology and Rationalization in the Western Cultural Account*, in INSTITUTIONAL ENVIRONMENTS AND THE ORGANIZATION, *supra* note 92 at 9; Lynne Zucker, *The Role of Institutionalization in Cultural Persistence*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra* note 91, at 83.

<sup>99</sup> See Jepperson, *supra* note 98, at 143, 145 (noting that "institutions represent a social order or pattern that has attained a certain state or property" and providing an explanation of that state or property); Lynne G. Zucker, *Organi-*

Paul DiMaggio and Walter Powell argue that the definition used by sociological institutionalists is actually more restrictive than that used by institutional economists, who consider mere rules of convenience to be institutions.<sup>100</sup>

Sociological institutionalism is no more unified than historical institutionalism.<sup>101</sup> Nonetheless, broad themes can be discerned. Sociological institutionalism emphatically embraces a cultural approach to the relationship between institutions and individual behavior.<sup>102</sup> Sociological institutionalism "emphasize[s] the way in which institutions influence behavior by providing the cognitive scripts, categories and models that are indispensable for action, not least because without them the world and the behaviour of others cannot be interpreted."<sup>103</sup> Institutions and individual be-

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*zations as Institutions, in RESEARCH IN THE SOCIOLOGY OF ORGANIZATIONS* 1, 2 (S.B. Bacharach ed., 1983) (stating that "institutionalism is fundamentally a cognitive process"). Public international lawyers will note the similarity to custom, which is considered a source of international law that is binding, in part, because there is a sense that it is binding. See Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060, 3 Bevans 1153, 1187 (stating that to constitute custom, a country's behavior must not only consist of a general practice but must also be accepted by that country as obligatory); see also IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4-5 (4th ed. 1990) (discussing custom).

<sup>100</sup> See DiMaggio & Powell, *supra* note 91, at 9; see also MARY DOUGLAS, *HOW INSTITUTIONS THINK* 46-48 (1986). Whether one definition actually is more restrictive than another is not a question with an objective answer, and has much to do with the underlying perspective of each school of thought. The instrumentalist orientation of institutional economics requires a definition that includes rules of convenience, whereas the cultural orientation of sociological institutionalists requires a definition that includes constructs that often are not scrutinized by other schools.

<sup>101</sup> DiMaggio and Powell begin their introduction to sociological institutionalism by noting that "it is often easier to gain agreement about what it is *not* than about what it *is*." DiMaggio & Powell, *supra* note 91, at 1.

<sup>102</sup> See *supra* notes 80-83 and accompanying text (discussing the cultural approach).

<sup>103</sup> Hall & Taylor, *supra* note 61, at 948; see also DiMaggio & Powell, *supra* note 91, at 3 ("[T]hought of self, social action, the state, and citizenship are shaped by institutional forces."). Hall and Taylor note that "[i]nstitutions influence behaviour not simply by specifying what one should do but also by specifying what one can imagine oneself doing in a specific context." Hall & Taylor, *supra* note 61, at 948; see also Neil Fligstein, *Social Skill and Institutional Theory*, 40 AM. BEHAVIORAL SCIENTIST 397, 397 (1997) (noting that sociological institutionalism "treats shared meanings as constraints on action that limit and determine what is meaningful behavior"); Zucker, *supra* note 98, at 2 (noting that shared cognitions define "what has meaning and what actions are possible").

havior, therefore, are mutually constitutive and mutually reinforcing.<sup>104</sup> Moreover, even though an individual may be acting rationally or out of self interest, perceptions of rationality or self interest are framed through—and thus shaped by—institutions.<sup>105</sup>

Sociological institutionalism also propounds a cultural account for the origination and alteration of institutions. This is most easily understood when contrasted with institutional economics. Institutional economics places the creation or alteration of institutions in the hands of entrepreneurs who act when the benefits of creation or alteration will outweigh the costs.<sup>106</sup> In other words, institutional economics proffers a voluntaristic, means-end oriented explanation. Sociological institutionalism, on the other hand, does not proffer a utilitarian explanation; instead, it argues that institutions are created or changed because the new institution will confer greater social legitimacy on the organization or its individuals. "In other words, organizations embrace specific institutional forms or practices because the latter are widely valued within a broader cultural environment."<sup>107</sup> Legitimate institutions should not be confused with laudable institutions, the adjective that is more accurate is "plausible"<sup>108</sup>—institutions are accepted if they are considered "appropriate."<sup>109</sup> Once created or

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<sup>104</sup> See *supra* note 83 (discussing the mutually reinforcing roles of actions and institutions and similarities with law); see also Jepperson, *supra* note 98, at 146 ("institutions simultaneously empower and control").

<sup>105</sup> See DiMaggio & Powell, *supra* note 91, at 10 ("[T]he very notion of rational choice reflects modern secular rituals and myths that constitute and constrain legitimate actions."); see also Ann Swidler & Jorge Arditi, *The New Sociology of Knowledge*, 20 ANN. REV. SOC. 305 (1994) (arguing that patterns of knowledge in organizations shape both the content and structure of knowledge). Interestingly, the prominent regime theorist Robert Keohane agrees: "institutions do not merely reflect the preferences and power of the units constituting them; the institutions themselves shape those preferences and that power." Robert O. Keohane, *International Institutions: Two Research Programs*, 32 INT'L STUD. Q. 379, 382 (1988).

<sup>106</sup> See North, *supra* note 8, at 191-92.

<sup>107</sup> Hall & Taylor, *supra* note 61, at 949.

<sup>108</sup> See ROBERT WUTHNOW ET AL., CULTURAL ANALYSIS 49-50 (1984) (stating that legitimation means "explaining or justifying the social order in such a way as to make institutional arrangements subjectively plausible"); see also W. Richard Scott, *Unpacking Institutional Arguments*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra* note 91, at 164, 169-70 (discussing legitimacy).

<sup>109</sup> See March & Olsen, *supra* note 82, at 741 (stating that "actors connote certain actions with certain situations by rules of appropriateness"). In *Limits of Citizenship*, Yasemin Soysal concludes that states adopted certain policies to

altered, institutions persist not because they are useful but instead because institutions constrain the manner in which individuals are able to consider changing institutions.<sup>110</sup>

Sociological institutionalism has not been completely voiceless in mainstream legal scholarship. Edward Rubin, who advocates a "new institutionalism" as a unifying theoretic for law,<sup>111</sup> incorporates the work of James March and Johan Olsen as well as those of Paul DiMaggio and Walter Powell in his explanation of institutionalism.<sup>112</sup> Rubin's is a very limited use of sociological institutionalism—he suggests a microanalysis of courts as institutions.<sup>113</sup> Nonetheless, his approach—in which he examines societal motivations of judges in an institutional context—resonates with the general tenets of sociological institutionalism.<sup>114</sup> Rubin's use of sociological institutionalism stands virtually alone in legal scholarship, and has not been replicated in international legal scholarship.

In short, although sociological institutionalism is an emerging school of thought, its concept of how institutions inform individual behavior and how institutions are created and altered can be

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wards immigrants not because those policies were functional or beneficial to the state but instead because those policies conformed to evolving concepts of human rights. YASEMIN NUHOGLU SOYSAL, *LIMITS OF CITIZENSHIP* 164 (1994). The concept of appropriateness may be vaguely reflected in Richard Posner's concept of intuition. For example, Posner has defended slavery contracts as a matter of economic theory and of legal theory. See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 86 (1981) (economic theory); Richard A. Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103, 134 (1979) (legal theory). He does not countenance slavery contracts, however, because they fail "the ultimate test" of a moral theory, which he describes as conformity to intuition. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 376-77 (1990). Similarly, even if some utility argument in favor of slavery could be fabricated, sociological institutionalism predicts that slavery would not be instituted because it is not considered appropriate and certainly does not enhance the legitimacy on an organization.

<sup>110</sup> See DiMaggio & Powell, *supra* note 91, at 10-11, 14-15. With an interesting turn of a phrase, DiMaggio and Powell state "[i]n other words, some of the most important sunk costs are cognitive." *Id.* at 11.

<sup>111</sup> See Rubin, *supra* note 1.

<sup>112</sup> See Edward L. Rubin, *Legal Reasoning, Legal Process and the Judiciary as an Institution*, 85 CAL. L. REV. 265, 280 n.41 (1997) (reviewing CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996)). Rubin also refers to institutional economists such as Douglass North and Oliver Williamson. See *id.*

<sup>113</sup> See *id.* at 281.

<sup>114</sup> A particularly excellent example is Edward Rubin & Malcom Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989 (1996).

sketched out. Nonetheless, even though these analytical principles are available, they have barely entered the realm of legal scholarship and have not been imported into international legal scholarship.<sup>115</sup> In particular, sociological institutionalism has not been used as a model for analysis of the World Trade Organization.

### 2.1.3. *Historical Institutionalism and Sociological Institutionalism Differ*

Historical institutionalism and sociological institutionalism differ from one another. At the level of first principles, which is the level at which this Article scrutinizes the various theoretical schools, they differ on at least two points: the creation and alteration of institutions, and the role of institutions in affecting individual behavior.

With respect to the creation and alteration of institutions, the difference might be summarized as one of perspective; historical institutionalism looks inward while sociological institutionalism looks outward. In other words, historical institutionalism examines factors pertinent to the institution under scrutiny—its past and the decision constraints that flow from the past—when asking how an institution came into existence. Sociological institutionalists, on the other hand, examine factors that are exogenous to the institution under scrutiny—institutions already existing in the cultural milieu act as the constraints on the creation and alteration of institutions.

With respect to the role of institutions in affecting individual behavior, the difference is one of scope. Both historical and sociological institutionalism accept the cultural approach to this relationship. Historical institutionalism, however, also accepts the

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<sup>115</sup> It should be noted that the Yale School of international law did borrow concepts from the sociology of the time. The Yale School portrayed international law as process, and emphasized the interrelatedness of legal and other social processes. Unlike current sociological theory, however, the Yale School displayed a distinctly realist posture. For example, the test of international decisions was whether they conformed with certain values critical to a world order among nations. Similarly, the Yale School posits that enforcement of decisions is shaped by social, moral and political relations among nations. See MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* (1961); Myres S. McDougal & W. Michael Reisman, *The Prescribing Order: How International Law is Made*, 6 *YALE J. WORLD PUB. ORDER* 249 (1980).

calculus approach, thus evidencing a wider or perhaps more eclectic perspective on the relationship between institutions and individual behavior. An equally meaningful difference with respect to the role of institutions in affecting individual behavior is in the quality of the treatment of the relationship between individual behavior and institutions. Taylor and Hall chide historical institutionalism for its lack of detailed attention to the relationship.<sup>116</sup> A great amount of sociological institutionalism, in contrast, focuses on the relationship between institutions and individual behavior, particularly on the cognitive role of institutions; this attention shapes a version of the cultural approach that is both detailed and unique to sociological institutionalism.

## 2.2. *Alternative Institutionalisms can be Distinguished from Other Institutionalisms*

Just as differences can be found between historical institutionalism and sociological institutionalism, critical differences can be discerned between the “alternative” institutionalisms and the two types of institutionalism that have entered the mainstream of international law scholarship. Again on the level of first principles, differences exist in the explanation each theoretical school offers for the creation and alteration of institutions, and for the role of institutions in affecting individual behavior.

Perhaps the greatest contrast is with respect to the creation or alteration of institutions. Regime theory and institutional economics offer little theoretical substance on this subject.<sup>117</sup> Individuals or states choose an institution from a wide menu of possibilities based on how well (or efficiently) that institution will effectuate the individuals’ or states’ preferences. Neither regime theory nor institutional economics explain how the menu is created, and the only constraint placed on the behavior of self-interested actors is informational. In contrast, historical institutionalism and sociological institutionalism, as discussed above, of-

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<sup>116</sup> See Hall & Taylor, *supra* note 61, at 950. Their criticism is all the more credible given that Peter Hall is a leading historical institutionalist.

<sup>117</sup> Robert Keohane admits that regime theory, the school of which he is a prominent member, “leave[s] open the issue of what kinds of institutions will develop, to whose benefit, and how effective they will be.” Keohane, *supra* note 105, at 388.

fer elaborate explanations of how that menu is created, and suggest a great number of constraints on actors' behavior.<sup>118</sup>

Regime theory and institutional economics do have elaborate explanations for the role institutions play in ordering behavior, although in the case of regime theory the analysis often deals with the behavior of states rather than individuals or voluntary associations.<sup>119</sup> Institutions are used as tools to accomplish ends, and are used in a voluntary and rational manner. Institutional economics in particular offers the most detailed explanation of individual behavior, although it is an explanation that rests uncomfortably on stark assumptions about state and individual behavior.<sup>120</sup> In contrast, historical institutionalism and sociological institutionalism offer a far less detailed explanation for individual behavior. In the case of historical institutionalism, the lack of detail may be attributable to a preoccupation with other aspects of institutionalism; nonetheless, historical institutionalism offers the insight that the calculus approach and the cultural approach may both be plausible in different times and situations. In the case of sociological institutionalism, the lack of detail is probably attributable to the enormous task that the theory takes on, which is to fit behavior into the context of entire cultures.

Each of the four iterations of institutionalism discussed in this Article have analytical strengths and weaknesses, and each has aspects that the others could profitably borrow. The insights of regime theory and institutional economics, as well as instances of their application to the World Trade Organization, are discussed above. What is equally interesting is that historical institutional-

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<sup>118</sup> In a similar vein, DiMaggio and Powell suggest that a dividing line among the various forms of institutionalism is whether a particular form of institutionalism's definition of institutions reflects the preferences of individuals or collective outcomes that are not the simple sum of individual interests. See DiMaggio & Powell, *supra* note 91, at 9. In this context it is interesting to contrast the common economic meaning of entrepreneur—to whom North attributes the changing of institutions, with the definition proffered by Fligstein—an actor with well developed social skills, particularly the ability to motivate cooperation among other actors. See Fligstein, *supra* note 103 *passim*.

<sup>119</sup> *But see supra* note 36 (noting that a small number of regime theorists argue for the application of regime theory to non-state actors).

<sup>120</sup> See Donohue & Ayres, *supra* note 40, at 812 (noting the limitations caused by the "clean assumptions" of law and economics); Thelen & Steinmo, *supra* note 62, at 12 (describing the "ruthless elegance" of economic explanations).

ism and sociological institutionalism also offer insights into the World Trade Organization.

### 2.3. *Historical Institutionalism and Sociological Institutionalism are Instructive to the Legal Analysis of the World Trade Organization*

These differences between regime theory and institutional economics on the one hand, and historical institutionalism and sociological institutionalism on the other, suggest that the alternative institutionalisms offer new perspectives to the legal scholar, and as a corollary offer trade scholars a means of sharpening their analysis of the World Trade Organization. Three short examples indicate that this is in fact the case.<sup>121</sup>

The first example is the dispute settlement process of the World Trade Organization. Several scholars have intuited that the dispute settlement process cannot be understood without understanding the process under the GATT. Their intuition is evidenced by the fact that prior to discussing dispute settlement within the World Trade Organization, these scholars often provide lengthy discussions of the process under the GATT.<sup>122</sup> As a purely technical matter, such discussion is not required because the World Trade Organization is distinct from and is not the technical successor to the GATT.<sup>123</sup> Institutional economics does not require such a discussion, because institutions are created by rational actors free from the burden of prior institutions. Similarly, regime theory has no place for such a discussion. In the ab-

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<sup>121</sup> These examples, of course, are not exhaustive. The question asked by this Article is not how alternative institutionalisms may be applied to analysis of the World Trade Organization, but instead why these iterations of institutionalism have not to date been used in such analysis.

<sup>122</sup> See, e.g., Arie Reich, *From Diplomacy to Law: The Juridicization of International Trade Relations*, 17 J. INT'L L. & BUS. 775 (1996-97).

<sup>123</sup> See Agreement Establishing the World Trade Organization art. 2, cl. 4, 33 I.L.M. 1144, 1145 (1994) [hereinafter the "Charter"] ("The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as 'GATT 1994') is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947 . . . as subsequently rectified, amended or modified (hereinafter referred to as 'GATT 1947')."); Amelia Porges, Introductory Note to the General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, 33 I.L.M. 1, 4 (1994) (quoting then Director-General Peter Sutherland as emphasizing that the World Trade Organization "will not be a successor agreement to GATT, as defined in the Vienna Convention").



sence of a theoretical framework, the intuitions of scholars analyzing dispute settlement become nothing more than interesting background information.

Historical institutionalism provides a theoretical perspective in which understanding dispute settlement under the GATT is of critical importance to understanding dispute settlement within the World Trade Organization. Dispute settlement under the GATT constituted the antecedent conditions from which dispute settlement within the World Trade Organization arose. John Croome's insightful history of the Uruguay Round of multilateral trade negotiations reveals several points during the seven years of negotiation that might be considered critical junctures;<sup>124</sup> alternatively, the entire negotiations could be considered a cleavage in the governance of international trade.<sup>125</sup> In either case, historical institutionalism posits that the antecedent conditions impose constraints on the choices that are available now—constraints that must be understood in order to truly effect analysis of the dispute settlement process.<sup>126</sup> Examples of aspects of dispute settlement under the World Trade Organization that are best understood in historical context include the allowance of multiple complainants in one proceeding,<sup>127</sup> which is an extension of several proceedings in the 1980s and a 1989 decision by the parties to the General

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<sup>124</sup> See JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND* (1995). The four years of preparation for and seven years of negotiation of the Uruguay Round cannot be summarized in one footnote—even a law review footnote. Croome, who participated in the entire span of the Uruguay Round, recalls “the days and nights of efforts, the clashes of policies and personalities, the national pressures on negotiators, the repeated solemn declarations of heads of state and government, the frustrations and breakthroughs.” *Id.* at 4. Examples of critical junctures might include the 1985 clash between developed and developing countries over the need for a new round of negotiations (which fundamentally changed perceptions of the Multi fibre Arrangement), *id.* at 24-25; the circulation by Arthur Dunkel of his Draft Final Act Embodying the Results of the Uruguay Round of Negotiations in 1991 (which jelled negotiators’ opinions and became the new point of reference for negotiators), *id.* at 291-94; and the collapse of the Blair House accords on agriculture (which very nearly resulted in the failure of the Uruguay Round), *id.* at 341.

<sup>125</sup> See COLLIER & COLLIER, *supra* note 69, at 29-30 & n.14 (discussing such cleavage).

<sup>126</sup> See Thelen & Steinmo, *supra* note 62, at 3 (arguing that historical constraints must be understood).

<sup>127</sup> See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 9, Charter, *supra* note 123, Annex 2 [hereinafter Understanding].

Agreement;<sup>128</sup> rules governing the participation of third parties,<sup>129</sup> which expand, in interesting ways, the rights given to third parties in two Decisions by parties to the General Agreement;<sup>130</sup> and even the much condemned secrecy of dispute settlement panels,<sup>131</sup> which was the emphatic practice of panels convened by the GATT.<sup>132</sup> The trade scholars' intuitions are correct, and are given a theoretical niche in historical institutionalism.

Historical institutionalism gives voice to questions that are outside the theoretical constructs of regime theory or institutional economics. For example, regime theory and institutional economics posit a world of autonomous, roughly equal actors. In the World Trade Organization, however, there are marked gradations of power. The "quad countries," consisting of Canada, the European Union, Japan and the United States, are the most powerful members.<sup>133</sup> Emerging economies and developing countries, on

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<sup>128</sup> See United States—Taxes on Petroleum and Certain Imported Substances, GATT B.I.S.D. (34th Supp.) at 136, 136-37 (1987); United States—Customs Users Fees, GATT B.I.S.D. (35th Supp.) at 245, 245-46 (1988); Conciliation on Improvements to the GATT Dispute Settlement Rules and Procedures, Apr. 12, 1989, GATT B.I.S.D. (36th Supp.) at 61, 64 (1989) [hereinafter 1989 Decision].

<sup>129</sup> See Understanding, *supra* note 127, art. 10.

<sup>130</sup> See Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 210, 213 (1979); 1989 Decision, *supra* note 128, at 65. The rules of the World Trade Organization give third parties access to the submissions of the primary parties, a right that they did not enjoy under the rules for dispute settlement under the GATT.

<sup>131</sup> See Understanding, *supra* note 127, art. 13(1) & art. 14(1); see also Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043, 1066 (1994) (castigating closed decisionmaking process as "inimical" to sound decisionmaking); Robert F. Housman, *Democratizing International Trade Decision-Making*, 27 CORNELL INT'L L.J. 699, 711 (1994) ("The application of these ironclad rules of secrecy is perhaps most troubling in the area of GATT dispute resolution."); John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1255 (1992) ("For purposes of gaining a broader constituency among the various policy interested communities in the world . . . the GATT could go much further in providing 'transparency' of its processes.").

<sup>132</sup> See, e.g., Panel on Japanese Measures on Imports of Leather, May 15-16, 1984, GATT B.I.S.D. (31st Supp.) at 94, 95 (1984) (recording a decision made by a GATT panel). For a more full discussion of these and many other aspects of the dispute settlement process under the World Trade Organization that stem from practices that evolved under the General Agreement, see Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT'L L. 379, 399-418 (1996).

<sup>133</sup> See *Uruguay Round: Quad Countries Deliver Ratification of Uruguay Round World Trade Agreement*, Int'l Trade Daily (BNA) (Jan. 3, 1995).

the other hand, have entered into a series of shifting alliances.<sup>134</sup> Historical institutionalism, with its roots in the political scientific analysis of power, is well situated to provide a theoretical framework for analysis of this aspect of the World Trade Organization.<sup>135</sup>

Similarly, sociological institutionalism allows scholars to frame questions that do not arise under regime theory or institutional economics. Of these, one of the more interesting has to do with sociological institutionalism's observation that institutions are a product of and are affected by the culture in which they are embedded.<sup>136</sup> The World Trade Organization is a global institution.<sup>137</sup> Sociological institutionalism would suggest that it is the product of a global culture. The existence of a global culture, however, is an issue that is greatly contended but little explored.<sup>138</sup> The insight that culture informs institutions raises several questions with respect to the World Trade Organization, such as whether, if there is no global culture, the World Trade Organization or the rules that it promulgates can truly persist; whether the rules issued by the World Trade Organization and

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<sup>134</sup> See ROBERT E. HUDEC, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* (1987); Robert E. Hudec, *GATT and the Developing Countries*, 1992 COLUM. BUS. L. REV. 67.

<sup>135</sup> See Hall & Taylor, *supra* note 61, at 954 (extolling the ability of historical institutionalism to analyze power).

<sup>136</sup> See *supra* notes 93-96 and accompanying text.

<sup>137</sup> See Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295, 322-23 (1996) (distinguishing the European Union as a federation of culturally related nations from the World Trade Organization as a global organization). As of October, 1997, the World Trade Organization had 132 members and 32 observers from all parts of the world.

<sup>138</sup> See, e.g., ANTHONY D. KING, *THE BUNGALOW: THE PRODUCTION OF A GLOBAL CULTURE* (2d ed. 1995) (using similarities of architectural style in India, Britain, North America, Africa, Australia and continental Europe to argue in favor of the inter-relatedness of worldwide social phenomena); William Alonso, *Citizenship, Nationality and Other Identities*, 48 J. INT'L AFF. 585, 588-592 (1995) (describing a study that finds some identification with a global culture, but closer identification with local factors); Jason Clay, *Global Culture is Globaloney*, UTNE READER, Jan./Feb. 1996, 36 at 37 (arguing that the putative global culture is really a profit-oriented manipulation by those with an interest in marketing the concept); Mel van Elteren, *Conceptualizing the Impact of U.S. Popular Culture Globally*, 30 J. POPULAR CULTURE 47 (1996) (stating that the spread of U.S. culture is due to an increase in capitalistic consumerism rather than a global culture, but noting that the spread has the effect of homogenizing culture worldwide).

other international economic organizations will engender a global culture; and how a thin global culture would constrain the functioning and enforcement of the World Trade Organization's rules and policies. Unfortunately, sociologists have only begun to scratch the surface of international institutions, and offer little guidance.<sup>139</sup> Nonetheless, the questions raised by sociological institutionalism are of obvious interest to trade law scholars.

### 3. THE QUESTION OF SCHOLARLY LINKAGE

#### 3.1. *Institutional Explanations of Historical Institutionalism's and Sociological Institutionalism's Lack of Influence on the Analysis of the World Trade Organization*

It is apparent that regime theory and economic institutionalism do not exhaust the universe of institutionalisms. It is also apparent that other forms of institutionalism can provide a useful prism for the scrutiny of international law in general, and for analysis of the World Trade Organization in particular. The obvious question, therefore, is why these alternative forms of institutionalism are not widely used. Interestingly, the alternative institutionalisms themselves provide possible answers to this question. In order to embark upon this analysis, it is necessary to accept that legal scholarship is itself an institution, replete with formal and informal rules, motivated actors, and shared cognitions.<sup>140</sup>

The first means by which to examine the scholarly linkages that have already occurred is through historical institutionalism. Historical institutionalism emphasizes path dependency. Future direction is conditioned by the past; significant change occurs at critical junctions or points of cleavage. Against this background, it is interesting to turn to a story related by the comparative legal scholar Alan Watson. Watson is not a historical institutionalist,

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<sup>139</sup> But see, e.g., David Strang & John W. Meyer, *Institutional Conditions for Diffusion*, in *INSTITUTIONAL ENVIRONMENTS AND ORGANIZATIONS*, 100 (W. Richard Scott & John W. Meyer eds., 1994) (analyzing how institutions affect cultural diffusion).

<sup>140</sup> See Nancy L. Cook, *Outside the Tradition: Literature as Legal Scholarship*, 63 U. CINN. L. REV. 95, 148 (1994) (stating that the development of legal scholarship is like that of "any institution"); see also Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 479-81 (1997) (discussing the functions of legal scholarship).

but he too is interested in how laws develop and change.<sup>141</sup> Watson attributes one factor in the development and change in legal systems to accident and "chance."<sup>142</sup> He relates a story concerning the development of law in South Africa. A South African physician happened upon one of Watson's books, *Legal Transplants*, in a bookstore shortly before a return flight to South Africa. The physician, who assumed that the book dealt with the law of medical transplants, purchased the book. Although the book actually deals with the transplant and reception of laws, the physician enjoyed the book and, after a series of letters with Watson, provided Watson with funds to edit a translation of Justinian's *Digest*. The translation was made available in South Africa, where it resulted in a measurable increase in the use of Roman law in South African legal decisions.<sup>143</sup> In relating this story, Watson revels in discussing the chance or accidental nature of this line of legal development.<sup>144</sup> What is most interesting for the purposes of the present analysis, however, is Watson's observation that the introduction of a single text into South African jurisprudence had tremendous impact on the formulation of South African law.<sup>145</sup>

Abbott's article on regime theory was not accidentally purchased on the way to an airport. The lesson of Watson's story, however, is apparent. Abbott's article shaped the direction of international legal scholarship, and conditioned its path toward acceptance and use of regime theory.<sup>146</sup> Burley's synthesis further constrained international law scholarship.<sup>147</sup> Had Abbott written

<sup>141</sup> See, e.g., ALAN WATSON, *THE EVOLUTION OF LAW* (1985).

<sup>142</sup> Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335, 341 (1996). Altogether, Watson suggests four factors: utility of the transplanted law, accident and chance, difficulties of clear sight, and the authority enhancing effect of the transplanted law. See *id.* at 335-45.

<sup>143</sup> See *id.* at 340.

<sup>144</sup> It should be noted that neither economic institutionalism nor regime theory are equipped to interpret this story. Indeed, Watson himself is reduced to labeling this factor "chance." *Id.* at 339. He also notes that "[p]urists will object and say that I am relying on anecdotal evidence. Yes, I am. But that in no way impairs my argument. . . . [c]hance cannot systematically be factored into any development." *Id.* at 341. Historical institutionalism provides a theoretical means of categorizing this critical junction in the development of South African law.

<sup>145</sup> See *id.* at 340-41.

<sup>146</sup> See *supra* note 30 (noting that scholars who used regime theory analysis acknowledged Abbott).

<sup>147</sup> See *supra* note 21 (relating plaudits for Burley).

an article expounding the application of historical institutionalism to legal theory, or had Burley explicated a detailed history of sociology rather than international relations theory, it is probable that the landscape of international law scholarship in general and of analysis of the international trade regime in particular would be quite different today.

Such a story may seem incomplete—it begins abruptly with the publication of Abbott's article. A lingering question remains: from where did this article arise? While only Abbott can fully answer that question, he does provide a clue in the article itself. That clue, in turn, can be placed within the structure of sociological institutionalism. Abbott opines that international relations theory, from which regime theory is taken, is the closest of the social sciences to international law scholarship.<sup>148</sup> In sociological institutionalism terms, Abbott is culturally predisposed, perhaps even constrained, to borrow from international relations theory. This is true both cognitively and with respect to legitimization. Cognitively, Abbott's writings indicate that he is steeped in knowledge of institutionalism and that he is a profound researcher. As a scholar trained in international law and international relations, however, he simply may not have "seen" historical or sociological institutionalism. With respect to legitimization, Abbott may, consciously or unconsciously, have considered borrowing from a related social science to be more appropriate than borrowing from political science or sociology.<sup>149</sup>

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<sup>148</sup> Abbott, *supra* note 10, at 342; see also Burley, *supra* note 21, at 205 ("Just as constitutional lawyers study political theory, and political theorists inquire into the nature and substance of constitutions, so too should two disciplines that study the laws of state behavior seek to learn from one another.").

<sup>149</sup> Cf. Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 900 (1992) (noting that methodological commitment tends to bind legal scholars and diminish acceptance of alternatives). Indeed, some aspects of historical institutionalism and sociological institutionalism may seem to some legal scholars to resonate with the deconstructionist allies of the school of critical legal studies, which is anathema to many U.S. scholars and thus would not be considered institutionally appropriate. In addition to criticism of its logic, deconstructionism is criticized as contributing to excessive cynicism and nihilism while contributing nothing positive to legal theory. See, e.g., DAVID C. HOY & THOMAS MCCARTHY, *CRITICAL THEORY* (1994) (criticizing deconstructionism); Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714, 743 (1994) (criticizing deconstructionism); Girardeau A. Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473, 540-41 (1984) (questioning whether deconstruction adds anything to legal analysis); see also Vivian Grosswald Curran, *Deconstruction, Structuralism, Antisemitism and the Law*, 36 B.C. L. REV. 1 (1994)

A similar story can be told with respect to economic institutionalism, although not quite as directly. The modern law and economics movement probably began when Aaron Director, an economist at the University of Chicago, introduced several members of that university's law faculty to economic theory.<sup>150</sup> From that beginning, law and economics has gone through several intellectual generations, becoming more broadly distributed throughout legal scholarship.<sup>151</sup> Thus, it is not possible to draw a straight line from Director to Trachtman, as it is from Abbott to Shell.<sup>152</sup> Nonetheless, a historical institutionalist might argue that at a critical juncture, when legal scholarship was receptive to a new paradigm, Director's protégées sent legal scholarship along the path of law and economics, and that the choices available to legal scholarship are now constrained by that choice.<sup>153</sup> Under this line of reasoning, it would be considered institutionally likely that a scholar would apply institutional economics to the World Trade

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(outlining criticisms of deconstructionism, from a perspective sympathetic to deconstructionism). The difference, of course, is that while deconstructionism simply posits that words have no objective meaning, historical institutionalism and sociological institutionalism posit that the meaning attributable to various cognitions may be attributable to several sets of rules, including self-referential rules.

<sup>150</sup> See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 316-30 (1995) (discussing the beginning and early history of law and economics). Among the first law faculty that Director worked on were Robert Bork and Richard Posner. See *id.* An interesting history, albeit recounted very subjectively by actual participants, of the nascence of the modern law and economics movement is Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J.L. & ECON. 163 (1983) (reproducing a transcript of a discussion among a number of members of the law and economics school). Intellectually, modern law and economics may have its roots in Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), and Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961). See RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 19-20 (3d ed. 1986) (discussing the influence of the two articles).

<sup>151</sup> See POSNER, *supra* note 150, at 19-20 (outlining a history of the law and economics school); Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 604-13 (1989) (same); Susan Rose-Ackerman, *Law and Economics: Paradigm, Politics or Philosophy*, in LAW AND ECONOMICS 233 (Nicholas Mercuro ed., 1989) (explaining the basic ideas of the 'Chicago' and 'Reformist' schools of law and economics).

<sup>152</sup> Shell himself draws that line. See *supra* note 31.

<sup>153</sup> Robert Ellickson reports that the percentage of law faculty with Ph.D.'s in economics grew considerably from 1960 to 1970. See Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 26-27 (1989).

Organization,<sup>154</sup> and unlikely that institutionalism from another school of thought would be applied.

Again, this story seems incomplete—its conclusion of inevitability seems rather self-fulfilling. And again, sociological institutionalism may offer a more satisfying explanation. Sociological institutionalism argues that institutions will be created or changed in ways that are considered appropriate.<sup>155</sup> Law and economics is wildly controversial as a theoretic for legal scholarship,<sup>156</sup> but it nonetheless has earned a position as a legitimate heuristic.<sup>157</sup> Just as importantly, law and economics analysis has become a proven route for ensuring publication and obtaining tenure and promotion.<sup>158</sup> It is difficult to make the same claim for political science or sociology, particularly in recent years.<sup>159</sup> Thus, culturally, it is more legitimate and appropriate to borrow from institutional

<sup>154</sup> Recounting this line of reasoning is not meant to imply that Trachtman's analysis is neither original nor well executed. It is both, in abundance.

<sup>155</sup> See Scott, *supra* note 97, at 169-70.

<sup>156</sup> See Avery Wiener Katz, *Positivism and the Separation of Law and Economics*, 94 MICH. L. REV. 2229, 2260 (1996) ("The tension among efficiency, equity, and other aspects of justice remains as controversial as ever in public discourse."); see also Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 8 (1986) (noting that law and economics is controversial because it makes radical assumptions and because it reduces values to preferences).

<sup>157</sup> See Linz Audain, *Critical Legal Studies, Feminism, Law and Economics, and the Veil of Intellectual Tolerance: A Tentative Case for Cross-Jurisprudential Dialogue*, 20 HOFSTRA L. REV. 1017, 1045 (1992) (noting that while the assumptions of law and economics are controversial, the methodology is not, because it is simply the methodology of economics); see also Gregory S. Crespi, *The Mid-Life Crisis of the Law and Economics Movement: Confronting the Problems of Nonfalsifiability and Normative Bias*, 67 NOTRE DAME L. REV. 231, 231-32 (1991) (discussing the influence of law and economics).

<sup>158</sup> See Donald N. McCloskey, *The Rhetoric of Law and Economics*, 86 MICH. L. REV. 752, 765 (1988) ("In his Maccabean lecture on jurisprudence in 1981, Guido Calabresi reported the current opinion that law and economics was the only sure route to promotion and tenure."); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1519 n.18 (1991) ("I am hard-pressed to identify a leading law faculty that has denied tenure to someone prominently identified as a . . . law and economics person, and find it absurdly easy to identify law faculties that have denied tenure to [critical legal studies] people.").

<sup>159</sup> An exception might be the Yale School of International Law, which professed to borrow from sociology (although now a dated sociology), and which occasionally is itself explicitly borrowed from. See, e.g., David J. Gerber, *International Discovery After Aerospaciale: The Quest for an Analytical Framework*, 82 AM. J. INT'L L. 521, 543 n.125 (1988) (borrowing from the Yale School, albeit in a domestic context). The Yale School is discussed *supra* note 115.



economics than from historical institutionalism or sociological institutionalism.

Regime theory and institutional economics are singularly unhelpful in explaining why they are the dominant institutionalisms used to analyze the World Trade Organization. Regime theory is inapplicable to a question of the institution of scholarship, but its principles would suggest that a number of autonomous scholars with relatively equal power selected regime theory and institutional economics as the most effective means of obtaining their preferences (which, hopefully, would be a clearer theoretical and practical understanding of the World Trade Organization). Institutional economics would make a similar argument, substituting efficient for effective. These self-congratulatory arguments, however, are wrong; it has already been demonstrated that historical institutionalism and sociological institutionalism offer unique and valuable insights into the World Trade Organization.<sup>160</sup> Clearly, the explanations suggested by historical institutionalism and sociological institutionalism are the more persuasive.

### 3.2. *Why Other Analytical Linkages May Not Exist*

The inquiry into why historical institutionalism and sociological institutionalism have not been used in the analysis of the World Trade Organization sheds light on another area of interest to trade scholars. Why have certain analytical linkages not been drawn? This question is of particular interest, because trade scholars should not assume that their repertoire for analysis, simply because it is bulky, is complete.

An example of a linkage that has not been drawn, for example, is that between the World Trade Organization and ethics. What is particularly puzzling is the fact that trade scholars have not drawn from the rapidly growing body of literature concerning business ethics,<sup>161</sup> particularly that branch of business ethics that concerns international business.<sup>162</sup>

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<sup>160</sup> See *supra* notes 121-139 and accompanying text.

<sup>161</sup> The field of business ethics is rapidly becoming big business. Among other developments, the last fifteen years have seen the proliferation of a great number of books and articles on ethical problems in business; the emergence of several centers and institutes at least partly devoted to the subject or to related problems like the role of values in scientific, technological or public policy work; the spread of business ethics courses in both college and business school curricula; and even,

Integrated social contract theory, as explicated by Thomas Dunfee and Thomas Donaldson, for example, has become a widely explored analytical tool in the field of business ethics.<sup>163</sup> It has also found expression in general management literature. In legal literature on trade, however, there are no references to this school of thought.<sup>164</sup>

Integrated social contract theory is based on, but radically extends, the tradition of social contract theorists such as Locke and Rousseau.<sup>165</sup> Integrated social contract theory adopts the appellation "integrated" because it unites two distinct types of social con-

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in some corporations, the development of seminars in ethics for executives.

Robert Jackall, *Business as Social and Moral Terrain*, in PERSPECTIVES IN BUSINESS ETHICS 77, 77 (Laura Pincus Hartman ed., 1998).

<sup>162</sup> See, e.g., BUSINESS ETHICS: JAPAN AND THE GLOBAL ECONOMY (Thomas W. Dunfee & Yukimasa Nagayasu eds., 1993); THOMAS DONALDSON, THE ETHICS OF INTERNATIONAL BUSINESS (1989).

<sup>163</sup> See Jeffrey Nesteruk, *The Moral Dynamics of Law in Business*, 34 AM. BUS. L.J. 133, 133 (1996) (stating that "virtue ethics and social contract theory . . . are increasingly influencing our understanding of ethical issues in business"); Robert Phillips, Stakeholder Theory, Social Contracts, and a Principle of Fairness 1 (1997) (unpublished manuscript on file with the author) ("Prominent among the myriad proposed models of business ethics are stakeholder theory and social contract theory. The latter has, in fact, been suggested as a normative grounding for the former."). A very clear explanation of integrated social contract theory can be found in DAVID J. FRITZCHE, BUSINESS ETHICS: A GLOBAL AND MANAGERIAL PERSPECTIVE 43-47 (1997).

<sup>164</sup> In legal literature as a whole there are virtually no references to integrated social contract theory. Moreover, the only two references found by the author of this Article are brief, and do not attempt to borrow from or integrate the theory into legal theory. In corporate law, Timothy Fort borrows Dunfee and Donaldson's criticism of stakeholder theory. See Timothy L. Fort, *The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 NOTRE DAME L. REV. 173, 188-89 (1997). Steve Salbu refers to the concept of moral free space, but does not present integrated social contract theory as a model. See Steven R. Salbu, *True Codes Versus Voluntary Codes of Ethics in International Markets: Towards the Preservation of Colloquy in Emerging Global Communities*, 15 U. PA. J. INT'L BUS. L. 327, 348 n.73 (1994). It should be noted that Professor Fort teaches at the University of Michigan's business school, and that Professor Salbu received his Ph.D. partially under the supervision of Dunfee. Both facts reinforce the path dependency of legal scholarship.

<sup>165</sup> See Michael Keeley, *Continuing the Social Contract Condition*, 5 BUS. ETHICS Q. 241 (1995) (stating that Donaldson and Dunfee's work extends the work of the Sophists and of Locke to modern organizations).

tracts.<sup>166</sup> The first type is a hypothetical macrosocial contract among all of the members of a given society, the contents of which are all of the economic rules to which all of the members would agree.<sup>167</sup> Obviously, this will not be a great number of rules. The result is moral free space within that hypothetical macrosocial contract. Inside that moral free space, communities are free to enter into the second type of social contract: explicit contracts that provide more detailed rules concerning ethical behavior in economic life.<sup>168</sup> These microsocial contracts are bounded only by hypernorms, which are “principles so fundamental to human existence that they serve as a guide in evaluating lower level moral norms,”<sup>169</sup> and by a requirement that individual members have consented to the contract.<sup>170</sup> Because membership in different economic communities may overlap, thus creating overlapping systems of rules within the moral free space of the macrosocial contract, Dunfee and Donaldson have devised a set of priority rules to determine which set should apply in a given situation.<sup>171</sup>

Dunfee defines communities as “all coherent groupings of people capable of generating ethical norms . . . includ[ing] a corporation, a department or other subgroup within a corporation, a social club, an industry association, a faculty senate, a church or synagogue, a city government, an association of trial lawyers and

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<sup>166</sup> See Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 ACAD. MGMT. REV. 252, 254 (1994) (explaining the appellation).

<sup>167</sup> See Thomas Donaldson & Thomas W. Dunfee, *Integrative Social Contracts Theory: A Communitarian Conception of Economic Ethics*, 11 ECON. & PHIL. 85, 93 (1995) (explaining the hypothetical macrosocial contract).

<sup>168</sup> See Donaldson & Dunfee, *supra* note 166, at 260-62 (discussing moral free space); Donaldson & Dunfee, *supra* note 167, at 93-95 (discussing microsocial contracts that fill in the moral free space).

<sup>169</sup> Donaldson & Dunfee, *supra* note 166, at 265; see also Thomas W. Dunfee, *The Role of Ethics in International Business*, in BUSINESS ETHICS: JAPAN AND THE GLOBAL ECONOMY, *supra* note 162, at 63, 69 (“Hypernorms are defined as norms so fundamental to human existence that they will be reflected in a convergence of religious, political, and philosophical thought. Hypernorms thus represent core or fundamental values common to many cultures.”).

<sup>170</sup> Donaldson & Dunfee, *supra* note 167, at 98. Consent can be indicated by, among other means, not taking advantage of an opportunity to exit. See *id.* at 99.

<sup>171</sup> See Donaldson & Dunfee, *supra* note 166, at 268-71 (outlining priority rules for determining which community’s rules apply).

so on.”<sup>172</sup> Clearly, the World Trade Organization constitutes a community under this definition. Just as clearly, legal scholarship on the World Trade Organization could benefit from the discipline that integrated social contract theory brings to consideration of the issue of ethics in an economic setting, and from a theory that “allows for moral diversity among various cultures while maintaining certain universal norms.”<sup>173</sup> And yet, it does not.

That legal scholarship has not availed itself of this or other analytics from the discipline of business ethics may be explained by the insights of historical institutionalism and sociological institutionalism. Historically and culturally, there has been little intellectual exchange between legal scholarship and business scholarship.<sup>174</sup> An example is illustrative. The concept of “core competencies” is a staple in management sciences and other sciences related to the study of businesses.<sup>175</sup> Out of the estimated *five thousand* law review articles published each year,<sup>176</sup> however, a search of the LEXIS electronic database reveals only *sixteen* references to core competencies. Of these, five could in no way be construed as a reference to business theory,<sup>177</sup> four were made by

<sup>172</sup> Dunfee, *supra* note 169, at 68. “Thus defined, communities are groups that determine their own membership and apply their own preferred forms of rationality.” *Id.*

<sup>173</sup> FRITZSCHE, *supra* note 163, at 43.

<sup>174</sup> See Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 303-05 (1984) (castigating legal scholarship and education for its lack of integration with business theory).

<sup>175</sup> For an early and often-cited discussion of core competencies, see C.K. Prahalad & Gary Hamel, *The Core Competence of the Corporation*, HARV. BUS. REV., May-June 1990, at 79.

<sup>176</sup> Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 928 (1990).

<sup>177</sup> See Frank S. Bloch, *Framing the Clinical Experience: Lessons on Turning Points and the Dynamics of Lawyering*, 64 TENN. L. REV. 989, 1000 (1997) (discussing clinical experience at the University of Tennessee); Teresa V. Carey, *Credentialing for Mediators—To Be or Not To Be?*, 30 U.S.F. L. REV. 635, 640 (1996) (discussing the attributes necessary for a mediator); Rob Frieden, *Privatization of Satellite Cooperatives: Smothering a Golden Goose?*, 36 VA. J. INT'L L. 1001, 1007 (1996) (discussing the language of the INMARSAT Convention); Emmanuel P. Mastromanolis, *Insights from U.S. Antitrust Law on Exclusive and Restricted Territorial Distribution: The Creation of a New Legal Standard for European Union Competition Law*, 15 U. PA. J. INT'L BUS. L. 559, 591 (1995) (discussing attributes of traders); Donald T. Weckstein, *Mediator Certification: Why and How*, 30 U.S.F. L. REV. 757, 767 (1996) (discussing training in the basic attributes of a mediator).

attorneys who were employed in business settings,<sup>178</sup> one was made by a businessperson who authored a very short comment,<sup>179</sup> and two were made by students.<sup>180</sup> Out of all sixteen, only one actually used the concept at length.<sup>181</sup> By contrast, a search in the same database of the term “efficiency” yields 17,792 references; of the term “efficient allocation,” 1,056 references; of “Coase Theorem,” 707 references; of “elasticity of demand,” 684 references. Even the term “David Ricardo” yields ninety references. Clearly, management theory is not part of the culture of legal scholarship in any meaningful way, whereas economic theory appears in abundance.

The insights of historical institutionalism and sociological institutionalism—that legal scholarship’s past and present culture lead it to certain linkages and away from others—reflects neither well nor poorly on legal scholarship, it is simply an observable phenomenon. Awareness of possible institutional limitations on

<sup>178</sup> See Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527, 1530 n.8 (1996) (Becker was Associate General Counsel of the Service Employees International Union, AFL-CIO); Ward Bower, *Law Firm Economics and Professionalism*, 100 DICK. L. REV. 515, 529 (1996) (Ward was a principal of a management consultant group); Thomas A. Piraino, Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 WM. & MARY L. REV. 871, 887 (1994) (Piraino was a Vice-President of Parker-Hannifan Corporation); Paul R. Verkuil, *Reverse Yardstick Competition: A New Deal for the Nineties*, 45 FLA. L. REV. 1, 17 (1993) (Verkuil was President and CEO of the American Automobile Association).

<sup>179</sup> See Ronald Mitsch, *Innovation as Part of the U.S. Corporate Culture: Innovation Working for You*, 21 CAN.-U.S. L.J. 171, 174 (1995) (Mitsch was Executive Vice President of the 3M Company).

<sup>180</sup> See William Kummel, Note, *A Market Approach to Law Firm Economics: A New Model for Pricing, Billing, Compensation and Ownership in Corporate Legal Services*, 1996 COLUM. BUS. L. REV. 379, 399 n.65 (discussing law firms’ competitive strategies); Nicholas A. Widnell, Comment, *The Crystal Ball of Innovation Market Analysis in Merger Review: An Appropriate Means of Predicting the Future?*, 4 GEO. MASON L. REV. 369, 393 (1996) (suggesting an approach for measuring market concentration for innovation).

<sup>181</sup> See Jeffery Atik, *Complex Enterprises and Quasi-Public Goods*, 16 U. PA. J. INT’L BUS. L. 1, 30 (1995). Mark Lemley also briefly explains the term, and Ann E. Conaway Stilson mentions it in a way that implies part of the underlying concept. See Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1049 n.279 (1997); Ann E. Conaway Stilson, *The Agile Virtual Corporation*, 22 DEL. J. CORP. L. 497, 527 (1997). The remaining reference is made by the former Vice Chairman of the Zambia Privatization Agency. See Benjamin Lubinda Ngenda, *Comparative Models of Privatization: A Commentary on the African Experience*, 21 BROOK. J. INT’L L. 179, 182 (1995). This survey of legal literature is, of course, subject to the limitations of any electronic database search.

scholarly linkages creates the opportunity to transcend those barriers in innovative ways.<sup>182</sup> Awareness of the institutional difficulties inherent in scholarly linkage also sheds light on problems of practical linkage between societal issues and the World Trade Organization.

#### 4. THE TRIALS OF SCHOLARLY LINKAGE SHED LIGHT ON ISSUES OF PRACTICAL LINKAGE

The importance of theory and of scholarly analysis of the World Trade Organization cannot be gainsaid. Arguably, the World Trade Organization owes its very existence to scholarly analysis of the international trade regime.<sup>183</sup> Nonetheless, it is important to consider the implications of the preceding section, discussing scholarly linkages, on practical linkages that are asked of the World Trade Organization in the real world. Those linkages are considerable, and growing. The World Trade Organization is not yet five years old, but it has already been suggested as the appropriate forum for the promulgation of rules concerning labor, investment, transnational bribery, human rights, antitrust, the environment, gender and racial discrimination, taxation, and the development of democracy.<sup>184</sup> While it is clear that not all of

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<sup>182</sup> See Rubin, *supra* note 149, at 901 (discussing the benefits that accrue from shifts in mainstream scholarship).

<sup>183</sup> At the outset of the Uruguay Round of multilateral trade negotiations, of course, the creation of an international organization was not contemplated. While, however, the Uruguay Round was proceeding, the Royal Institute of International Affairs commissioned Professor John Jackson to conduct a study of the international trade regime. Jackson suggested that only the creation of an international organization would bring coherency to the management of international trade regulation. His study was embraced by the European Community, which formally proposed the creation of such an organization. See Gardner Patterson & Eliza Patterson, *The Road from GATT to MTO*, 3 MINN. J. GLOBAL TRADE 35, 41-42 (1994); see also JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 91-103 (1990) (Chapter 8 entitled "Reforming the GATT System"). It is interesting to note that at the time he wrote his study, Jackson considered the creation of an actual international organization "improbable" and suggested that analyzing it as a hypothetical "might further stimulate thought about some of the difficult institutional problems of the GATT system." *Id.* at 93.

<sup>184</sup> See, e.g., William Diebold, *Some Second Thoughts*, 10 AM. U. J. INT'L L. & POL'Y 1251, 1257 (1995) (suggesting that the World Trade Organization issue rules for international investment); Claus Dieter-Ehlermann, *The International Dimension of Competition Policy*, 17 FORDHAM INT'L L.J. 833, 840 (1994) (suggesting that the World Trade Organization promulgate rules on competition policy); John H. Jackson, *Reflections on International Economic Law*, 17 U.

these linkages are desirable,<sup>185</sup> it is equally clear that some are.<sup>186</sup> The alternative institutionalisms may shed light on two questions concerning practical linkages: how to discern which linkages are desirable, and how to effectuate those desirable linkages.

The author of this Article has published an article on determining what issues are proper subjects for consideration by the World Trade Organization.<sup>187</sup> That article suggests four criteria that must be satisfied for an issue to fall within the World Trade Organization's mandate: that the issue be within the legal competency of the World Trade Organization, that the issue significantly involve trade, that the World Trade Organization be capable of enforcing any guidelines related to the issue, and that the issue require international coordination.<sup>188</sup> These criteria are explicitly drawn from the nature of the World Trade Organization as an international institution and from the purposes of its creators.<sup>189</sup> In that sense, these criteria reflect the rational and utilitar-

PA. J. INT'L ECON. L. 17, 23-24 (1996) (suggesting that the World Trade Organization will be called upon to issue rules concerning the environment, antitrust and competition, labor standards, human rights, distributional issues, gender and other discrimination, and democratic structure); Philip M. Nichols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 L. & POL'Y INT'L BUS. 305 (1996); Asif H. Qureshi, *Trade Related Aspects of International Taxation—A New WTO Code of Conduct?*, J. WORLD TRADE, Apr. 1996, at 161 (suggesting the World Trade Organization as a forum for the promulgation of uniform trade-related tax regulations); Thomas J. Schoenbaum, *The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust*, 19 N.C. J. INT'L L. & COM. REG. 393, 394 (1994) (suggesting that the World Trade Organization take up the issue of antitrust regulation); James F. Smith, *NAFTA and Human Rights: A Necessary Linkage*, 27 U.C. DAVIS L. REV. 793, 836 (1994) ("Over time it may be possible to explicitly link membership in the WTO to adherence to [human rights conditions].").

<sup>185</sup> See Philip M. Nichols, *Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority*, 28 N.Y.U. J. INT'L L. & POL. 711, 714-18 (1996) (arguing that excessive linkage would dilute the clarity of the World Trade Organization's mandate, undermine its credibility, and place issues in its hands that would best be considered elsewhere).

<sup>186</sup> The author of this Article has argued, for example, that the World Trade Organization should deal with the issue of transnational bribery. See Nichols, *supra* note 184.

<sup>187</sup> See Nichols, *supra* note 185.

<sup>188</sup> See *id.* at 722-40.

<sup>189</sup> See *id.* at 719 ("Specifically, the question requires an understanding of what type of international organization the World Trade Organization is, and what it is intended by its creators and members to accomplish."). The analysis relies on the taxonomy of international organizations created by Paul Taylor in its effort to define and characterize the World Trade Organization. See Paul Taylor, *A Conceptual Typology of International Organization*, in FRAMEWORKS

ian orientation of regime theory (as well as institutional economics,<sup>190</sup> although that iteration of institutionalism is not explicitly referred to in the article). In other words, these criteria examine intrinsic characteristics of the World Trade Organization as a regime and apply them outward. They do not reflect the historical or cultural orientation of historical institutionalism or sociological institutionalism. They do not examine constraints imposed upon the World Trade Organization through past decisions at critical junctures. They do not examine the culture in which the World Trade Organization is embedded to determine if linkage with some issues would be more appropriate than linkage with other issues. These types of analysis are not typical to mainstream trade scholarship, but nonetheless would provide interesting insights into the question of the scope of the World Trade Organization's authority.

An example of a practical linkage that might be excluded under regime theory is a linkage between trade and human rights.<sup>191</sup> Trade and human rights have not been linked in the status quo.<sup>192</sup> Particularly given regime theories' assumptions that actors in the international arena are autonomous and equal, regime theory might lead to a conclusion that such a linkage would render the international trade regime inadequate in effectuating members' preferences.<sup>193</sup> Because regime theory predicates institutional

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FOR INTERNATIONAL CO-OPERATION 12 (A.J.R. Groom & Paul Taylor eds., 1990).

<sup>190</sup> See Geoffrey R. Watson, *The Death of Treaty*, 55 OHIO ST. L.J. 781, 807 (1994) (stating that regime theory can be compared to economics because it treats states as unitary, rational, maximizing actors).

<sup>191</sup> Patricia Stirling, for example, advocates the creation of a human rights body within the World Trade Organization that will oversee the administration of multilateral enforcement of human rights through trade sanctions. See Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1, 4 (1996).

<sup>192</sup> See Smith, *supra* note 184, at 819 n.95 (noting that in the real world, human rights regimes and commercial regimes are wholly independent of one another, and using the separation of the World Trade Organization and the United Nations as an example).

<sup>193</sup> The criteria for determining which issues are proper for consideration by the World Trade Organization that are discussed *supra* notes 187-189 and accompanying text almost certainly would exclude this proposal. This proposal would not be considered within the scope of the World Trade Organization's authority because it would fail tests number two (that is, resolution of this issue would not significantly increase trade) and number three (that is, it would be very difficult for the World Trade Organization to supervise enforcement of



change on how *effective* the change in the institution would be,<sup>194</sup> upon receiving a negative answer it would resist the change.

Sociological institutionalism asks a different question. Rather than concerning itself with the utilitarian effectiveness of the institution, sociological institutionalism asks whether the contemplated change would render the institution more legitimate, that is, whether it would be considered more appropriate for the World Trade Organization to establish linkage with human rights than it would be for the Organization not to do so. While this Article does not delve into the myriad debates over human rights, there is a body of international law scholarship that concludes that human rights principals have achieved almost universal acceptance.<sup>195</sup> Interestingly, some of that scholarship suggests that the increased acceptance of human rights principles has proceeded hand in hand with increased acceptance of the globalization of commerce.<sup>196</sup> If indeed it can be demonstrated that a demand for core human rights forms part of the cultural context in which the World Trade Organization is embedded, and if it can be shown that a connection between those core rights and international commercial regulation is considered appropriate, then sociological institutionalism, unlike regime theory, might provide a theoretical justification for linkage.<sup>197</sup>

The alternative institutionalisms might also provide instruction in how to effectuate linkage. Regime theory and institu-

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any rules that it promulgated on the subject). These criteria, it should be recalled, reflect a regime theory orientation toward institutions.

<sup>194</sup> See *supra* note 18 and accompanying text.

<sup>195</sup> See, e.g., Jost Delbrück, *A More Effective International Law or a New "World Law"?*—*Some Aspects of the Development of International Law in a Changing International System*, 68 *IND. L.J.* 705, 713 (1993) ("Human dignity, as the anchor point for the normative validity of international human rights law and as a basic guiding principle for their interpretation and application, has become more firmly established within the international community than ever before."); Theodor Meron, *International Criminalization of Internal Atrocities*, 89 *AM J. INT'L L.* 554, 554 (1995) (noting the general acceptance of human rights as a subject for international regulation); Alex Y. Seita, *Globalization and the Convergence of Values*, 30 *CORNELL INT'L L.J.* 429, 447 (1997) (noting that "the rhetoric of human rights has gained universal acceptance").

<sup>196</sup> See Delbrück, *supra* note 195, at 713 (stating that "individual rights and fundamental freedoms are accepted, in principle, along with economic... rights"); Seita, *supra* note 195, at 447 (arguing that the acceptance of human rights goes hand in hand with economic globalization).

<sup>197</sup> This hypothetical is provided only as an example, and should not be construed as a fully developed argument for, or against, such a linkage.

tional economics rely on the self-interest of actors to effectuate a change in institutions; clearly, however, this theoretical device is not perfectly applicable in the real world.<sup>198</sup> An actor cannot simply demonstrate that a particular linkage is more effective or efficient in satisfying World Trade Organization members' preferences and expect the members to fall in line. On an intuitive level, it is understood that historical and cultural barriers must be overcome; such barriers are the lifeblood of historical and sociological institutionalism.

An example of linkage that might be instructed by historical institutionalism and sociological institutionalism is a linkage between trade and the environment.<sup>199</sup> Parsing the mass of literature on trade and the environment would overwhelm this Article;<sup>200</sup> therefore, a single, discrete example is used. Steve Charnovitz, who has written prodigiously and insightfully about

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<sup>198</sup> An obvious criticism is that the ineffective or inefficient institutions that are created, often persist, or are resistant to change, while more suitable alternatives do not come into effect.

<sup>199</sup> Reconciliation of trade policy with environmental policy is probably of some relevance to the survival of the international trade regime. See Robert Howse & Michael J. Trebilcock, *The Fair Trade-Free Trade Debate: Trade, Labour and the Environment*, in ECONOMIC DIMENSIONS OF INTERNATIONAL LAW, *supra* note 38, at 2 (suggesting that popular support for the international trade regime will evaporate if the trade regime does not address concerns); Nichols, *supra* note 32, at 702 ("Placing primacy on trade thus imperils popular and sovereign support for a trade regime, and endangers all of free trade."). The infamous Tuna/Dolphin decisions, which were not even adopted by the GATT, is indicative of the tensions. The mere release of these decisions, which exalted trade concerns over environmental concerns, led to calls for the United States to withdraw from the trade regime. See Belina Anderson, *Unilateral Trade Measures and Environmental Protection Policy*, 66 TEMP. L. REV. 751, 751-52 (1993) (describing reactions to the Tuna/Dolphin decisions). For descriptions of the Tuna/Dolphin proceedings and decisions, see Joel P. Trachtman, *GATT Dispute Settlement Panel*, 86 AM. J. INT'L L. 142 (1992). For a respected discussion of the many issues concerning trade and the environment (the mention of which is not intended to slight the many other excellent discussions), see the essays contained in THE GREENING OF WORLD TRADE ISSUES (Kym Anderson & Richard Blackhurst eds., 1992).

<sup>200</sup> Cf. Nichols, *supra* note 32, at 673 ("To bundle all of the many values regarding environment into one cohesive scheme would be a monumental, and probably impossible, task."); Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1230 (1995) ("Just listing some of the many pressing environmental issues can lead to despondency: species extinction, deforestation, desertification, toxic waste, acid rain, global climate change, and severe air and water pollution in large cities and poor countries.").

the relationship between law and trade,<sup>201</sup> has advocated a fundamental change in the rules of the World Trade Organization—a change that would lead to greater participation by nongovernmental organizations<sup>202</sup> in the Organization's rulemaking process.<sup>203</sup> Charnovitz and others forcefully argue that nongovernmental organizations have demonstrably aided other international organizations in the creation of effective trade policy and linkages.<sup>204</sup> In other words, Charnovitz offers a utilitarian argument.<sup>205</sup> Despite this argument, the institutional alteration that Charnovitz calls for has not been effected.<sup>206</sup>

Regime theory and institutional economics have little to say about the failure of a proposed alteration other than that if the de-

<sup>201</sup> See, e.g., Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT'L L.J. 459 (1994); Steve Charnovitz, *Green Roots, Bad Pruning: GATT Rules and Their Application to Environmental Trade Measures*, 7 TUL. ENVTL. L.J. 299 (1994); Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treaty-making*, 8 TEMP. INT'L & COMP. L.J. 257 (1994).

<sup>202</sup> Charnovitz uses the term "nongovernmental organizations" in a manner that does not include businesses. See Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183, 187 (1997).

<sup>203</sup> See Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331, 331 (1996).

<sup>204</sup> See *id.* at 341 (citing NGO participation in GATT Uruguay Round); A. Dan Tarlock, *The Role of Non-Governmental Organizations in the Development of International Environmental Law*, 68 CHI. KENT L. REV. 61 (1992). But see Philip M. Nichols, *Realism, Liberalism, Values, and the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 851, 856-60 (1996) (cautioning against relying on the results of nongovernmental participation in other international organizations unless it is demonstrated that that organization is comparable to the World Trade Organization).

<sup>205</sup> See Charnovitz, *supra* note 203, at 341 (arguing that nongovernmental organization participation would facilitate negotiations). Of course, to those who are ideologically predisposed to discount environmental concerns, ignoring any attempts to reconcile the two issues might seem to have the greatest utility; given the plasticity of economic assumptions it is even possible that they could construct mathematical proofs for their position. See Cotter, *supra* note 40, at 2114, 2117-18 (discussing the falsifiability problem with economics). The point, however, is not that the World Trade Organization must embrace environmental issues, but instead, that failure to consider environmental concerns endangers the continued viability of the trade regime. Cf. Howse & Trebilcock, *supra* note 199, at 3 ("If international trade law simply rules out of court any trade response to the policies of other countries, however abhorrent, then there will be an understandable, and dangerous, temptation to declare that the international trade law is an ass [sic].").

<sup>206</sup> See Steve Charnovitz, *A Critical Guide to The WTO's Report on Trade and Environment*, 14 ARIZ. J. INT'L & COMP. L. 341, 341-42 (1997).

sired institutional alteration did not occur, it must not have been perceived as effective or efficient by international actors.<sup>207</sup> Historical institutionalism and sociological institutionalism, on the other hand, speak to historical constraints that must be overcome, cognitions that must be expanded or changed, and cultural legitimations that must be elicited and made explicit. While this Article does not purport to engage in the laborious task of applying the alternative institutionalisms to a specific linkage, the usefulness of these theoretical schools to those who advocate practical linkages should be clear.

Charnovitz does point out that the proposed International Trade Organization, which would have joined the World Bank and the International Monetary Fund as the third Bretton Woods institution if its charter had been ratified by the United States in 1948,<sup>208</sup> had provisions for the participation of nongovernmental organizations. He suggests that this means the World Trade Organization should do the same.<sup>209</sup> As a purely legal matter, of course, the actions of one international organization have little bearing on the requirements to be made of another.<sup>210</sup> Historical institutionalism, on the other hand, does provide a theoretical justification for exploration of the history of nongovernmental organization participation. This theoretical construct, however, requires more rigor than simple iteration of the history of the International Trade Organization. Rather, it suggests examination of at least two critical junctures: the point at which the International Trade Organization was not created, and the point at which the drafters of the World Trade Organization's charter discarded any plans to deeply involve nongovernmental organizations. Scrutinizing these critical junctures for the purpose of de-

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<sup>207</sup> See North, *supra* note 8 (noting that entrepreneurs change or do not change institutions based on their perceptions of the benefits).

<sup>208</sup> See ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 11-12 (2d ed. 1990) (discussing the history of the International Trade Organization); Nichols, *supra* note 132, at 389-91 (same).

<sup>209</sup> See Charnovitz, *supra* note 203, at 338-39. Charnovitz has also written the definitive article on the history of nongovernmental organization participation in international organizations. See Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183 (1997).

<sup>210</sup> In general, the authority and requirements of an international organization are bounded by its organic documents, or by a limited number of powers that are implied to international organizations. See Edward Gordon, *The World Court and the Interpretation of Constitutive Treaties*, 59 AM. J. INT'L L. 794, 816-21 (1965); Nichols, *supra* note 185, at 723-24.

termining how the choices made at those cleavage points possibly constrain future institutional choices could provide guidance for those who wish to effect institutional alteration.

## 5. CONCLUSION

Institutionalism is an increasingly useful tool in the repertoire of international law scholarship. Among other uses, institutionalism has been used to scrutinize the World Trade Organization. Institutionalism, as it is used in international law scholarship, however, reflects only two sources: regime theory from international relations theory, and institutional economics from the social science of economics. Regime theory and institutional economics, however, do not exhaust the universe of possible sources for models of institutional analysis. This Article offers two examples of other models for institutional analysis: historical institutionalism from political science, and sociological institutionalism from sociology. Neither school of institutionalism has been used to analyze the World Trade Organization.

Historical institutionalism and sociological institutionalism differ from regime theory and institutional economics in fundamental ways. To the international trade law scholar who is seeking models for analysis, these differences should not be looked upon as reasons to discredit one school or another, but instead as opportunities to examine international law from a variety of perspectives, or even to hybridize in legal analysis the strengths of several other disciplines while pruning their weaker analytical principles. As this Article briefly demonstrates, historical institutionalism and sociological institutionalism can lead to new insights concerning the World Trade Organization.

While trade scholars should appreciate the possibility of new tools of analysis, the existence of these tools raises an interesting question concerning why some forms of institutionalism have been used in trade scholarship and others have not. In order to answer that question, scholars must recognize that trade scholarship itself is an institution, and is subject to the same scrutiny as the World Trade Organization. By examining how analytical linkages occur or do not occur in trade scholarship, lessons can be learned that have applicability to the broader questions of theoretical and practical linkage to the World Trade Organization.

# DOMESTIC POLICY OBJECTIVES AND THE MULTILATERAL TRADE ORDER: LESSONS FROM THE PAST\*

FRIEDER ROESSLER \*\*

## 1. INTRODUCTION

Trade issues are rarely discussed in isolation from other policy issues. The conference that led to the Havana charter for an International Trade Organization (ITO) was the United Nations Conference on Trade and Employment. Chapter II of the charter assigned to the ITO the task of resolving the most pressing economic problems of the late 1940s, including attaining full employment, eliminating *balance-of-payments disequilibria*, action against *inflationary or deflationary pressures*, and promoting *fair labor standards*. Chapter III committed the ITO's members to cooperation on economic development and reconstruction, and chapters III and V established the ITO as a forum for negotiating agreements on technology transfer, foreign investment, double taxation, and restrictive business practices, as well as commodity agreements (ICITO 1948).

While the Havana charter was never adopted, its chapter on commercial policy survived in the form of the GATT. Linkages taken over into the original GATT concerned *balance-of-payments disequilibria* and *competition*, to which a linkage between trade and *development* was subsequently added. Under the WTO, commitments on trade in goods have now been linked with

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commitments on *intellectual property rights* through an integrated dispute settlement mechanism.

When the Uruguay Round was brought to a close in April 1994 at the Marrakesh ministerial, the list of linkages with trade proposed by various speakers included *environmental policies, internationally recognized labor standards, competition policy, company law, foreign investment, immigration policies, development, political stability, and alleviation of poverty* (GATT Document MTN, TNC/45 [MIN], 12). Only one of these proposals was accepted: the Decision on Trade and Environment provides for the WTO to continue the work of the GATT on environment (GATT 1994, 469). Efforts to link trade with labor standards did not succeed at the WTO ministerial meeting in Singapore in December 1996, but two working groups were established to study the relationship between trade and *investment* and the intersection between trade and *competition*, respectively.

As the preceding paragraphs demonstrate, linkages between trade and other policy areas have long been a feature of the multilateral trade order, and recent events suggest an intensification of the trend. The pursuit of domestic policy objectives through the multilateral trade order raises fundamental issues for the newly established WTO. Will such linkages be beneficial or harmful to the young institution? Will the attainment of domestic policy objectives be furthered or frustrated by their integration into the world trade order? Will regimes established in disparate policy areas mutually reinforce or weaken each other when interacting in a single treaty with an integrated enforcement mechanism?

This paper attempts to shed light on these questions by examining the experience of the GATT with the linkages made between trade and balance-of-payments matters, development policies, and objectives of antitrust policies. This paper argues that the integration of these subject matters into the multilateral trade order undermined *both* the trade order *and* the attainment of the objectives in those nontrade policy areas. At least two important lessons can be drawn from this experience: first, the pursuit of domestic policy objectives through trade policy instruments is not judicable and therefore leads to a de-legalization of international trade relations; and second, exemptions from trade policy disciplines designed to permit the pursuit of domestic policy objectives attract protectionist forces that eventually subject that objective to their ends. The application of these lessons to the trade and environment linkage is considered in detail.

## 2. THE PURSUIT OF DOMESTIC POLICY OBJECTIVES THROUGH THE GATT

### 2.1. *Trade and Monetary Policies*

Within nations, trade policy and monetary policy are conducted in isolation. Trade policies are basically structural policies determined by legislators for long periods of time, while monetary policies are conducted on a daily basis by central banks, often politically independent of the executive and legislative branches. Trade and monetary policies are generally implemented with different instruments: trade policies with tariffs, quotas, and similar measures; monetary policies with interventions in the exchange and money markets.

The architects of the postwar economic system nevertheless considered that it was necessary to link these two policy areas. GATT contracting parties were permitted to impose import restrictions for the purpose of correcting a balance-of-payments deficit; in other words, to use trade policy instruments to achieve monetary objectives. According to article XII of the GATT, which applies to all WTO members, and section B of article XVIII, which applies only to developing countries (GATT 1994, 501, 512), a WTO member may impose import restrictions to safeguard its external financial position provided the restrictions do not exceed those necessary to prevent a serious decline, or achieve a reasonable increase, in its monetary reserves. The restrictions need not be withdrawn even if a change in monetary policies would make them unnecessary.

The 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes of the GATT contracting parties recognized that "trade measures are in general an inefficient means to maintain or restore balance-of-payments equilibrium" (GATT 1978-79, 205). This statement is regarded by most economists as a truism. Since the fundamental cause for a balance-of-payments deficit is normally an excess of domestic consumption over domestic production, the solution lies in most cases in restrictive fiscal and monetary policies that help reduce the overall level of consumption. Imposing import controls on particular products will influence the *pattern* of domestic consumption but cannot have any predictable and durable impact on the overall *level* of domestic consumption. Like devaluations, import controls change the prices of internationally traded products, but only for



imports and not exports, and therefore constitute at best "half a devaluation" (GATT 1983, 16).

In practice, the trade measures imposed under articles XII and XVII:B of the GATT have not been applied across the board to all imports and have thus distorted the price relationships not only between imports and exports but between different categories of imports. Such distortions inevitably entail additional inefficiencies, widening the gap between domestic production and consumption. For these reasons, the only predictable consequence of an import restriction imposed under the GATT's balance-of-payments provisions is a worsening of the balance-of-payments deficit.

What practical use did the GATT contracting parties make of the balance-of-payments provision? In the immediate postwar period, they were mainly invoked by European countries struggling to achieve the convertibility of their currencies. In the 1960s, when convertibility had been achieved, many European countries, eschewing devaluations, used the provision to justify import restrictions designed to maintain the exchange value of their currencies. In 1971, the United States invoked article XII to justify an import surcharge imposed to force its trading partners to accept a revaluation of their currencies in relation to the dollar. Since the replacement of the International Monetary Fund's (IMF) par value system by a system of flexible exchange rates in the early 1970s, industrialized countries ceased almost completely to invoke the GATT's balance-of-payments provisions (Roessler 1975).

These provisions then became the almost exclusive preserve of the developing countries, which invoked them, often for decades or longer, as a legal justification for their import substitution policies. By doing so, developing countries avoided the procedural strictures of GATT article XVII:A and C, which were meant to be the legal basis for restrictive import measures imposed for development purposes. As import substitution policies became less popular and the pressure on the more advanced developing countries to liberalize grew, they began to disinvoke voluntarily the balance-of-payments provisions. In 1995 and 1996, seven WTO members ceased to apply article XVII:B or gave undertakings to disinvoke it. In early 1997 the IMF found that India did not have a balance-of-payments problem justifying an invocation of article XVII:B. The only members still consulting in the WTO Committee on Balance-of-Payments Restrictions

(BOP Committee) are Bangladesh, Hungary, Nigeria, Pakistan, Sri Lanka, and Tunisia. Of these countries, all except Hungary have invoked article XVIII:B since their accession to the GATT.<sup>1</sup>

The determination as to what constitutes a serious decline or a reasonable increase in reserves is made by the BOP Committee on the basis of a determination by the IMF. According to article XV:2 of the GATT, the IMF's views on this matter must be accepted by the WTO (GATT 1994, 507). Under the current monetary system, however, the IMF faces an impossible task. The level of import controls necessary to resolve the reserve problem depends on the level of the exchange rate: the greater the devaluation, the less protection will be required to safeguard the external financial position. In the past, the IMF's par value system dictated the choice of the exchange rate, namely the exchange rate agreed with the IMF, but under the current monetary system, the choice of any exchange rate by the IMF would be arbitrary. If it chooses the exchange rate that prevails after the introduction of the import restrictions, its determination would only reflect what the market has already decided and automatically sanction the level of import controls actually applied. If it chooses the exchange rate that would be required to eliminate the need for the restrictions, it would effectively eliminate the right under articles XII and XVIII:B to impose restrictions. In short, the criteria that determine the level of restrictions have not been capable of rational application for more than two decades—except for the determination that a country has no balance-of-payments problems and therefore the level of restrictions should be zero—but the GATT, and now the WTO, have nevertheless not adopted any other criteria.

The linkage between trade and monetary matters has helped neither the GATT nor the IMF in the pursuit of their basic objectives. The right of all WTO members to impose import restrictions in the event of a balance-of-payments deficit creates significant legal uncertainty in international trade relations, and nourishes the illusion that import controls can reduce a deficit. It is disquieting that the United States could now, consistent with its WTO obligations and section 122 of its Trade Act of 1974, impose a surcharge on a wide range on its imports, or that China could, once it becomes a WTO member, withdraw all the market-

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<sup>1</sup> Information supplied by the WTO Secretariat.

access commitments now painfully being negotiated in the process of its accession to the WTO simply by writing a letter to the director general of the WTO. In practice, the use of balance-of-payments provision by developing countries deprived them of the possibility to invoke GATT disciplines to ward off domestic protectionist pressures. The restrictions originally imposed in a payments crisis often created their own pressure groups, making their subsequent removal politically difficult or impossible. As a result, the countries disinvoking the balance-of-payments provisions generally required long transition periods to phase out the restrictions.

From the perspective of the monetary order, the balance-of-payments provisions of the GATT have also not had a favorable effect. Article IV:1 of the Articles of Agreement of the IMF states that "the essential purpose of the international monetary system is to provide a framework that facilitates the exchange of goods, services, and capital among countries" (IMF 1978, 6). However, the GATT balance-of-payments provisions allowed governments to postpone devaluations and therefore to mask the most visible sign of fiscal or monetary mismanagement. By helping governments postpone the political consequences of mismanagement, these provisions created a permanent moral hazard for governments, undermining the smooth operation of the international monetary system.

The right of GATT contracting parties to impose IMF-sanctioned trade controls in payments crises originally served to promote the goals of convertibility and of exchange rate stability, considered by the architects of the postwar international economic order to be of a higher priority than trade liberalization. Now the convertibility of the major currencies has been achieved and exchange rate stability as such has ceased to be a goal of the IMF. Nevertheless the IMF insisted throughout the Uruguay Round on the maintenance of GATT's balance-of-payments provisions and even on their extension to the General Agreement of Trade in Services (GATS).<sup>2</sup> One explanation is that the balance-of-payments provisions give the IMF the possibility to approve trade measures that permit its members in payments crises to use their scarce financial resources to reimburse their debts rather

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<sup>2</sup> See the Declaration on the Relationship of the World Trade Organization with the International Monetary Fund (GATT 1994, 447), and articles XI and XII of the GATS (GATT 1994, 337).

than to pay for additional imports. The provisions sought by the IMF thus give it the competence to approve measures designed to protect its own financial interests and those of its members.

The response to the above observations might be that the link between trade and monetary matters is a fact of political life, without which the world trade order would not be politically realistic. In reply, it could be pointed out that the world trade order should not pave the way to disaster but react appropriately when it occurs. Debt crises are also a political fact of life, but the creation of a formal legal framework for the rescheduling of debts has been wisely avoided. Rather than granting WTO members an almost unconditional right to impose trade controls for decades merely because of a payments deficit, the WTO should grant ad hoc time-bound waivers when grave crises arise, on conditions tailored to the circumstances of the case. The explicit and permanent linkage between trade and monetary matters incorporated in 1947 into the GATT has neither an economic rationale nor a political rationale and serves neither the purpose of the world trade order nor that of the international monetary system.

## 2.2. *Trade and Development Policies*

The central theme of international economic diplomacy in the 1960s and 1970s was third world development. The Charter on the Economic Rights and Duties of States, adopted by the United Nations in 1974, made all aspects of international economic cooperation subservient to the goal of development (General Assembly resolution 3281 [XXIX] of 12 December 1974). In the GATT decision on "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries" (GATT 1978-79, 203), the principle of nonreciprocity in trade negotiations between developed and developing countries was recognized, developed countries were permitted to accord tariff preferences to developing countries under the Generalized System of Preferences (GSP), and developing countries were accorded the right to exchange preferences among themselves in the name of collective autonomy.

Today, the new international economic order is long forgotten, and the charter lies in the wastepaper basket of history. Declining tariffs eroded the commercial attraction of the GSP, and it never achieved its ethical mission—to create greater equality among nations—because the benefits were concentrated on a small

group of highly advanced developing countries. The principle of nonreciprocity had on balance a negative impact on trade liberalization: rather than inducing developed countries to liberalize unilaterally imports in sectors of export interest to the developing countries, such as textiles and agriculture, the principle provided developing countries with a justification for refusing to make market-access commitments and to sign the agreements on non-tariff measures concluded in the Tokyo Round. As a result of the principle of nonreciprocity, developing countries were deprived of the main benefit of GATT membership, namely the exposure to a system of rules and procedures that help correct the protectionist bias in trade policymaking, and of the benefits of adherence to codes of good government practice incorporated in the Tokyo Round agreements (Hudec 1987). The cause of development was manifestly not served by releasing developing countries from their GATT obligations.

The trade and development linkage eliminated the rule of law in north-south trade relations. The most-favored-nation rule was removed, but no other rule of conduct was put in its place. The beneficiaries of the principle of differential treatment were never defined. The GSP permits the donor countries to unilaterally determine the beneficiaries and to withdraw the preferences at any time, which led developed countries to impose numerous conditions on the grant of the preferences. Thus, the main preference donors, the United States and the European Community, each make GSP benefits conditional on the adoption of certain labor standards, cooperation in drug control, and many other policy conditions.<sup>3</sup> The nonreciprocal nature of the preferences thus

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<sup>3</sup> Under Title V of the United States Trade Act of 1974, a developing country cannot receive preferences if inter alia the country expropriates or otherwise seizes control of property owned by a U.S. citizen, including patents, trademarks, and copyrights; repudiates an agreement with a U.S. citizen; imposes taxes or other exactions with respect to property of a U.S. citizen; refuses to cooperate with the United States to prevent narcotic drugs from entering the United States unlawfully; aids or abets any individual or group that has committed an act of international terrorism; denies its workers internationally recognized rights, including acceptable minimum wages; refrains from enforcing arbitral awards; is a member of the Organization of Petroleum Exporting Countries.

Under article 3:2, 7, 8, and 9 of Council Regulation (EC) 3281/94 of 19 December 1994 (Official Journal of the European Communities, 31 December 1994, no. L 348/1), the European Community makes GSP benefits available to countries that conduct a campaign to combat drugs; apply the conventions of the International Labor Organization on the freedom of association, on the

turned out to be an illusion: rather than reciprocating in the field of trade, the developing countries were forced to make concessions in other policy areas without receiving legally guaranteed benefits in return. The new law of north-south relations consisted essentially of clauses enabling, but not obliging, developed countries to accord trade advantages under unilaterally determined conditions. What was hailed by some authors as "a new law of development" (Hubbard 1979, 92) consisted essentially of rules delegating trade relations between developed and developing countries.

The historical failure of the GATT in this area was the absence of an appropriate response to the genuine problems that low-income states may have had in applying GATT principles. For instance, certain countries with a fiscal infrastructure insufficient to raise revenue through domestic taxes could have been given the right to levy import duties for revenue purposes. Instead, the GATT responded to the broad political demands of the Group of 77, a coalition spanning the richest and poorest developing countries with no common trade interests. This group was able to formulate only the demand to exempt all of its membership from the rules of the GATT, and make them all eligible for GSP. None of the instruments the GATT adopted in response to the demands of the developing countries was therefore targeted to the real and definable problems of these states and to those of the poorest among them.

### 2.3. *Trade and Competition Policies*

At present, the only provision in the WTO agreements that links trade with competition is article VI of the GATT, which declares that dumping "is to be condemned if it causes or threatens material injury to an established industry" (GATT 1994, 493) and permits the levying of duties to offset such dumping.

Dumping and antidumping have been extensively analyzed in the literature on imperfect competition. At their origin, anti-

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protection of the right to organize and bargain collectively, and on the minimum age for admission to employment; apply standards relating to the sustainable management of forests; do not practice any form of forced labor; do not manifest shortcomings in customs controls on export or transit of drugs; comply with international conventions on money laundering; do not engage in unfair trading practices, such as discrimination against the European Community, comply with market-access obligations under the WTO agreements.

dumping provisions in the international trade agreements were intended to protect competition against anticompetitive practices, and in particular to combat predatory pricing (Hindley and Messerlin 1996). The general conclusion is that predatory pricing is only in exceptional situations a rational strategy of companies locked in battle for control of a market and that, in most cases, the antidumping provisions have been used in circumstances in which predatory pricing cannot occur. Thus, it was found that "most antidumping cases involve products with a considerable number of producers at the global level, none of whom has a dominant share of global output" (Hinkley and Messerlin 1996, 21). As a result, there is no economic rationale for the vast majority of antidumping cases.

Even on the assumption that predatory pricing may occur and will need to be suppressed by governments to safeguard competition, there would still not be any justification for special rules that differentiate between domestic and imported products. Article III, the GATT's national treatment provision, and article XX:d of the GATT's general exceptions allow WTO members to apply their competition policies equally to all sources of predatory pricing and to take in respect of imported products all measures necessary to secure compliance with those policies. The only function of the WTO antidumping provisions is therefore to permit WTO members to apply to imported products competition rules that are more onerous than those applied domestically.

Article VI of the GATT is supplemented by the WTO Agreement on Implementation of Article VI of the GATT 1994 (Antidumping Agreement), which regulates the application of antidumping measures at the national level in great detail. Such an agreement fosters the illusion that the rule of law applies in this area. In fact, however, the agreement leaves WTO members with an extremely wide range of discretion in determining whether injurious dumping has occurred, and its article XVII:6 explicitly exempts the exercise of this discretion from a full review by WTO panels and the WTO Appellate Body (GATT 1994, 193). The exercise of the right to take antidumping measures is consequently not submitted to judicable criteria and effective multilateral control, notwithstanding the plethora of WTO rules on their application.

The origin of antidumping provisions in the GATT was innocuous, and such measures were rarely applied in the first two decades of the GATT's existence. As other authors have amply

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documented, however, the provisions became a safe harbor for projectionist domestic interests (Hindley and Messerlin 1996). Once GATT contracting parties were permitted to deviate from the basic trade policy principles, ostensibly to pursue competition policy objectives, the political forces that these principles are to control overwhelmed the competition policy objectives. There is nearly unanimity in the academic world now that the WTO's rules on antidumping operate to protect competitors rather than competition and consequently have acquired a rational that is the complete opposite of the one they were originally meant to serve.

### 3. THE TRADE AND ENVIRONMENT LINK: WILL HISTORY REPEAT ITSELF?

The trade and environment debate raises issues and submits the principles of the world trade order to scrutiny from a new perspective. However, there are elements in the proposals to integrate environmental concerns into the multilateral trade order that so strongly resemble aspects of the unsuccessful linkages made between trade and other policy matters that a repetition of past mistakes is to be feared.

Technically, there is no conflict between environmental policies and trade policies. The rules of the WTO do not prescribe or prevent the attainment of any domestic policy goal in the field of the environment. They are merely "negative" rules prohibiting policies that distinguish, openly or in disguise, between products and services or service suppliers as to their origin or destination. Such distinctions are, however, normally not necessary to attain domestic environmental policy goals (Roessler 1996b). Why then do so many environmental organizations consider WTO law as a threat to domestic environmental legislation?

Their opposition is based on the fear that many laws furthering environmental and other public interests may only be adopted with elements that are contrary to WTO law. The legal constraints imposed by WTO membership create in their view obstacles to the formation of domestic political coalitions between sectoral interests pursuing protectionist aims and public-interest groups pursuing environmental goals, and the rulings of the WTO panels put into jeopardy existing domestic laws furthering legitimate domestic policy objectives for which there is, politically, no prospect of a WTO-consistent solution. As Ralph Nader stated in his testimony before the U.S. Senate Finance

Committee on the results of the Uruguay Round (16 March 1994, photocopy): "Raw log export bans are one of the most trade restrictive means to attain the goal of conserving our nation's forests. Yet, after years of debate, raw log bans were the only politically feasible approach because they accommodated the interest of providing alternative lumber processing jobs to those who would no longer be cutting down forests. Laws with such mixed economic and social purposes, of which there are many, would likely fall before challenge under the World Trade Organization's rules."

Ralph Nader is no doubt right. And many other illustrations can be provided to substantiate his point. Take the case, for instance, of the introduction of a new clean-air standard for gasoline. Such a standard, by itself, can of course be introduced for all gasoline without any legal constraints under WTO law. A problem of WTO consistency would arise, however, if the domestic political constraints are such that a new standard would secure a parliamentary majority only if domestic gasoline is exempted from the standard for five years or, to put the issue in political-economy terms, if the cost of reducing pollution is initially borne only by nonvoting producers abroad. That discrimination would be inconsistent with the GATT's national treatment provisions of article III and would most likely not be justifiable under the GATT's public policy exceptions of article XX. The five-year exemption violating the GATT 1994 would thus not be *technically necessary* to implement a higher environmental standard (it would in fact reduce the new standard's environmental impact during the transition period), but would be *politically necessary* to adopt the higher standard.

Another example illustrating Nader's point is the phase-out mechanism for chlorofluorocarbons (CFCs) included in the 1987 Montreal Protocol on Substances That Deplete the Ozone Layer. In theory, the phase-out of CFCs could have been achieved through internal measures consistent with the national treatment principle, for instance, a system of sales licenses. However, such a system would have imposed only burdens on the producers of the chemicals and would probably not have won their support. The mechanism that was instead adopted provides for quantitative limits on the production of CFCs in the members, combined with a ban on imports from nonmembers, with the result that the consumption of CFCs is reduced. Under this mechanism, the decline in the domestic supply of CFCs combined with the import

controls generated rents for the domestic producers during the phase-out period, and the scheme therefore won their support. The import controls were thus not technically required to protect the ozone layer, but were politically necessary to win the support of the producers of ozone-depleting chemicals (Enders and Porges 1992).

How can the dilemma of groups pursuing environmental goals be accommodated in the WTO law? One approach would be to add a provision to the GATT 1994 permitting discriminatory trade measures if a legitimate domestic policy goal would not be politically attainable without that measure. However, such a "political necessity" clause would establish a license for unprincipled policymaking, and the market-access rights under the WTO agreements would therefore be submitted to the vagaries of the domestic political process of the WTO members. A provision with these functions, however drafted, would not mark a line between international trade interests and domestic policy constraints, and would therefore be incompatible with the rule of law in international trade relations (Roessler 1996a).

Environmental groups have also been concerned that a WTO member is, under the principle of unconditional most-favored-nation treatment, unable to offset through trade measures the economic consequences of the differences between its environmental policies and those of other WTO members. This concern is reflected in the following statement by Ralph Nader (16 March 1994):

U.S. corporations long ago learned how to pit states against each other in a "race to the bottom"—to provide the most permissive corporate charters, lower wages, pollution standards, and taxes. Often it is the federal government's role to require states to meet higher federal standards. . . . There is no overarching "lift up" jurisdiction on the world stage. . . . The Uruguay Round is crafted to enable corporations to play this game at the global level, to pit country against country in a race to see who can set the lowest wage levels, the lowest environmental standards, the lowest consumer safety standards. Notice this downward bias—nations do not violate the GATT rules by pursuing too weak consumer, labor . . . and environmental standards. . . . Any . . . demand that corporations

pay their fair share of taxes, provide a decent standard of living to their employees or limit their pollution of the air, water and land will be met with the refrain, "You can't burden us like that. If you do, we won't be able to compete. We'll have to close down and move to a country that offers us a more hospitable business climate."

The theoretical literature on interjurisdictional competition indicates that the problem described by Ralph Nader is largely a reflection of a desirable competition among jurisdictions and not a race to the bottom (Wilson 1996). Given that jurisdictions can be assumed to choose environmental quality to maximize the welfare of residents, they have no incentive to offer firms exemptions from taxes required to cover costs to the environment even when competing for scarce capital. However, second-best situations—unavailability of policy instruments or distortions in market structure or both—may give rise to the adoption of inefficiently low or *too high* standards; again, a case-by-case analysis is necessary.

Furthermore, if the race-to-the-bottom argument is accepted, it would apply not only to environmental policies but to all policies that affect the location of industries, including tax and subsidy policies, the provision of infrastructure, and production regulation of all kinds. Eliminating a race to the bottom only in the area of environmental policies would merely displace the race into other policy areas, for example in workers' safety. At the end of this process, there would no longer be local jurisdictions within federal states, and states would have to cede their policy autonomy to international authorities (Revesz 1992).

What would be the consequence of a new general rule in the WTO legal system that would permit WTO members to apply import taxes and restrictions designed to offset the competitive advantages that differences in environmental and other regulations accord to producers abroad?<sup>4</sup> With such a rule, the law of

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<sup>4</sup> There is no provision in the WTO agreement that permits trade restrictions specifically designed to offset differences in domestic policies. WTO members may impose countervailing duties on products that benefit from a domestic production subsidy. However, a countervailing duty may be imposed even if the importing contracting party also accords a subsidy. Two WTO members granting the same fiscal advantages to their steel industries may impose (and frequently impose in practice) countervailing duties on the steel products exported to each other. The countervailing-duty provisions of the

the WTO would provide legal security only for the products and services traded between pairs of countries with identical domestic production regulations. This would be contrary to the principle of comparative advantage according to which nations are to exploit their differences, which are often reflected in their regulations (Bhagwati 1996). Moreover, the unconditional most-favored-nation principle would be lost, and with it the peace-engendering impact of that principle. With a general rule that permits WTO members to eliminate the external effects of the differences between them, the WTO legal system could therefore no longer fulfill its functions.

One legal method to take into account the domestic political constraints of WTO members and the fear of a race-to-the-bottom effect of trade liberalization would be to permit them to individually vary their market-access commitments in accordance with those constraints. That method is already available. The market-access commitments under the WTO agreements are made by product (GATT), by sector (GATS), or by entity (Agreement on Government Procurement). The schedules of commitments of WTO members therefore vary significantly. Moreover, WTO members are entitled to renegotiate their commitments. Both during the process of negotiating the commitments and after their acceptance, WTO members thus have the possibility to adjust their trade obligations in accordance with their domestic political constraints and the external impact of their policies. However, this adjustment takes place at the time when market-opening commitments are negotiated or after a renegotiation based on reciprocity, and therefore maintains the balance of rights and obligations among members.

From the perspective of WTO law, the issue is thus not whether domestic policy constraints should be taken into account or whether trade liberalization entails a healthy competition

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WTO are therefore not provisions permitting measures designed to offset policy divergences, but are provisions permitting the protection of import-competing industries contingent upon the protection of an exporting industry in another country. This observation can also be made in respect of the provision of the GATT that exempts measures related to the products of prison labor from the obligations under the GATT (article XX:e). It is true that the domestic policies of another WTO member trigger in this case the right to impose import controls, but that right may be exercised independently of the prison-labor regulations of the contracting party imposing the import control. A WTO member could consequently permit the sale of products produced in domestic prisons while restricting the sale of those made in foreign prisons.

among jurisdictions or a destructive race to the bottom. Given the right of each member to adjust its market-access commitments to its perception of these issues, the real issue is whether WTO members should be able to react to the external repercussions of their own domestic policy choices by unilaterally withdrawing their market-access commitments or whether they should be able to do so only by renegotiating their commitments. A multilateral trade order based on the rule of law cannot but be based on the principle of renegotiation.

There are many proposals to use the market-access opportunities created by the obligations assumed under the WTO agreements as bargaining chips to induce other countries to change their environmental policies, and the withdrawal of these opportunities as sanctions against countries that do not cooperate in the protection of the environment. Thus, Steve Charnovitz (1993, 282) wrote:

How can an agreement on minimum standards be achieved among a hundred countries with different values and resources? One approach is to devise a clever mix of carrots and sticks from a diverse enough issue garden to allow a cross-fertilization of concerns. The goal is not only to obtain an agreement, but also to maintain its stability. The carrots are the basic tool. Because countries face different economic trade-offs . . . an assistance mechanism can be developed to enable gainers to compensate losers and rich nations to "bribe" poor ones. This assistance could be in the form of financial aid or technology transfer . . . , or it could be trade concessions.

The proposal to use the world trade order as a source of carrots and sticks for the pursuit of environmental objectives is based on three illusions. The first is generated by the image of "carrots and sticks." "Carrot" suggests that you give something of value to you; "stick" suggests that you inflict pain without hurting yourself. However, such sticks do not exist in international economic relations. Here, nations can hurt others only by hurting themselves at the same time; a trade sanction inflicts costs both on the imposing nation and on the target nation, and the cost for the former can sometimes exceed that of the latter. The choice is thus not, as the image suggests, between costly subsidies and costless

trade sanctions, but between subsidies that transfer resources from one nation to another and trade sanctions that destroy the resources of both (GATT 1991).

If the image of carrots and sticks has such currency in the trade and environment debate, it is probably because the costs of trade sanctions are generally so thinly spread across populations that they arouse little political opposition and are therefore not taken into account in the public debate. This is probably also the reason that a trade sanction seems to be the only stick seriously considered in the trade and environment literature even though the arsenal of economic sanctions contains many more sticks, such as the interruption of financial relations, telecommunications, transport services, and so forth. These other types of economic sanctions may be just as effective in obtaining commitments from other nations to cooperate in the protection of the environment as trade sanctions; however, they will cause concentrated and easily visible effects for a small group of producers and will therefore engender greater political opposition. If one has concluded that sanctions are required to achieve a negotiating goal, one still needs to decide that among the sanctions available the trade sanction is the most efficient one. The public choice on that issue, however, is likely to be distorted by the bias that distorts the public choice on trade policies generally. The focus of the trade and environment debate on trade sanctions, rather than economic sanctions generally, is an indirect reflection of this bias.

The second illusion is that the goals of trade liberalization and environmental protection can be obtained simultaneously in a single negotiation. In a reciprocity-based negotiation in the WTO, a nation will not obtain in return for its market-access commitment an equivalent market-access commitment *and* commitments in another policy area; it will obtain only one or the other and will therefore have to decide which of the two objectives to pursue. To propose that a multilateral negotiation cover market access issues *and* a raising of environmental standards is therefore to propose that nations with high environmental standards pursue their trade interests *or* their environmental interests.

The third illusion is that the trade and environment link is a one-way street toward better environmental protection. In any system in which the results of reciprocity negotiations are enforced through a right to retaliation, an issue linkage becomes a two-way street: if market access and the protection of endangered species were to be successfully linked in WTO negotiations, trade

concessions could be withdrawn in response to the failure to protect an endangered species *and vice versa*. If environmentalists seek in the WTO the "trade weapon" to further environmental goals, they must therefore accept that other nations obtain the "environmental weapon" to defend their trade interests. However, it is totally inappropriate to make commitments on such essential matters as the protection of endangered species, where the withdrawal from obligations may have irreversible effects, dependent on the ups and downs of commercial policies. The main purpose of international bargaining is to create regimes, systems of rules and procedures making governmental actions more predictable. Each of these regimes cannot furnish predictability if it is constantly exposed to the need to adjust to a breakdown in other regimes. That is true for both the international trade order and international environmental law.

The inherent limitations of the cross-retaliation principle were recognized by the negotiators of the WTO agreements. Initially, the United States, mainly with its interest in protecting worldwide intellectual property rights in mind, proposed that there be an unbridled right of cross-retaliation under the WTO dispute settlement procedures. However, it subsequently revised its position to the effect that retaliation across sectors should be resorted to only if retaliation within the sector was not practical or effective. This change reflected the fear of the United States' banking sector that cross-retaliation resulting from failures to observe obligations in the field of trade in goods might upset the delicate balances of interest between nations in the field of financial services. Article 22:3 of the Dispute Settlement Understanding (DSU) therefore now contains eight subparagraphs which, while maintaining the principle of cross-retaliation, define meticulously the circumstances under which a WTO member may retaliate across sectors and the elements of the Uruguay Round package that constitute individual sectors, segregating—of course—financial services as a separate sector (GATT 1994, 423). If environmental groups did not have the illusion of the one-way street, they would, just like the U.S. banking community, make every effort to ensure that their important cause is not throw into the crab basket of trade policymaking.



#### 4. CONCLUSION

What do the linkages between trade and domestic policy objectives reviewed in this paper have in common? In each case, the linkage led to the creation of new rules permitting governments to depart from basic principles of the world trade order without, however, establishing effective new disciplines constraining the exercise of the resulting discretion. The reason was that the new rules enabled governments to pursue monetary, development, and competition policies with second-best policy instruments, and, as economic theory has amply demonstrated, one cannot define in the abstract *ad in advance* under what circumstances the choice of the wrong instrument for the right policy raises welfare. Only a case-by-case analysis is appropriate in this situation. No generally applicable, abstract rule is therefore conceivable that would distinguish between permissible and forbidden second-best policies on economic efficiency grounds.

The choice of the second-best policy instrument was permitted essentially for political reasons, that is, to exempt from GATT disciplines the trade policy measures of governments politically unable to pursue their monetary, development, or competition policies with more direct and efficient policy instruments. However, a GATT rule that defines the domestic political circumstances that would justify the resort to a second-best policy instrument is impossible to craft. For instance, in the case of balance-of-payments policies implemented through trade measure, such a rule would have to provide for something like the following: "A WTO member incurring a serious balance-of-payments deficit may, instead of devaluing its currency, impose an import surcharge if it demonstrates that its government would, if it were to devalue, lose the next election/be toppled by riots/encounter serious problems in containing wage demands." It is obvious that such a rule would not be seriously considered even though it would precisely reflect the political purpose of the GATT's balance-of-payments exception. A fundamental lesson that can be drawn from the GATT's links with monetary, development, and competition policies is that, upon entering the realm of the second-best, the realm of the rule of law is left, and any such link therefore entails a delegalization of international trade relations.

Each of the linkages reviewed above was made to harness the instruments of trade policy for domestic policy objectives. In all three cases, however, the protectionist forces freed by the elimina-

tion of the trade policy disciplines seized the occasion and overwhelmed the domestic policy objective. Thus, the antidumping provisions, originally designed to protect competition, now operate exclusively to protect competitors. Another conclusion that can therefore be drawn from the experience under the GATT is that, if domestic policy objectives are not pursued in a trade-neutral manner, they attract protectionist interests that will tend to undermine the attainment of these objectives. As a result neither the world trade order nor the causes such linkages were meant to serve benefited from the link.

Many of the proposals to pursue environmental objectives through the multi-lateral trade order have features that resemble those of past failed linkages between trade policy instruments and domestic policy objectives. Again proposals are made that would permit the use of trade measures in the pursuit of policy objectives that cannot be attained efficiently with trade policy instruments. And, again, the hoped-for cross-fertilization is likely to turn into cross-contamination. The fundamental illusion that prompts these proposals is that the link between environmental policies and trade policies is a one-way street and that it is therefore possible to use the political pressures behind trade policy instruments for one's policy objectives without in turn being subjected to these pressures. In fact, however, that linkage, as the previous linkages of its kind, is likely to turn into a disservice to the important cause it is meant to advance.

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# THE FUNCTION-SPECIFIC AND LINKAGE-BARGAIN DIPLOMACY OF INTERNATIONAL INTELLECTUAL PROPERTY LAWMAKING

MICHAEL P. RYAN\*

## 1. INTRODUCTION

As the twenty-first century draws near, one of the most compelling problems in international economic law and relations is how to achieve the “deep integration” among national political economies which will promote economic efficiency and growth.<sup>1</sup> States share interests in overcoming political segmentation through the harmonization of economic policies and regulations, but domestic opponents successfully resist change frequently.<sup>2</sup> The globalization of private production in the post-war era has led to ever-growing demand from industrialized country-based business enterprises for free trade,<sup>3</sup> and ever-increasing economic interdependence has promoted international trade cooperation through regional and multilateral institutions.<sup>4</sup> Yet, opposition within developing countries, despite that they have become

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<sup>1</sup> See generally MILES KAHLER, *INTERNATIONAL INSTITUTIONS AND THE POLITICAL ECONOMY OF INTEGRATION* (1995) (analyzing the role of international institutions in promoting policy cooperation and harmonization).

<sup>2</sup> See generally RONALD ROGOWSKI, *COMMERCE AND COALITIONS: HOW TRADE AFFECTS DOMESTIC POLITICAL ALIGNMENTS* (1989) (arguing that patterns of trade influence the structure and behavior of domestic political groups and coalitions).

<sup>3</sup> See HELEN V. MILNER, *RESISTING PROTECTIONISM: GLOBAL INDUSTRIES AND THE POLITICS OF INTERNATIONAL TRADE* 18 (1988) (arguing that “firms with more extensive exports and multinationality should be less likely to demand protection”).

<sup>4</sup> See generally ROBERT Z. LAWRENCE, *REGIONALISM, MULTILATERALISM, AND DEEPER INTEGRATION* (1996) (discussing the regional and multinational institutions that have resulted from economic liberalization).

“emerging markets” in the 1990s because of the shift in their economic development strategies from closed, import-substituting strategies<sup>5</sup> toward open, investment and trade-promoting strategies, is entrenched politically.<sup>6</sup> Domestic coalition support in developing countries for the “shallow integration,” nondiscrimination and border measure reduction program of the second half of the twentieth century remains unconsolidated while support for the “deep integration,” regulatory and policy harmonization program of the twenty-first century is shallow.<sup>7</sup> Thus, under conditions of universal state participation, it has never been more important to understand how international economic law is made, and intellectual property lawmaking represents a challenging and instructive issue area.

The international law of patents, trade secrets, copyrights, industrial designs, and trademarks has been more than a century in the making, owing to a series of treaties promulgated late in the nineteenth century and amended during the twentieth century to adapt to changing technologies and competition patterns in intellectual property-intensive business sectors. Over most of its history, the international law of intellectual property existed a world apart from the international law of real property trade. The former institutionalized government intervention into markets, while the latter institutionalized government withdrawal from markets. The diplomacy of the former was conducted by obscure intellectual property administrators at the World Intellectual Property Organization (“WIPO”) forum (or its predecessors), while the diplomacy of the latter was conducted by high-profile trade and economic ministers at the General Agreement on Tariffs and Trade (“GATT”) forum, and never-the-twain-shall-meet. Met they finally did, nevertheless, in the Uruguay Round of GATT multilateral trade negotiations in the late 1980s and early 1990s for the purpose of establishing minimum national standards of protection of intellectual property rights under authority of re-

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<sup>5</sup> See ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* 263-305 (1987).

<sup>6</sup> See *ECONOMIC CRISIS AND POLICY CHOICE: THE POLITICS OF ADJUSTMENT IN THE THIRD WORLD* (Joan M. Nelson ed., 1990); JEFFREY A. FRIEDEN, *DEBT, DEVELOPMENT AND DEMOCRACY* (1991); *THE POLITICS OF ECONOMIC ADJUSTMENT* (Stephan Haggard & Robert R. Kaufman eds., 1992).

<sup>7</sup> See generally STEPHAN HAGGARD, *DEVELOPING NATIONS AND THE POLITICS OF GLOBAL INTEGRATION* (1995) (arguing that political group support within developing countries for trade liberalization is weak).

formed treaties regarding intellectual property. One hundred years of function-specific international lawmaking under WIPO auspices gave way to linkage-bargain international lawmaking under GATT auspices in order to offer developing countries compelling rationales for a commitment to “deep integration” policy change. Yet, though many observers opined that the Trade-Related Intellectual Property Rights (“TRIPS”) agreement at GATT indicated that function-specific intellectual property diplomacy at WIPO was dead, within two years two new treaties were signed at WIPO, offering excellent contemporary opportunity to assess the function-specific and linkage-bargain diplomacy of international intellectual property lawmaking.

## 2. EXPLAINING INTERNATIONAL LAWMAKING

International law scholars have contributed little explanation to international lawmaking. Ian Brownlie’s seminal treatise articulates the sources of international law, including custom, treaty, and international adjudicatory decision, and defines key concepts in international law, including subject, comity, equity, sovereignty and the rest, but offers no explanation of how treaties are obtained.<sup>8</sup> Neither Joseph Brierly’s *Law of Nations* nor Percy Corbett’s *Growth of World Law* attempts systematic explanation of how international law is made as a matter of state practice.<sup>9</sup> The Myres McDougal World Public Order research program, conducted with the collaboration of political scientist Harold Lasswell, drew from conceptual advances in political science in the 1950s<sup>10</sup> which articulated an empirical, policy process method of analysis for law and policy: study the relevant policy actors; analyze the structure of influence and power; and examine the symbols, practices, and functions of politics. But, McDougal

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<sup>8</sup> See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 1-31 (1990) (examining the sources of international law).

<sup>9</sup> J. L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* (5th ed. 1963); PERCY E. CORBETT, *THE GROWTH OF WORLD LAW* (1971).

<sup>10</sup> See generally DAVID EASTON, *THE POLITICAL SYSTEM: AN INQUIRY INTO THE STATE OF POLITICAL SCIENCE* (1966) (arguing that political science ought study the process of policymaking in order to understand political outcome); HAROLD D. LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (1936) (arguing that politics redistributes social values); HAROLD D. LASSWELL & ABRAHAM KAPLAN, *POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY* (1950) (arguing that the central concept of politics is social power).

conducted in the main a scholarship of international law description and prescription<sup>11</sup> as did his students;<sup>12</sup> thus, his research program did not fulfill its explanatory promise nor did it become the conceptual link between the fields of international law and international politics.<sup>13</sup> Louis Henkin provided an insightful, if laconic, explanation of the politics and diplomacy of international lawmaking:

The character, shape, and content of international law—as of national law—are determined by prevailing political forces within the political system, as refracted through the way law is made. . . . Emerging law will depend on the interest of influential states to espouse it, a common interest in developing it, and the inability, or lack of interest, of others to resist it.<sup>14</sup>

But, he concluded his analysis was not very helpful:

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<sup>11</sup> See MYRES S. MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* (1980) (describing values regarding human dignity and prescribing universal norms regarding human rights); MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* (1961) (describing national security and peace values and prescribing universal norms of state security behavior); MYRES S. MCDUGAL ET AL., *LAW AND PUBLIC ORDER IN SPACE* (1963) (describing communication values and prescribing universal norms for international communication policy); MYRES S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* (1962) (describing social values with respect to ocean resources and prescribing universal norms of ocean resource utilization); MYRES S. MCDUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* (1987) (describing social values and prescribing universal norms of social justice).

<sup>12</sup> See RICHARD A. FALK, *A STUDY OF FUTURE WORLDS* (1975) (recommending an alternative world system which maximizes social values of human rights and social justice); *INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE* (Richard A. Falk et al. eds., 1985) (providing a basic textbook regarding shortcomings of extant international law regarding human rights and social justice).

<sup>13</sup> See FRANCIS ANTHONY BOYLE, *WORLD POLITICS AND INTERNATIONAL LAW* 61-66 (1985).

<sup>14</sup> LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 32, 33-34 (2d ed. 1979).



Negotiated at a particular time, with virtually all states participating, any emerging treaty will reflect what the participants perceived as their interests as regards the matter at issue, in the context of the system at large. But with ever more governments participating, with their interests often varied and complex, the process is confused and the result often not only impossible to predict but even difficult to explain when it appears.<sup>15</sup>

International politics scholars have contributed to explanations of international lawmaking, though Hans Morgenthau, an international lawyer by education but student of international power by practice, offered nothing more than that “[i]n the international sphere there are but two forces creating law: necessity and mutual consent,”<sup>16</sup> and scholars working in his tradition ignored international law under the presumption of its irrelevance under “conditions of international anarchy.”<sup>17</sup> International politics scholars known as “functionalists” explained the growth of international law and the proliferation of international governmental organizations in the late nineteenth and early twentieth centuries as the result of technological advances in transportation and communication, which had increased the need for transnational policy cooperation.<sup>18</sup> Technical, knowledge-rich specialists in a functional area influence the drafting of international law,<sup>19</sup> but the international governmental organization is the negotiation-facilitating forum for rule-creation decisions made by states. Robert Cox, Harold Jacobson and their colleagues provided an analytic framework composed of a taxonomy of actors and factors and a method of weighting the power and influence of states and

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<sup>15</sup> *Id.* at 35-36.

<sup>16</sup> HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 283 (5th ed. 1978).

<sup>17</sup> KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 102-16 (1979) (arguing that the world political system is characterized by a structure of anarchy and lack of universal state authority).

<sup>18</sup> See the description of functionalism in HAROLD K. JACOBSON, *NETWORKS OF INTERDEPENDENCE: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL POLITICAL SYSTEM* 62-66 (1984).

<sup>19</sup> See HAROLD KARAN JACOBSON & ERIC STEIN, *DIPLOMATS, SCIENTISTS, AND POLITICIANS: THE UNITED STATES AND THE NUCLEAR TEST BAN NEGOTIATIONS* (1966) (arguing that scientists and technical specialists influenced the drafting of international law).

intergovernmental organizations ("IGOs").<sup>20</sup> Robert Keohane and Joseph Nye articulated the "complex interdependence" research program in the late 1970s, and international laws were explained as the product of a diplomacy of state power, interests, and goals conducted with the active participation of sub- and transnational actors, including multinational corporations, non-governmental organizations, secretariats at international governmental organizations, and epistemic communities (transnational, knowledge-common professional networks), and mediated by the rules, procedures, principles, and norms of international regimes.<sup>21</sup> "[I]ncentives to form international regimes depend most fundamentally on the existence of shared interests. . . . International regimes reduce transaction costs of legitimate bargains and increase them for illegitimate ones."<sup>22</sup> Thus, international politics scholarship offered a good "why" explanation and a general "how" explanation of international lawmaking.

But, the general "how" explanation, which seemed adequate for the "shallow integration" of the GATT treaty and its early tariff-cutting agreements, could not explain why the "deep integration" agenda GATT Tokyo Round multilateral trade negotiations had been achieved with great difficulty and without the consent of the many states which refused to sign some of the agreements. The general "how" explanation also seemed an inadequate description and prescription for the seemingly intractable conflict between industrialized and developing countries over international intellectual property law. When U.S. business people and government representatives called for new international intellectual property law creation, because many developing countries possessed weak institutions of intellectual property protection or none at all, developing-country governments signaled at the WIPO forum that they wanted no part of reformed international

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<sup>20</sup> See ROBERT W. COX ET AL., *THE ANATOMY OF INFLUENCE: DECISION MAKING IN INTERNATIONAL ORGANIZATION* 1-58 (1974) (providing an analytic framework carried out in the study of a number of international organizations).

<sup>21</sup> See *INTERNATIONAL REGIMES* 1 (Stephen D. Krasner ed., 1983); ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 92 (1984) [hereinafter KEOHANE, *AFTER HEGEMONY*]; ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* 55 (1977); Peter M. Haas, *Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control*, 43 *INT'L ORG.* 377 (1989).

<sup>22</sup> KEOHANE, *AFTER HEGEMONY*, *supra* note 21, at 79, 90.

intellectual property institutions. What was needed was a better understanding of the strategic interaction of states in multilateral bargaining settings. The diplomacy of international law writing is really a two-level game in which states bargain with their own domestic groups even as they bargain with each other.<sup>23</sup> The domestic level of the game may require the inclusion of new domestic groups and issues, the payment of side concessions, and even re-definition of issues from low- to high-national interest politics in the minds of opinion-leading policymakers, legislators, and domestic groups in order to change domestic political and economic calculations.<sup>24</sup> Thus, explain bargaining-approach students of trade negotiations, the key to getting agreement is getting the right mix of issue linkages onto the table.<sup>25</sup> Linkage-bargain diplomacy can be fruitfully exploited to achieve treaties in diplomatically and politically difficult policy areas in which agreement would otherwise be elusive. Thus, since the international regime establishes the IGO forum and the decision-making rules which govern multilateral negotiations to write new public international law,<sup>26</sup> international intellectual property law creation would need to be moved from the function-specific WIPO forum with its one-nation, one-vote decision making to the linkage-bargain capable GATT forum with its economic power-based decision making. All previous diplomatic conferences to write public international

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<sup>23</sup> See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988).

<sup>24</sup> See H. Richard Friman, *Side-Payments Versus Security Cards: Domestic Bargaining Tactics in International Economic Negotiations*, 47 INT'L ORG. 387 (1993) (showing that side payments to previously uninvolved interest groups change state payoffs structures); Leonard J. Schoppa, *Two-Level Games and Bargaining Outcomes: Why Gaiatsu Succeeds in Japan in Some Cases but Not Others*, 47 INT'L ORG. 353 (1993) (showing that trade issues may be linked with national security issues in order to change state interest calculations).

<sup>25</sup> See Bernard M. Hoekman, *Determining the Need for Issue Linkages in Multilateral Trade Negotiations*, 43 INT'L ORG. 693 (1989) (arguing that GATT possesses the bargaining capability to link issues which can change domestic political calculations toward international agreement); James K. Sebenius, *Negotiation Arithmetic: Adding and Subtracting Issues and Parties*, 37 INT'L ORG. 281 (1983) (providing a logic for the inclusion/exclusion of issues and associated domestic interest groups in order to achieve international agreement); Robert Tollison & Thomas Willett, *An Economic Theory of Mutually Advantageous Issue Linkages in International Negotiations*, 43 INT'L ORG. 425 (1989) (arguing that issue linkages can change domestic political calculations toward international agreement).

<sup>26</sup> See JACOBSON, *supra* note 18, at 83; KEOHANE, *AFTER HEGEMONY*, *supra* note 21, at 90.

law regarding intellectual property took place within the WIPO forum or its predecessors. Nevertheless, U.S. trade diplomats hypothesized that a linkage-bargain conducted within the GATT forum could achieve an unprecedented multilateral intellectual property agreement. The "South" would get apparel and agriculture liberalization; the "North" would get globally universal, minimum-standard intellectual property protections as well as foreign direct investment policy liberalization.<sup>27</sup> When the TRIPS Agreement was finally achieved as part of the Uruguay Round package, it appeared that linkage-bargain diplomacy explained the outcome. It also recommended the conclusion that international intellectual property lawmaking was henceforth linkage-bargain, trade-related intellectual property diplomacy.

Linkage bargaining within the GATT regime worked because U.S. negotiators held fast to their position that the Uruguay Round agreements had to be accepted in their totality. There would be no a la carte shopping among agreements as had happened at the Tokyo Round, a circumstance with force because the final Uruguay Round package included the agreements establishing the World Trade Organization and the Dispute Settlement Understanding. The Dispute Settlement Understanding, within the context of the TRIPS Agreement, offered some respite from the threat of Special 301<sup>28</sup> and trade sanctions carried out by the U.S. Trade Representative ("USTR") bilaterally. The Special 301 threat loomed large in the minds of developing-country policymakers, who had little to fear from the European Community which was lukewarm from the beginning with respect to TRIPS, but who had much to fear from a USTR which had "self-initiated" Special 301 actions over intellectual property against Korea and Brazil in 1986 to get them to the table. USTR pursued an aggressive Special 301 diplomacy throughout the eight years of the Uruguay Round to keep countries at the table.

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<sup>27</sup> See generally GARY C. HUFBAUER & JEFFREY J. SCHOTT, *TRADING FOR GROWTH: THE NEXT ROUND OF TRADE NEGOTIATIONS* 73-75 (1985) (contending that industrialized countries and developing countries could each benefit from international trade agreements achieved through linkage bargains involving apparel, agriculture, intellectual property, and foreign direct investment); *MANAGING TRADE RELATIONS IN THE 1980S: ISSUES INVOLVED IN THE GATT MINISTERIAL MEETING OF 1982* (Seymour J. Rubin & Thomas R. Graham eds., 1983) (proposing an agenda for new multilateral trade negotiations which included non-traditional trade issues).

<sup>28</sup> See Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2901 (1998) [hereinafter Special 301].

However, closer examination of TRIPS diplomacy reveals why function-specific intellectual property diplomacy within WIPO was dead neither in logic nor in practice. Linkage-bargaining within the Uruguay Round only worked because there was a draft TRIPS Agreement text on the table as the final linkage bargains were being struck. Functionalism proposes that expert, functional specialists crucially help international regime cooperation happen through their ability to deploy their technical knowledge.<sup>29</sup> Under the leadership of the TRIPS negotiation chair, the GATT secretariat culled ideas from the negotiators and offered compromise text to the combatants, providing a Draft Composite Text which was incorporated into the Dunkel Draft offered by the director-general as compromise final agreements. When the end-game concluded, the Draft Composite Text became the final TRIPS Agreement. By contrast, there was no Trade-Related Investment Measures Agreement in the Uruguay Round because there had been no specialist-drafted text to incorporate into the Dunkel Draft.

International intellectual property law writing did not remain linkage-bargain, trade-related diplomacy in practice. Two copyright treaties, aimed at adapting to Internet-based electronic commerce, were negotiated and signed under WIPO auspices a mere two years after TRIPS, contradicting the proposition that trade-related intellectual property diplomacy would be a diplomatic way of life toward the year 2000 and beyond. The December 1996 agreements were the product of classic function-specific international law-writing diplomacy. WIPO sponsored a number of international conferences attended by expert specialists in communication technology, copyright business strategy, and copyright law over a period of five years leading up to the 1996 Diplomatic Conference. The five-year educational initiative and drafting help from the WIPO Secretariat created a consensus sufficient for a copyright treaty to supplement the Berne Convention and a performances and phonograms treaty to supplement the Rome Convention, recommending that function-specific diplomacy rests upon the IGO's capacity to promote learning. "Learning is largely an information-processing activity in which information about the structure of behavior and about environmental events is transformed into symbolic representations that

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<sup>29</sup> See JACOBSON, *supra* note 18, at 62-66.

serve as guides for action.”<sup>30</sup> Learning is the result of comparatively simpler processes of replacement whereas “problem-solving” requires greater leaps of mental replacement (such as analogy), and “innovation” requires the greatest leaps of mental replacement, but both problem-solving and innovation are nevertheless forms of learning. Learning may be “observational,” i.e., the outcome of noting someone else’s experience, or may be “experiential,” i.e., the outcome of the trial-and-error of one’s own experience. According to educational psychology, learning is dependent upon cognition and motivation.<sup>31</sup> “Cognition” means the learner’s ability to process information—selection, acquisition, construction, integration. “Motivation” means the learner’s goals, sense of efficacy (control), and expectancy for success. Cognition and motivation are interdependent and dynamic. Cognition depends upon the existence of appropriate cognitive structures and learning strategies; cognitive structures and learning strategies relate to personality and motivation characteristics. Individual learning relates to, but is not identical to, organizational learning. Organizations are more than collected individuals, and organizational learning is more than collective individual learning.<sup>32</sup> An organization is “learning” when “encoding . . . procedures . . . , beliefs . . . , paradigms, [and] codes.”<sup>33</sup> Organizational learning depends upon the existence of “shared mental models” or “consensual knowledge” (akin to the “cognitive structures” of individual learning), which encourages the integration of new knowledge into organizational routines.<sup>34</sup>

This Article explains the international lawmaking of intellectual property through investigation of the evolution of the regime, first proceeding by reviewing the key treaties of the interna-

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<sup>30</sup> ALBERT BANDURA, *SOCIAL FOUNDATIONS OF THOUGHT AND ACTION: A SOCIAL COGNITIVE THEORY* 51 (1986).

<sup>31</sup> See Lyn Corno & Richard E. Snow, *Adapting Teaching to Individual Differences Among Learners*, in *HANDBOOK OF RESEARCH ON TEACHING* 605 (Merlin C. Wittrock ed., 3d ed. 1986) (arguing that teaching strategies are most effective when adapted to differences in students’ patterns of cognition and motivation); Paul Pintrich et al., *Instructional Psychology*, 47 *ANN. REV. PSYCHOL.* 611 (1986) (arguing that student learning is dependent upon patterns of cognition and motivation).

<sup>32</sup> See Daniel H. Kim, *The Link Between Individual and Organizational Learning*, *SLOAN MGMT. REV.*, Fall 1993, at 37.

<sup>33</sup> Barbara Levitt & James G. March, *Organizational Learning*, 14 *ANN. REV. SOC.* 319, 320 (1988).

<sup>34</sup> See Kim, *supra* note 32, at 43.

tional intellectual property regime constructed through function-specific diplomacy. The function-specific and linkage-bargain diplomacy of TRIPS is then discussed, followed by assessment of the important reforms which the agreement brings to the international law of intellectual property. The Article assesses the 1996 Diplomatic Conference which produced two new copyright treaties and the return of WIPO-forum, function-specific international lawmaking diplomacy.

### 3. FUNCTION-SPECIFIC, WIPO FORUM-MADE INTERNATIONAL INTELLECTUAL PROPERTY LAW

The nineteenth century Industrial Age emergence of transnational competition in intellectual property-intensive goods led to the first institutionalization of intellectual property into public international law through the negotiation of conventions, regarding industrial property in 1883, trademark in 1891, and copyright in 1896.<sup>35</sup> The Paris Convention for the Protection of Industrial Property,<sup>36</sup> periodically amended during this century, establishes a "Paris Union" of signatories which offer national treatment to each other with respect to their policies regarding industrial property. An important provision of the convention is that a right of priority is established throughout the membership once an application for a patent, utility model, industrial design or trademark is filed in any one member state. However, this provision ought not be misinterpreted to mean that a patent application filed in one member state is a patent application filed in all member states, for it does not.<sup>37</sup> It simply means that a date has been established throughout the membership should any "first-to-file" dispute arise.

The Treaty provides that states have the right to legislate regarding compulsory licenses with a view "to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work."<sup>38</sup> The members are bound to assure effective protection against unfair compe-

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<sup>35</sup> In this section, I discuss the key treaties of the international intellectual property regime. However, several other treaties regarding intellectual property exist and are administered by WIPO.

<sup>36</sup> Paris Convention for the Protection of Industrial Property, *opened for signature* Mar. 20, 1883, 21 U.S.T. 1583 [hereinafter Paris Convention].

<sup>37</sup> *See id.* art. 4.

<sup>38</sup> *Id.* art. 5.

tition and particular attempts to "create confusion" in the marketplace by attempting to pass off goods through unauthorized use of trademarks or trade names.<sup>39</sup> Each member is obligated to establish a special industrial property service office for the purpose of administering policy regarding patents, utility models, industrial designs, and trademarks, including publishing a public record of intellectual property grants and registrations.<sup>40</sup> Regarding enforcement, the Treaty provides that "[a]ll goods unlawfully bearing a trademark or trade name shall be seized on importation into those countries of the Union where such mark or trade name is entitled to legal protection."<sup>41</sup> The Paris Convention created a forum for the members to consult with each other, an executive committee of member representatives to meet more often, and a secretariat known as the "International Bureau."<sup>42</sup>

The Paris Convention bears the marks of its articulation as a modest agreement among generally like-minded industrialized countries. Patent policies aim to provide incentives to innovate inventions and new devices under circumstances where the costs of new product development are high while the costs of product imitation (or outright theft) are low, a circumstance which economists call the "appropriability problem."<sup>43</sup> Without market intervention, the research investment is without justification because there is no market reward. A system of patent is an intervention by government into the marketplace to correct deficiencies of unregulated markets, which if left to themselves tend to underproduce innovation, when inventions bring value to the public in themselves and propel economic growth at large. However, since a patent confers an exclusive right in the marketplace over a product or process, patent law demands full disclosure of the product or process when the patent is granted. The policy is that the inventor enters into a contract with the public. The in-

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<sup>39</sup> See *id.* art. 10.

<sup>40</sup> See *id.* art. 12.

<sup>41</sup> *Id.* art. 9.

<sup>42</sup> See *id.* art. 13.

<sup>43</sup> See generally PETER MEINHARDT, INVENTIONS, PATENTS AND MONOPOLY (1946) (arguing that patent systems solve the appropriability problem); Kenneth W. Dam, *The Economic Underpinnings of Patent Law*, 23 J. LEGAL STUD. 247 (1994); Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265 (1977); Edwin Mansfield, *Patents and Innovation: An Empirical Study*, 32 MGMT. SCIENCE 173 (1986) (showing that certain industries are the most patent-dependent).



ventor receives limited exclusivity as a reward for skill, and in return the inventor teaches others skilled in the art how to do it. Thus, technology diffusion is institutionalized into a patent system by way of the publication of the patent search reports and the patent claim itself.<sup>44</sup> Students of innovation assert that the interesting and challenging policy dilemmas regarding patents include: How long ought the patent term be? How ought "market" be defined if a patent has possibly become anti-competitive? What is the appropriate "scope" or coverage of the patent?<sup>45</sup>

The Paris Union agreed that the patent institution was important for industrial innovation even if it disagreed on particulars, acknowledging that Europeans decide patentability based upon the concept of "inventive step" and maintain a "first-to-file" priority system, while Americans decide patentability based upon the concepts of "nonobviousness" and "novelty" and maintain a "first-to-invent" priority system. Though a few developing countries had joined early in the convention's history, for example, Brazil in 1884, the Dominican Republic in 1890, Mexico in 1903, and Cuba in 1904, sixty-two developing countries joined the Paris Union after 1962, and many former socialist republics and states have joined in the 1990s, bringing the total membership of the Paris Union to a substantial 136 members.<sup>46</sup>

The Patent Cooperation Treaty ("PCT"),<sup>47</sup> articulated by the U.S. Patent and Trademark Office,<sup>48</sup> signed in Washington in

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<sup>44</sup> See Janusz A. Ordover, *A Patent System for Both Diffusion and Exclusion*, 5 J. ECON. PERSP. 43 (1991) (arguing that the central features of a patent system diffuse technology even as they exclude competitors from specific uses of the technology).

<sup>45</sup> See Nancy T. Gallini, *Patent Policy and Costly Imitation*, 23 RAND J. ECON. 52 (1992); Robert P. Merges & Richard R. Nelson, *On Limiting or Encouraging Rivalry in Technical Progress: The Effect of Patent Scope Decisions*, 25 J. ECON. BEHAV. & ORG. 1 (1994).

<sup>46</sup> See WORLD INTELLECTUAL PROPERTY ORGANIZATION, STATES PARTY TO THE CONVENTION ESTABLISHING THE WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), Pub No. 423(E), at 4-6 (Oct. 15, 1995) [hereinafter STATES PARTY]. I chose 1962 as a beginning year to tabulate accessions because it was in that year that WIPO's predecessor organization began preparations for a major diplomatic conference regarding industrial property, which was held in Stockholm in 1967. See WORLD INTELLECTUAL PROPERTY ORGANIZATION, THE FIRST TWENTY-FIVE YEARS OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION, FROM 1967 TO 1992, at 5 (1992).

<sup>47</sup> Patent Cooperation Treaty, *opened for signature* June 19, 1970, 28 U.S.T. 7645 [hereinafter PCT].

1970 and subsequently amended, makes it possible to seek patent protection for an invention simultaneously in each of a large number of countries by filing an international patent application. The PCT provides detailed provisions regarding the process within the International Patent Cooperation Union. The international application for patent contains the name of the applicant, the title of the invention, a description of the invention which "shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art"<sup>49</sup> including an abstract, the claim or claims for patent, and the member states or region in which the patent is sought. The applicant indicates in which contracting parties of the union the international application should have effect, an effect which is the same as if the application had been independently filed in the state's patent office. The international application is then subjected to an "international search" of the prior art.<sup>50</sup> One of the major patent offices (Australia, Austria, China, Japan, the Russian Federation, Spain, Sweden, the United States, or the European Patent Office) carries out the search. The search report is communicated to the inventor, who may withdraw the application if the result of the search indicates that patentability is modest. If the applicant decides to continue with the international application, the application and search report are sent to all designated national and regional patent offices, in proper form and, if necessary, translated.<sup>51</sup> The WIPO International Bureau publishes for public notice the international application (after eighteen months) and the international search report.<sup>52</sup> The PCT provides innovators an efficient application submission procedure to multiple national authorities but does not provide a mechanism for an "international patent." Indeed, Article 27 makes clear that "[n]othing in this Treaty and the Regulations is intended to be construed as prescribing anything that would limit the freedom of each Contracting State to prescribe such substantive conditions of

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<sup>48</sup> See ARPAD BOGSCH, *THE FIRST TWENTY-FIVE YEARS OF THE PATENT COOPERATION TREATY (PCT) 1970-1995*, at 10 (1995).

<sup>49</sup> PCT, *supra* note 47, art. 5.

<sup>50</sup> See *id.* art. 15.

<sup>51</sup> See *id.* art. 20.

<sup>52</sup> See *id.* art. 21.

patentability as it desires.”<sup>53</sup> Definitions of “prior art” and standards for patentability are reserved to the member states.

The PCT does, however, establish an “international preliminary examination” option for applicants.<sup>54</sup> For an additional fee, the PCT administrators will request that one of the national or regional patent offices do a preliminary examination and offer a “non-binding” opinion regarding “whether the claimed invention appears to be novel, to involve an inventive step . . . , and to be industrially applicable.”<sup>55</sup> It offers the applicant better information regarding patentability than the international search. The PCT establishment of the International Patent Cooperation Union includes the creation of an assembly composed of the contracting parties, an executive committee of representatives drawn from the membership, and administering authority vested in the WIPO’s International Bureau.<sup>56</sup> The International Bureau, financed by fees paid for its services, also offers technical services to national patent office authorities, providing training, administrative reform counsel, and record-keeping and processing advice.<sup>57</sup> A total of eighty-three states have acceded to the PCT, including twenty-four developing countries—Brazil (1978), Vietnam (1993), and China (1994) among them.<sup>58</sup>

The International Convention for the Protection of New Varieties of Plants (“UPOV”),<sup>59</sup> signed in 1961 and amended in 1991, establishes a union of contracting parties which agree to confer “breeder’s rights” on those who discover or develop new varieties of plants. A “variety” is defined as “a plant grouping within a single botanical taxon of the lowest known rank.”<sup>60</sup> The Union for the Protection of New Varieties of Plants is headquartered at the WIPO and administered under authority of the Director-General of WIPO, who also serves as Secretary General of the Plant Variety Union. Article 4 provides that contracting parties confer national treatment upon each other while Articles 5 through 9 estab-

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<sup>53</sup> *Id.* art. 27.

<sup>54</sup> *See id.* art. 31.

<sup>55</sup> *Id.* art. 33.

<sup>56</sup> *See id.* ch. 5.

<sup>57</sup> *See id.* art. 56.

<sup>58</sup> *See STATES PARTY, supra* note 46, at 17.

<sup>59</sup> International Convention for the Protection of New Varieties of Plants, Dec. 2, 1961, 33 U.S.T. 2703 [hereinafter UPOV].

<sup>60</sup> *Id.* art. 1.

lish the conditions under which breeder's rights are granted.<sup>61</sup> The breeder's right "shall be granted where the variety is new, distinct, uniform, and stable."<sup>62</sup> The Treaty goes on to provide that the breeder's right "shall not be subject to any further or different conditions," contingent upon compliance with application procedures and fee payment.<sup>63</sup> "Newness" means "novelty," and in the area of plant varieties that means that the variety has never been sold or otherwise exploited earlier than one year before the application date in territories outside of application (six years in the cases of trees and vines).<sup>64</sup> Hence, the plant breeder's novelty standard is lower than the patent novelty standard, yet more demanding than the "originality" notion of copyright law. The variety must be "distinct" and that means that it is "distinguishable from any other variety whose existence is a matter of common knowledge at the time of the application."<sup>65</sup> It must be "stable" and that means its "relevant characteristics remain unchanged after repeated propagation."<sup>66</sup>

Regarding the application, the breeder has the right to select the country of priority application, but need not wait until the process is complete before applying for secondary rights in other contracting party national jurisdictions.<sup>67</sup> The applicant has a twelve-month right of priority beginning with the application date,<sup>68</sup> and the applicant has "provisional protection" against infringement during the pendency period.<sup>69</sup> The breeder maintains exclusive rights regarding "production or reproduction (multiplication), conditioning for the purposes of propagation, offering for sale, selling or other marketing, exporting, importing, stocking for any of the purposes mentioned" above.<sup>70</sup> However, exceptions to these rights include "acts done privately and for non-commercial purposes, acts done for experimental purposes,

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<sup>61</sup> See *id.* arts. 4, 5-9.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See *id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See *id.* art. 10.

<sup>68</sup> See *id.* art. 11.

<sup>69</sup> See *id.* art. 13.

<sup>70</sup> *Id.* art. 14.

and acts done for the purpose of breeding other varieties . . . .”<sup>71</sup>  
The UPOV also provides an “optional” exception:

Each contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder’s right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety . . . .<sup>72</sup>

Article 16 further provides for the exhaustion of breeder’s rights by stating that they “shall not extend to acts concerning any material of the protected variety,” when “material” means “propagating,” “harvesting,” and “any product made directly from the harvested material.”<sup>73</sup> The breeder’s right “shall be granted for a fixed period” and “shall not be shorter than 20 years from the date of the grant of the breeder’s right” (twenty-five years in the case of trees and vines).<sup>74</sup> Article 20 provides terms by which the new variety is “designated by a denomination which will be its generic designation,” which may be trademarked.<sup>75</sup> Twenty-nine states belong to the UPOV, including only a few developing countries: Argentina, South Africa, and Uruguay.<sup>76</sup>

The Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure,<sup>77</sup> signed in 1977 and amended in 1980, establishes a union of contracting parties which either allows or requires the deposit of microorganisms for the purposes of patent procedure and which agrees to recognize the legitimacy of the deposit with any international depository authority. Article 6 provides that for a state to become an international depository authority, it must become

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<sup>71</sup> *Id.* art. 15.

<sup>72</sup> *Id.* art. 15.

<sup>73</sup> *Id.* art. 16.

<sup>74</sup> *Id.* art. 19.

<sup>75</sup> *See id.* art. 20.

<sup>76</sup> *See STATES PARTY*, *supra* note 46, at 24.

<sup>77</sup> Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, Apr. 28, 1977, 32 U.S.T. 1241 [hereinafter Budapest Treaty].

signatory to the treaty and comply with certain procedures specified in the treaty.<sup>78</sup> Article 7 provides that the International Bureau of WIPO, as administrator of the treaty, determines whether a national depository is in compliance and designates international depository status.<sup>79</sup> Thirty-five states, including China, Korea, Singapore, and the Philippines, have joined the Budapest Treaty.<sup>80</sup>

The Hague Agreement Concerning the International Deposit of Industrial Designs,<sup>81</sup> signed in 1925 and amended through the years, allows nationals of any of the contracting parties to secure protection for industrial designs in all the contracting countries by depositing their design with the International Bureau of WIPO. In order to register the industrial design, the designer submits an application along with a graphic of the design. According to Article 7, the duration of protection for international industrial designs is fifteen years, divided into a first five-year phase when the design may be accepted under sealed cover and a second ten-year phase when the design must be accepted only under open cover. The International Bureau publishes notice of industrial design registrations monthly in the Bulletin. Only twenty-five states have acceded to the Hague Agreement, including, surprisingly, North Korea in 1992.<sup>82</sup>

The Berne Convention for the Protection of Literary and Artistic Works,<sup>83</sup> amended many times over more than 100 years, defines "literary and artistic works" as:

[E]very production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to

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<sup>78</sup> See *id.* art. 6.

<sup>79</sup> See *id.* art. 7.

<sup>80</sup> See STATES PARTY, *supra* note 46, at 21.

<sup>81</sup> Hague Agreement Concerning the International Registration of Industrial Designs and Models, Nov. 6, 1925, 74 L.N.T.S. 343 [hereinafter Hague Agreement].

<sup>82</sup> See STATES PARTY, *supra* note 46, at 12.

<sup>83</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341 [hereinafter Berne Convention].

which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture, or science.<sup>84</sup>

Furthermore, the Berne Convention covers translations, adaptations, musical arrangements, encyclopedias, anthologies, and other collections and arrangements of expression.<sup>85</sup> All these expressions “enjoy protection in all countries of the Union.”<sup>86</sup> However, the Berne Convention states that:

“[P]ublished works” means works . . . whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work, [and thus does not include] [t]he performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture . . . .<sup>87</sup>

The law of copyright protects these works in order to stimulate expression to the benefit of the public interest, because costs of product development (such as, writing a novel or composing a musical piece or writing business application software) are high, yet costs of unauthorized appropriation are low.<sup>88</sup> In theory, the contract institution could achieve the same results, but in practice

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<sup>84</sup> *Id.* art. 2.

<sup>85</sup> *See id.* art. 2(3).

<sup>86</sup> *Id.* art. 2(6).

<sup>87</sup> *Id.* art 3.

<sup>88</sup> *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989) (arguing that the purpose of copyright is to solve the appropriability problem and thereby encourage the expression of ideas).

the transaction costs of negotiation and enforcement would be too high, so copyright is the necessary institutional innovation. The limited period of copyright exclusivity is defined to cover only the expression, not the underlying ideas, so that copyright encourages expression rather than monopoly of ideas. Thus, one may obtain a copyright for a work of fiction or of nonfiction, for example, and the copyright is obtained for how the ideas are expressed, not for the story plot or the thesis. The copyright institution provides the chance of commercial success for risky businesses. Without the intervention by government, the marketplace would tend to underproduce expression when expression products bring cultural and political benefits as well as economic benefits to the public.

The Berne Convention offers national treatment, stating that "when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors."<sup>89</sup> However, the Berne Convention clearly states that "the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed."<sup>90</sup> The Convention confers moral rights by stating that "the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."<sup>91</sup> These rights pass to the author's heirs.<sup>92</sup> The term of protection is established as the life of the author plus fifty years,<sup>93</sup> fifty years after the work has been made available to the public in the case of cinematographic works,<sup>94</sup> and a minimum of twenty-five years from their making in the case of photographic works.<sup>95</sup>

The authors maintain the exclusive right to authorize reproduction of their works "in any manner or form."<sup>96</sup> Authors of

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<sup>89</sup> Berne Convention, *supra* note 83, art. 5(3).

<sup>90</sup> *Id.* art. 5(2).

<sup>91</sup> *Id.* art. 6 [bis] (1).

<sup>92</sup> *See id.* 6 [bis] (2).

<sup>93</sup> *See id.* art. 7(1).

<sup>94</sup> *See id.* art. 7(2).

<sup>95</sup> *See id.* art. 7(4).

<sup>96</sup> *Id.* art. 9(1).



literary and artistic works enjoy the exclusive right to authorize broadcasting, publishing, or other public communication, performance, and distribution of their works.<sup>97</sup> Authors also have an exclusive right to authorize adaptations, arrangements, and other alterations of their works,<sup>98</sup> including adaptation into cinematographic work and “the distribution of the works thus adapted or reproduced.”<sup>99</sup> This right includes importantly “the inalienable right to an interest” in resales of the work.<sup>100</sup>

These exclusive rights, however, are constrained by the caveat that national governments may “determine the conditions” under which the rights are exercised, though governments may not “be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration.”<sup>101</sup> The author’s exclusive right does not take away from the public the right to “make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose.”<sup>102</sup> This provision is augmented by the caveat that press or broadcast transmissions of current events are a matter for the national legislation to determine, with respect to “the extent justified by the inforamatory purpose,”<sup>103</sup> whether they may “be reproduced and made available to the public.”<sup>104</sup> The exclusive rights of authors are further limited by the sweeping language of Article 17: “The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right.”<sup>105</sup> Infringing copies of a protected work are subject to seizure, and this “seizure shall take place in accordance with the legislation of each country.”<sup>106</sup> The

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<sup>97</sup> See *id.* art. 11 [bis] (1).

<sup>98</sup> See *id.* art. 12.

<sup>99</sup> *Id.* art. 14(1)(i).

<sup>100</sup> *Id.* art. 14 [ter] (1).

<sup>101</sup> *Id.* art. 11 [bis] (2).

<sup>102</sup> *Id.* art. 10(1).

<sup>103</sup> *Id.* art. 10 [bis] (2).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* art. 17.

<sup>106</sup> *Id.* art. 16(1),(3).

Berne Convention is administered by the International Bureau of WIPO, which receives financial assessments from the member states of the Berne Union and charges fees for the services which it provides. In stark contrast to the Paris Convention on patents, the Berne Convention on copyrights demands that minimum standards be maintained with respect to literary and artistic works. The Berne Union membership totals 117 governments, including countries such as Brazil, China, Egypt, India, Malaysia, and South Africa.<sup>107</sup> The utility of the copyright for the promotion of expression product creation has long been recognized in developing countries which have rich traditions in literature and the arts.

The Rome Convention of 1961, formally the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations,<sup>108</sup> grants national treatment to performers, phonogram producers, and broadcasters. The protection provided for performers includes prevention of any non-consensual broadcast or public communication, fixation, and reproduction of their works.<sup>109</sup> Producers of phonograms enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.<sup>110</sup> Broadcasters of phonograms enjoy the right to authorize or prohibit the rebroadcast, fixation, and reproduction of their broadcasts.<sup>111</sup> The Rome Convention provides that the term of these rights is twenty years from the end of the year in which fixation of the phonogram, performance, or broadcast took place. The member states, however, may limit these rights through domestic laws and regulations regarding private use, the use of short excerpts in connection with the reporting of current events, broadcast by its own facilities, education, and scientific research. Forty-nine states have joined the Rome Convention, including Brazil, Chile, Mexico, and some other Latin American and African countries.<sup>112</sup>

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<sup>107</sup> See STATES PARTY, *supra* note 46, at 7-9.

<sup>108</sup> International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention].

<sup>109</sup> See *id.* art. 7.

<sup>110</sup> See *id.* art. 10.

<sup>111</sup> See *id.* art. 13.

<sup>112</sup> See STATES PARTY, *supra* note 46, at 15.

The Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms,<sup>113</sup> signed in 1971, states in the preamble that the motivation for the agreement is that the contracting states are “concerned at the widespread and increasing unauthorized duplication of phonograms and the damage this is occasioning to the interests of authors, performers, and producers of phonograms.”<sup>114</sup> Member states “shall protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producer and against the importation of such duplicates . . . , and against the distribution of such duplicates to the public.”<sup>115</sup> The Geneva Convention establishes a minimum twenty-year period for the protection of phonogram rights against infringement, and provides that the member states will implement their obligations through “one or more of the following: protection by means of the grant of copyright or other specific right; protection by means of the law relating to unfair competition; protection by means of penal sanctions.”<sup>116</sup> The Convention further provides that compulsory licenses must fulfill all the following conditions: (1) duplication is for use solely for the purpose of teaching and scientific research; (2) the license is valid only within the territory of the state which granted the license; (3) “equitable remuneration” is provided. The membership, amounting to fifty-three states, includes developing countries such as Brazil (1975), China (1993), Egypt (1978), India (1975), Mexico (1973), and Korea (1987).<sup>117</sup>

The Madrid Agreement Concerning the International Registration of Marks,<sup>118</sup> as amended during its more than 100-year life, establishes the Madrid Union regarding trademarks and provides that nationals of any of the contracting countries may secure mark protections applicable to their goods and services registered in their country of origin in all member countries by filing their

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<sup>113</sup> Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, Oct. 29, 1971, 25 U.S.T. 309 [hereinafter Geneva Convention].

<sup>114</sup> *Id.* p.mbl.

<sup>115</sup> *Id.* art. 2.

<sup>116</sup> *Id.* art. 3.

<sup>117</sup> See STATES PARTY, *supra* note 46, at 19.

<sup>118</sup> Madrid Agreement Concerning the International Registration of Marks, Apr. 14, 1891, 828 U.N.T.S. 389 [hereinafter Madrid Agreement].

marks with the International Bureau of WIPO. When filing the application for Union registration, the mark holder must comply with rules articulated in the Madrid Convention and additional regulations specified by WIPO, including indication of the goods and services for which protection is claimed. These goods and services are classified according to terms specified by the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks,<sup>119</sup> which was signed in 1957 and amended through the years. The Trademark Law Treaty,<sup>120</sup> signed in Geneva in 1994, further details rules regarding the international registration of marks for goods and services. Forty-eight states have acceded to the Madrid Agreement; forty-five states have acceded to the Nice Agreement; forty-seven states have acceded to the Trademark Law Treaty.<sup>121</sup>

#### 4. LINKAGE-BARGAIN, GATT TRIPS DIPLOMACY

The Paris Convention, in particular, offered weak standards; it obligated members to little more than national treatment. American patent interests determined that minimum standards needed to be added to the Paris Convention because the era of treaty membership among generally like-minded industrialized countries was over. Developing countries had become important sources of intellectual property product production, and a good deal of it was pirated. Even in countries which belonged to the patent treaty, local laws offered little chance of remedy for infringement. Beginning in the late 1970s, a couple of the more research-oriented pharmaceutical companies and U.S. Patent and Trademark Office representatives took their case for new negotiations to WIPO with the goal of a diplomatic conference of the Paris Union which would fundamentally reform the patent treaty. They were rebuffed at WIPO, where they were told that the developing countries vehemently opposed changes to the Paris Convention. To press forward despite developing country opposition, they were told, would yield nothing for the United States

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<sup>119</sup> Nice Agreement Concerning the International Classification of Goods and Services to Which Trademarks Are Applied, June 15, 1957, 23 U.S.T. 1336 [hereinafter Nice Agreement].

<sup>120</sup> Trademark Law Treaty, in WIPO, *Industrial Property and Copyright, Industrial Property Laws and Treaties, Multilateral Treaties*, Jan. 1995, at 1-12, reprinted in 49 Pat. Trademark & Copyright J. (BNA) at 22 (Nov. 10, 1994).

<sup>121</sup> See STATES PARTY, *supra* note 46, at 11, 13, 23.

or its patent-oriented industries, and WIPO itself might well be fatally damaged in the process; developing countries would reject any reformed treaty and might even leave WIPO to reinforce their displeasure.

The Advisory Committee on Trade Policy Negotiation ("ACTPN") provided the forum for U.S. intellectual property interests to advocate a "trade-related" strategy to reform the intellectual property policy milieu in which they were operating. The ACTPN, led by the chief executive officers of Pfizer and IBM, persuaded the U.S. Trade Representative ("USTR") that the next round of multilateral trade negotiations should be used to adapt the international institutions of intellectual property to a world economy where developing countries were major producers of intellectual property goods. Patent protection should be harmonized at a high standard, and computer software, increasingly important to the U.S. economy, should be explicitly protected by the Berne Convention. Business interests and USTR articulated a "GATT strategy" to overcome developing-country opposition within WIPO to intellectual property institution change. GATT had a record of success regarding new rule creation in politically thorny trade policy matters, and it was its institutional design which offered the prospect of successfully reforming international intellectual property laws.

The early GATT rounds of negotiations in the 1950s had been primarily for the purpose of tariff reduction, and an "offer-concession" negotiation scheme was carried out whereby the major trading states bargained in essentially bilateral fashion, requesting and offering concessions, trading off one product area for another.<sup>122</sup> The GATT most-favored-nation ("MFN") rule institutionalized tariff cuts throughout the membership. Trade negotiators established a "linear-cut" negotiation scheme for the 1960s Kennedy Round of tariff negotiations, whereby a general across-the-board cut was the starting point for exceptions-oriented bargaining.<sup>123</sup> Linear tariff cutting produced another one-third

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<sup>122</sup> See KENNETH DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 61 (1970) (describing the patterns of trade negotiation during the first six rounds of international trade negotiations).

<sup>123</sup> See ERNEST H. PREGG, *TRADERS AND DIPLOMATS: AN ANALYSIS OF THE KENNEDY ROUND OF NEGOTIATIONS UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE* 58-80 (1970) (describing the negotiation preparations for the Kennedy Round); see also GERARD CURZON, *MULTILATERAL COMMERCIAL DIPLOMACY: THE GENERAL AGREEMENT ON*

cut in world tariff levels in the 1973-79 Tokyo Round of negotiations, but of greater import to world trade was that the multilateral trade negotiation ("MTN") forum had proven itself capable of winning international agreements to reduce nontariff barriers to trade. Nontariff barriers posed special challenges to trade negotiators because they were difficult to measure and, hence, tricky to value and weight. Yet, Tokyo Round negotiators had been able to create "linkage" opportunities provided by the round's broad agenda during a final end-game to get important new agreements regarding issues such as antidumping, government procurement, and safeguards.<sup>124</sup> Further supporting the GATT forum was the fact that the GATT secretariat had earned a reputation for providing objective technical support, either through the leadership of a more active director-general during the Kennedy Round who hosted in his office the final, late-night bargaining, or of a more modest director-general during the Tokyo Round who kept to the background.<sup>125</sup>

USTR and American business leaders assessed that the GATT round, to begin in the early 1980s with a proposed agenda of trade barrier reduction regarding agriculture and textiles issues known to be important to many developing countries,<sup>126</sup> could achieve what could not be achieved at the World Intellectual Property Organization forum. The GATT MTN, which had been hailed at the conclusion of the Tokyo Round as the birth of the most

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TARIFFS AND TRADE AND ITS IMPACT ON NATIONAL COMMERCIAL POLICIES AND TECHNIQUES 77-78 (1965) (explaining the dynamics of linear tariff reductions in the GATT negotiations).

<sup>124</sup> See GILBERT R. WINHAM, *INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION* 256-305 (1983). See generally Jock A. Finlayson & Mark W. Zacher, *The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions*, in *INTERNATIONAL REGIMES* 273 (Stephen D. Krasner ed., 1983) (describing the nontariff barriers and how negotiators addressed them in the Tokyo Round).

<sup>125</sup> Eric Wyndham White had been director-general of the GATT secretariat since its inception in 1948, and Preeg explains that he had played a key brokering role in the Kennedy Round. See PREEG, *supra* note 123, at 184-89. White's successor, Olivier Long, receives only one mention by Winham in the history of the Tokyo Round. See WINHAM, *supra* note 124, at 96. Analytically, however, I note that Winham makes almost no reference in the entire book to the GATT Secretariat.

<sup>126</sup> See C. FRED BERGSTEN & WILLIAM R. CLINE, *TRADE POLICY IN THE 1980s*, at 38-41 (1982); see also *COMPLETING THE URUGUAY ROUND: A RESULTS-ORIENTED APPROACH TO THE GATT TRADE NEGOTIATIONS* 1-50 (Jeffrey J. Schott ed., 1990).

important institutional innovation in world trade since the creation of the GATT itself,<sup>127</sup> could provide the forum for trade negotiators to link “concessions” on intellectual property protection on the part of the South, to concessions on agriculture and textiles on the part of the North. However, for the strategy to work, the round negotiation scheme would need a crucial change from the Tokyo Round scheme: there could be no a la carte shopping among agreements as had been permitted in the Tokyo Round, no selective, code-by-code signatures, and no “code conditionality” regarding benefits. All agreements would have to be accepted by all contracting parties, or developing countries would simply opt out of an intellectual property agreement.

U.S. policymakers, however, faced an unexpected problem in their own camp, even before their GATT strategy could be set in motion. The “countable indicators” of piracy losses provided by the International Intellectual Property Alliance (a specialized coalition organization representing filmmakers, music producers, book publishers, and software makers) in 1985<sup>128</sup> demonstrated to USTR that they had extensive film, music, book, and software piracy problems in developing countries and thus that the copyright issue should be on the agenda as well. However, to the surprise of USTR policymakers, the copyright interests did not share the belief of the patent interests that the multilateral, GATT-based negotiation strategy was in their interest. Film, music, and book interests adamantly opposed the idea of reforms of the Berne Convention within the next round of trade negotiations. The copyright interests knew that GATT rounds were wild and woolly affairs: President Carter recruited Robert Strauss, a master negotiator, to become Trade Representative for the purpose of bringing the difficult Tokyo Round to a close, and the deals he struck to get agreements in 1979 were legendary—admired by some, loathed by others.<sup>129</sup> The Berne Convention did not cover computer software, but its rules were in general acceptable to

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<sup>127</sup> See John H. Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 *LAW & POL'Y INT'L BUS.* 21 (1980) (arguing that the Tokyo Round initiated a wholly-new international trade law-creation institution).

<sup>128</sup> See INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, *TRADE LOSSES DUE TO PIRACY AND OTHER MARKET ACCESS BARRIERS AFFECTING THE U.S. COPYRIGHT INDUSTRIES* (1985) (report on file with Office of U.S. Trade Representative).

<sup>129</sup> See Gilbert R. Winham, *Robert Strauss, MTN, and the Control of Faction*, 14 *J. WORLD TRADE L.* 377 (1980).

copyright-oriented U.S. companies. The problem for them was lack of enforcement in developing countries, and the film, music, and book interests were placing their stock in the bilateral, Section 301 strategy to get enforcement levels up. To the copyright interests, the GATT strategy offered risks without apparent rewards. USTR hosted several meetings, described by participants all-around with words such as "testy" and "acrimonious," to get the copyright interests on-board with the multilateral GATT strategy.

Getting intellectual property onto the MTN agenda was itself no easy task. Believing that European support would be necessary and Japanese support helpful in making it happen, the U.S. Trade Representative recommended to the chairmen of Pfizer and IBM that they encourage their European and Japanese counterparts to pressure their governments and EC secretariat leadership to support the idea.<sup>130</sup> Though competitors in global markets, these companies shared the common interest in improved intellectual property protection around the world, especially in developing-country markets, and various European and Japanese trade associations were talked into supporting the initiative. Yet, neither they, nor their governments, were as committed to the issue as were some people in the United States. The round had many issues which they perceived to be of greater salience, and developing-country opposition was well-known.

Many of the developing countries maintained that WIPO, not GATT, was the appropriate forum for intellectual property discussions and that patent policies especially ought to vary by level of development and not be harmonized. Extensive piracy of patented pharmaceuticals and chemicals, copyrighted film, music, book, and software products meant that local interests opposed policy change. Inside and outside the governments, health care interests claimed that pharmaceutical piracy benefited the people; agricultural interests claimed that agri-product piracy promoted local food production; and, book and software interests claimed that piracy contributed to local learning and technology transfer. The so-called Group of Ten ("G-10") developing countries, Argentina, Brazil, Cuba, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania, and Yugoslavia, opposed placing intellectual property on to the Uruguay Round agenda, just as they opposed placing

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<sup>130</sup> See Michael A. Santoro & Lynn Sharp Paine, *Pfizer: Global Protection of Intellectual Property*, HARV. BUS. SCH. CASES 7 (1995).



services and investment on the agenda. During several years of pre-round agenda negotiation, they did not budge from their opposition to the notion of "trade-related intellectual property" talks, so USTR decided to take the unprecedented "self-initiated" Section 301 action against Korea and Brazil in order to bully the developing countries to the GATT negotiating table. By playing the 301 card, they aimed to signal that negotiations could go on one-by-one under threat of bilateral trade sanction or could take place within the GATT MTN round, but that they would take place nevertheless.

The 301 bullying gambit worked, aided by some draftsmanship maneuvering, since a group of twenty developing countries and twenty industrialized countries agreed to include intellectual property on the agenda. In July 1986, a final draft text for the Punta del Este Ministerial Declaration<sup>131</sup> was submitted to all the trade ministers under the authorship of the Swiss and Colombian ambassadors, and it was this text which was adopted as the agenda for the Uruguay Round.<sup>132</sup> The Punta del Este Declaration gave the following mandate to the negotiators:

In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate, as appropriate, new rules and disciplines. Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods taking into account work already undertaken in the GATT.<sup>133</sup>

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<sup>131</sup> Punta del Este Ministerial Declaration, Sept. 20, 1986, GATT B.I.S.D. (33d Supp.) at 19 (1987).

<sup>132</sup> See Gail Evans, *Intellectual Property as a Trade Issue—The Making of the Agreement on Trade-Related Aspects of Intellectual Property Rights*, 1 *WORLD COMPETITION* 160, 173 (1994).

<sup>133</sup> Punta del Este Ministerial Declaration, *supra* note 131, at 25-26.

Through U.S. leadership and the cooperation of the governments of Europe, Japan, and some of the developing countries, the GATT Uruguay Round multilateral trade negotiations, with their opportunities for linkage bargaining, became in the late 1980s and early 1990s the forum for international intellectual property negotiations. However, the Trade-Related Intellectual Property Rights declaration text was deliberately loosely-worded. Thus, the first issue for the TRIPS negotiating committee with the Uruguay Round was an agenda. The United States insisted that TRIPS should comprehensively cover patents, trade secrets, industrial designs, integrated circuit designs, copyrights, and trademarks; it should articulate as goals agreements which achieved MFN, national treatment, transparency, and minimum standards; and it should be geographically universal. The Organization for Economic Development and Cooperation ("OECD") and newly industrializing countries had converged toward a consensus that the TRIPS Agreement ought to incorporate the Paris Convention and the Berne Convention, apply Berne rules to computer programs by defining them as "literary works," and go beyond Paris and Berne to establish minimum standards. India, on behalf of the G-10, contended that a counterfeiting code with respect to trademark and copyright ought to be the only issue under discussion and bitterly opposed any agreement regarding patents and trade secrets.<sup>134</sup> The Indian government argued that patents were trade restrictive by allowing certain firms to exploit monopolies over pharmaceuticals and agricultural chemicals and products.

Negotiations proceeded, though wide gaps in policy preferences persisted for several years, and months would pass between formal meetings among negotiators. American governmental trade negotiators in Geneva frequently contacted the primary Washington-based intellectual property interest groups, including the Intellectual Property Committee, the International Intellectual Property Alliance, the Pharmaceutical Research and Manufacturers of America, and various company and trade association representatives. European business was represented in Geneva by the Union of Industrial and Employers' Confederation of Europe, which is composed of thirty-three member federations from twenty-two countries. Japanese business was represented by the

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<sup>134</sup> See Evans, *supra* note 132, at 162.

*keidanren*, the Japanese Federation of Economic Organizations. These groups jointly announced in June 1988 a draft agreement, the Basic Framework of GATT Provisions on Intellectual Property, Statement of Views of the European, Japanese, and United States Business Communities.<sup>135</sup> European business groups recommended that developing countries be offered preferential treatment on an MFN basis, pledges of increased technical assistance, and transitional provisions to sweeten the deal, the last term of which was at the time and until the end opposed by the U.S. pharmaceutical makers. India and Brazil, for their part, denounced the Basic Agreement proposed by multinational corporations, especially the patent rules. India argued that developing countries should be free to exclude pharmaceuticals, food, and chemicals from patent protection, shorten patent protection periods for other sectors, and license foreign patents under preferential terms. A patent conferred in a host country, contended the Indian negotiators, was an obligation upon the multinational company, and compulsory licensing should be recognized as a legitimate government policy tool to prevent multinational enterprises from misusing their rights within the host country.<sup>136</sup> At a 1989 international conference held at Vanderbilt Law School, one industrial design scholar contended that the TRIPS negotiators ought to adapt the "fair use" doctrine of copyright law to patent law,<sup>137</sup> a proposal rejected by both patent specialists and copyright specialists as a perversion of policy purposes in both their houses, but which underscored that the negotiation gap remained so wide that unconventional thinking could be aired. At the same conference, two senior Congressional staff members insisted that the minimum which the U.S. delegation should obtain in a TRIPS Agreement was "(1) substantive standards for intellectual property protection; (2) effective enforcement measures at the border and internally; (3) a multilateral consultation and dispute settlement mechanism; and (4) traditional GATT provisions, including transparency and national treatment applied to intellectual prop-

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<sup>135</sup> See *id.* at 165.

<sup>136</sup> See *id.* at 167.

<sup>137</sup> See J. H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 747, 809 (1989).

erty."<sup>138</sup> A GATT secretariat official pointed out to the developing country policymakers that they were acting as though the choice of forum was GATT or WIPO when the reality was a choice between GATT and USTR. They were failing to recognize that their bargaining leverage was greater within the multilateral Uruguay Round than within the bilateral Section 301 procedure with the United States.<sup>139</sup>

The turning point in the negotiations came in April 1989 when a compromise between the industrialized and developing countries was achieved to draft a "framework agreement" which would outline minimum standards for intellectual property rights and enforcement, but leave the GATT versus WIPO competence question off the table.<sup>140</sup> In September, 1989, India announced that it accepted the principle of international enforcement of intellectual property within the context of the Uruguay Round, an act which allowed the negotiations to become about substantive provisions of an agreement. Proposals were tabled by industrialized and developing countries alike, with countries such as Canada and Mexico sharing India's concerns about patent-based monopolies turning into international anti-competitive situations. In January 1990, this phase of the negotiations resulted in the creation of the Checklist of Issues, which listed some 500 points of disagreement.

Led by the American, European, Japanese, Swiss, and Indian negotiating teams, draft texts were circulated to bridge the check-listed differences. Brokered by the chairman of the TRIPS negotiating group, the GATT secretariat staff culled these ideas and proposals so that in June the TRIPS chairman and the ambassador from Sweden, Lars Anell, presented a Draft Composite Text at the Brussels Ministerial Meeting in December 1990. The TRIPS Draft Text indicated that much disagreement persisted on important issues of intellectual property policy, including (1) first-to-file versus first-to-invent systems for patents, (2) compulsory licensing, (3) patents regarding plant and animal varieties, (4) copyright versus neighboring rights for performers, (5) moral rights under

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<sup>138</sup> Robert W. Kastenmeier & David Beier, *International Trade and Intellectual Property: Promise, Risks, and Reality*, 22 VAND. J. TRANSNAT'L L. 285, 291 (1989).

<sup>139</sup> See Arvind Subramanian, *TRIPS and the Paradigm of GATT: A Tropical, Temperate View*, 13 WORLD ECON. 509 (1990).

<sup>140</sup> See Evans, *supra* note 132, at 169.

copyright, and (6) rental rights under copyright. The Chairman of the TRIPS committee established a “ten-on-ten” structure—ten industrializing countries, ten developing countries—to move the negotiations toward consensus.

Because the whole Uruguay Round was foundering, GATT Director-General Arthur Dunkel and the secretariat compiled the results achieved to that point and presented them with the Draft TRIPS in December 1991 as a formal draft for final negotiation.<sup>141</sup> Agreement had been reached in principle to phase-out the Multifiber Arrangement, thus offering the developing countries something of great economic worth. The overriding problem of the Uruguay Round had by then become the agricultural policy dispute between the European Union on one side and the United States and the so-called “Cairns Group” of agricultural exporting countries on the other. When compromise was finally reached, the whole Uruguay Round was brought to conclusion and the Draft Composite Text became the final TRIPS Agreement essentially without change.<sup>142</sup> Interviewees, looking back on the negotiations, acknowledged that without the secretariat-drafted Draft Composite Text there would have been no TRIPS Agreement. They were effusive in their praise of the negotiation committee chair, whom several called the “hero” of the story, and of the secretariat. Indeed, the investment agreement contained modest provisions, and services yielded only a framework agreement, while sector-specific commitments were put off for further negotiation after the Round.

##### 5. GATT FORUM-MADE INTERNATIONAL INTELLECTUAL PROPERTY LAW

In the end, the TRIPS Agreement produced agreement regarding patents, copyrights, trademarks, semiconductor masks, industrial designs, and trade secrets. The TRIPS Agreement builds upon the substantial legal base provided by previous international treaties regarding intellectual property. Regarding patents, the

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<sup>141</sup> See *id.* at 174.

<sup>142</sup> See Carlos A. Primo Braga, *Trade-Related Intellectual Property Issues: The Uruguay Round Agreement and Its Economic Implications*, in *THE URUGUAY ROUND AND THE DEVELOPING ECONOMIES* 387 (Will Martin & L. Alan Winters eds., 1995).

agreement<sup>143</sup> offers product and process patents to nearly all types of inventions "in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application" when the terms "non-obviousness" and "useful" are "synonymous."<sup>144</sup> Article 27 further explains that patent rights are "enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced."<sup>145</sup> This Article is thus an important achievement from the perspective of U.S. negotiators, for it legitimizes the patentability of pharmaceuticals, transgenic plants and animals, and computer software. However, it also qualifies that states may exclude from patentability inventions for reasons of "public order" or "morality."<sup>146</sup> This clause is ambiguous because it confers upon the state the right to prohibit patents to protect "human, animal or plant life or health or to avoid serious prejudice to the environment," including but not limited to (1) "diagnostic, therapeutic and surgical methods for the treatment of humans or animals," and (2) "plants and animals other than micro-organisms, and essentially biological processes for the production of plants and animals other than non-biological and microbiological processes."<sup>147</sup> The passage explicitly permits plant variety patents and provides that the language should be revisited "four years after the date of entry into force of the WTO Agreement."<sup>148</sup> The precise meaning of the passage can only become known through interpretation over time and when issues are re-addressed beginning in 1999.

TRIPS provides patent holders with exclusive rights to make, use, sell, import, assign or transfer the patent through license. However, these rights may be limited in certain ways and compulsory licensing, though not prohibited, is constrained by Article 31 such that it must be (1) a non-exclusive license; (2) "predominantly for the supply of the domestic market of the

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<sup>143</sup> See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 81 (1994) [hereinafter TRIPS].

<sup>144</sup> *Id.* art. 27.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

Member authoring such use;" (3) with "adequate remuneration;" (4) "subject to judicial review" as well as other terms.<sup>149</sup> A patent term runs for at least twenty years from the date of the filing of the application,<sup>150</sup> and an opportunity exists for judicial review of any decision to revoke or forfeit a patent.<sup>151</sup> Regarding process patents, the alleged infringer has the burden to prove that he produced an identical product by a different process under circumstances where the "product obtained by the patented process is new," or where "there is substantial likelihood that the identical product was made by the process and the owner of the patent has been unable through reasonable efforts to determine the process actually used."<sup>152</sup>

TRIPS requires that members offer MFN terms to each other, stating that "any advantage, favor, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members."<sup>153</sup> Members must offer signatories national treatment: "Each Member shall accord to the nationals of other Members treatment no less favorable than that it accords to its own nationals with regard to the protection of intellectual property . . ." <sup>154</sup> The twin requirements of MFN and national treatment, which have been hallmarks of the GATT/WTO-based trade regime since its founding, aim to generalize the rights and responsibilities among weak states and powerful states alike. The TRIPS, like the GATT/WTO, permits exceptions to the MFN requirement through free trade agreements or customs unions. However, because of the limitations of the terms of the TRIPS, they do not establish a harmonized, global, level playing field of harmonized policies and practices. Furthermore, Article 8 provides a caveat which appears to offer some latitude for members regarding their commitments in the TRIPS by stating:

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect pub-

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<sup>149</sup> *Id.* art. 31.

<sup>150</sup> *See id.* art. 33.

<sup>151</sup> *See id.* art. 32.

<sup>152</sup> *Id.* art. 34.

<sup>153</sup> *Id.* art. 4.

<sup>154</sup> *Id.* art. 3.

lic health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement. 2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.<sup>155</sup>

The precise meaning of Article 8 will only become known over time through the inevitable litigation of international dispute settlement.

TRIPS aims to prevent disputes by demanding transparency with respect to intellectual property laws, regulations, administrative practices, and court decisions (though permitting the withholding of information due to public interest or proprietary interest concerns) through publication and reporting to the TRIPS Council of certain aspects of the policy and practices.<sup>156</sup> When disputes between members do arise, the disputants use GATT/WTO dispute settlement procedures.<sup>157</sup> These procedures call for bilateral negotiation with or without the good offices of the WTO secretariat first, then formal dispute settlement if needed. The dispute settlement mechanism is the establishment of a three-member panel which assesses the arguments of the disputants and issues a decision which typically offers interpretation of relevant international law and an opinion regarding a state's policy compliance with relevant international law.<sup>158</sup> The dispute settlement provision is, from the standpoint of developing countries (as well as some industrialized countries), the great achievement of the Round, for it constrains U.S. unilateralism. The agreement establishes a Council for TRIPS, a body composed of

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<sup>155</sup> *Id.* art. 8.

<sup>156</sup> *See id.* art. 63.

<sup>157</sup> *See id.* art. 64.

<sup>158</sup> *See* ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993) (providing analysis of GATT dispute settlement procedures and cases); PIERRE PESCATORE ET AL., HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT (1997) (providing analysis of WTO dispute settlement reforms).



representatives from member states who monitor the operation of the agreement.<sup>159</sup> The Council offers an on-going forum for consultation regarding intellectual property policy issues, a mechanism which may resolve disputes without the need for formal dispute settlement.

Regarding copyright, TRIPS establishes that members comply with the 1971 terms of the Berne Convention.<sup>160</sup> Article 10 explicitly provides that computer programs and databases are to be protected as literary works under the Berne Convention.<sup>161</sup> Article 12 establishes a generally applicable fifty-year term minimum, dating from the year of publication or making, while not diminishing longer terms which many states offer to their copyright holders.<sup>162</sup> Article 11 grants “at least” owners of computer software and cinemaworks the right to authorize or prohibit rental of their products.<sup>163</sup> With respect to the rights related to sound recordings, performers control fixation, reproduction, and broadcasting of their performances.<sup>164</sup> Producers of sound recordings have the right to authorize or prohibit the reproduction of their phonograms.<sup>165</sup> Broadcasters have the right to authorize or prohibit the fixation, reproduction of fixations, and rebroadcasting of their broadcasts.<sup>166</sup> These rights and obligations are further specified in the Rome Convention, which Article 14 embodies in TRIPS, although moral rights are not specified in TRIPS.<sup>167</sup>

With respect to trademarks, owners are granted, by Article 16 and through application of the Paris Convention, an exclusive right of use “in the course of trade identical or similar signs for goods and services . . . where such use would result in a likelihood of confusion.”<sup>168</sup> TRIPS further enhances protection for internationally well-known marks, though not with absolute clarity: “In determining whether a trademark is well known, Members shall take account of the knowledge of the trademark in the relevant

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<sup>159</sup> See TRIPS art. 68.

<sup>160</sup> See *id.* art. 9.

<sup>161</sup> See *id.* art. 10.

<sup>162</sup> See *id.* art. 12.

<sup>163</sup> See *id.* art. 11.

<sup>164</sup> See *id.* art. 14.

<sup>165</sup> See *id.*

<sup>166</sup> See *id.*

<sup>167</sup> See *id.*

<sup>168</sup> *Id.* art. 16.

sector of the public, including in the Member concerned which has been obtained as a result of the promotion of the trademark."<sup>169</sup> Sustained use of the mark combined with registration of the mark with trademark authorities appears to be the best means to maintain and extend trademark rights globally, for Article 19 requires that registration may be canceled "only after an uninterrupted period of at least three years of non-use" by the holder.<sup>170</sup> TRIPS also provides that a trademark registration term minimum is seven years, but that a trademark may be renewed indefinitely.<sup>171</sup> Article 21 declares the prohibition of compulsory licensing of marks, instead conferring to the owner the exclusive right to assign the trademark.<sup>172</sup>

TRIPS requires that member states protect industrial designs "that are new or original"<sup>173</sup> and that the owner of a protected industrial design has the right to prevent third parties from making, selling, or importing articles "bearing or embodying a design which is a copy or substantially a copy."<sup>174</sup> The agreement provides that the term of protection be at least ten years. With regard to lay-out design (topography) protection for integrated circuits, TRIPS refers to the Treaty on Intellectual Property in Respect of Integrated Circuits ("IPIC Treaty"),<sup>175</sup> signed in Washington when it states that members should consider it unlawful to import, sell, or distribute a product which is or which contains an unauthorized, protected integrated circuit lay-out design (sometimes called a "semiconductor mask").<sup>176</sup> Article 38 provides that this protection ought to last for at least ten years beginning with registration filing or first commercial exploitation "wherever in the world it occurs."<sup>177</sup>

Trade secret protection, though the term "trade secret" is not used, is provided for in Article 39.<sup>178</sup> "This was an area of heated

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.* art. 19.

<sup>171</sup> *See id.* art. 18.

<sup>172</sup> *See id.* art. 21.

<sup>173</sup> *See id.* arts. 16, 25.

<sup>174</sup> *Id.* art. 25.

<sup>175</sup> *See* The Treaty on Intellectual Property in Respect of Integrated Circuits, May 26, 1989, 28 I.L.M. 1484.

<sup>176</sup> *See id.* arts. 35-36.

<sup>177</sup> *Id.* art. 38.

<sup>178</sup> *Id.* art. 39.

North-South debate, with developing countries opposing the treatment of trade secrets as an intellectual property right.”<sup>179</sup> In accordance with the Article 10 unfair competition section of the Paris Convention, members are to protect “undisclosed information.”<sup>180</sup> Persons should be able to protect their information so long as it is secret, has commercial value because it is secret, and has “been subject to reasonable steps under the circumstances . . . to keep it secret.”<sup>181</sup> However, neither the TRIPS nor the Paris Convention establishes rules regarding judicial remedies for theft of trade secrets.

The TRIPS Agreement also concerns competition—specifically the licensing of intellectual property rights.<sup>182</sup> Article 40 states that certain types of licensing agreements can restrain trade or impede the transfer and dissemination of technology; thus it explicitly reserves to the members the right to write legislation which controls these types of licensing agreements.<sup>183</sup>

Considerable text is devoted to issues of enforcement, an outcome important to U.S. copyright interests, in the short term and also to patent interests over the long term. The general obligation is presented in Article 41 that members “shall ensure that enforcement procedures . . . are available under their law so as to permit effective action against any act of infringement of intellectual property rights . . ., including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.”<sup>184</sup> The requirements also included enforcement procedures which are “fair and equitable” but which are not “unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.”<sup>185</sup> Procedures are to be transparent; decisions are to be delivered “without undue delay” and “based only on evidence in respect of which parties were offered the opportunity to be heard.”<sup>186</sup> The Article further obligates states to offer the “opportunity to be heard.”<sup>187</sup> These en-

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<sup>179</sup> Braga, *supra* note 142, at 393.

<sup>180</sup> See TRIPS art. 39.

<sup>181</sup> *Id.*

<sup>182</sup> See *id.* art. 40.

<sup>183</sup> See *id.*

<sup>184</sup> *Id.* art. 41.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

forcement provisions also require states to offer the opportunity for judicial review of administrative decisions, though it makes no demand that states create a special, separate judicial review procedure regarding intellectual property law.<sup>188</sup>

Civil judicial procedures are demanded in Article 42, including the right to timely, written notice, the right to independent legal counsel, and the right to present relevant evidence.<sup>189</sup> The judicial authorities are given the authority to order that evidence be produced by the opposing party when the complainant has "presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party."<sup>190</sup> Judicial authorities have "the authority to order a party to desist from an infringement, *inter alia* to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, immediately after customs clearance of such goods."<sup>191</sup> These authorities, also must be able to pay damages "adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity."<sup>192</sup> Judicial authorities may also "order prompt and effective provisional measures" to prevent infringement from occurring by preventing the distribution for sale or importation of infringing goods and by preserving evidence."<sup>193</sup> The article further lays out guidelines regarding procedures for provisional measures.<sup>194</sup>

Members are obligated by TRIPS provisional measures to adopt administrative or judicial procedures which afford rights-holders the opportunity to stop the importation of infringing goods at the border through customs action.<sup>195</sup> The rights-holder must provide "adequate evidence,"<sup>196</sup> however, before the customs action need be taken, and the goods may only be held up at the

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<sup>188</sup> *See id.*

<sup>189</sup> *See id.* art 42.

<sup>190</sup> *Id.* art. 43.

<sup>191</sup> *Id.* art. 44.

<sup>192</sup> *Id.* art. 45.

<sup>193</sup> *Id.* art. 50.

<sup>194</sup> *See id.*

<sup>195</sup> *See id.* art. 51.

<sup>196</sup> *Id.* art. 52.

border for ten working days without the initiation of full judicial procedures or revocation of the suspension order.<sup>197</sup>

In addition to civil actions, members are required, at minimum, to provide criminal procedures in cases of “willful trademark counterfeiting or copyright piracy on a commercial scale,” and the remedies “shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of corresponding gravity.”<sup>198</sup> Seizure, forfeiture, and destruction of the infringing goods may also be available remedies.<sup>199</sup>

Since the WTO Agreement requires member states to accept all WTO agreements, most developing countries will be party to TRIPS. However, the TRIPS agreement includes the important caveat that no member is bound to comply until one year after the January 1, 1995, effective date of the WTO, and middle-level developing countries are given an additional five-year implementation grace period, while least-developed countries receive ten-year phase-in periods for implementation of all the terms of the agreement.<sup>200</sup> Perhaps as importantly, de jure implementation of TRIPS obligations in some emerging-market countries may not indicate de facto implementation by local governmental and judicial authorities. The implementation of TRIPS into national legal systems among industrializing countries will gradually occur during the decade to come, but at a pace and vigor which may vary considerably across emerging-market, developing countries. These transition periods were strenuously opposed by the pharmaceutical interests, yet they, the copyright interests, U.S. government negotiators, and many other business and government participants, were generally pleased with the final TRIPS product, for developing countries were finally obligated under international public law to meet basic standards of intellectual property protection, thereby achieving “deep integration” in an important policy area. The points of continued disagreement which had been specified in the Draft Composite Text, in the minds of the participants, could be re-addressed at another date. Some contentious points were taken-up almost immediately after the conclu-

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<sup>197</sup> See *id.* art. 55.

<sup>198</sup> *Id.* art. 61.

<sup>199</sup> See *id.*

<sup>200</sup> See *id.* art. 65.

sion of the GATT Uruguay Round, and they were taken up in the WIPO forum.

#### 6. FUNCTION-SPECIFIC, WIPO FORUM-MADE INTERNATIONAL COPYRIGHT LAW

Even as the TRIPS negotiations were proceeding, a communication revolution was underway, born of the spectacular rise in: the use of the Internet; telephony deregulation, which increased the number of providers and the need for high-capacity fiber optic cable; and an important breakthrough in digital compression technologies, which increased channel-capacity and may foment a digital convergence of communication media. The digital communication revolution challenges conventional institutions of intellectual property, such as copyright to adapt to new technological capabilities and new commercial behaviors. The future of global electronic communication and commerce was at issue as representatives of national governments, companies, and nongovernmental organizations convened at the World Intellectual Property Organization Conference in December 1996 for the purpose of amending the Berne and Rome Conventions regarding copyright and performers' rights for the era of digital communication. Digital convergence and networked, interactive communication offers the prospect of new services and conveniences, including a powerful new medium by which to distribute copyrighted materials. It also, however, offers the prospect of unauthorized piracy of digitized music, films, and software, repeatedly downloaded with no quality loss. The prospect of Internet-based electronic commerce posed challenges to information technology (encryption, e-cash, etc.) and the copyright institution even as it offered a paradigm-shift in product distribution. The key question was: did "going digital" require a complete rethinking of international copyright law?

WIPO sponsored a number of international conferences attended by expert specialists in communication technology and intellectual property law over a five-year period leading up to the December 1996 Diplomatic Conference. Conferences were convened under the auspices of WIPO in Palo Alto, California, in March 1991; Cambridge, Massachusetts, in April 1993; Paris, in June 1994; Mexico City, in May 1995; and Naples, in October 1995. At the Cambridge Conference, *Digital Media* magazine editor articulated, for the 300 participants, the special characteristics

of the digital information and expression revolution: (1) intangible until processed and projected through a microprocessor-controlled device; (2) copied indefinitely with no loss of quality; (3) information is malleable, i.e., can be combined, altered, mixed, manipulated with relative ease; (4) infinite life (unlike old movie film and 78 rpm recordings which decay).<sup>201</sup>

Two American copyright attorneys reminded the participants that governments have a long, embarrassing history of retarded copyright policy response to technological innovations in expression media.<sup>202</sup> Two music industry representatives emphasized the revolutionary change imminent in their business: "Everything capable of being reduced to zeros and ones, whether literary text, audio or audio-visual signals, or other information, can be delivered to the home without manufacturing costs or environmental waste. . . . Industries that have produced and manufactured cultural goods will become service, rather than goods, providers."<sup>203</sup> They opined that electronic delivery will one day replace existing retail marketing systems for phonograms but only if appropriate technical and legal means of anti-piracy are established. At the Paris conference, a professor from the University of Paris, noting the emerging "multimedia" works, opined that the acquisition of a right to copy text, music, and images already was limiting and would increasingly constrain the creativity of these new kinds of expressions unless appropriate provisions were provided in the law.<sup>204</sup>

A Finnish copyright authority explained that the copy machine had introduced a tremendous technological challenge in the area of scientific, technical, and medical ("STM") journal publish-

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<sup>201</sup> See David Baron, *Digital Technology and the Implications for Intellectual Property*, in WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO WORLDWIDE SYMPOSIUM ON THE IMPACT OF DIGITAL TECHNOLOGY ON COPYRIGHTS AND NEIGHBORING RIGHTS 31 (1993) [hereinafter WIPO, DIGITAL TECHNOLOGY].

<sup>202</sup> See Morton David Goldberg & Jesse M. Feder, *Copyright and Technology: The Analog, the Digital, and the Analogy*, in WIPO, DIGITAL TECHNOLOGY, *supra* note 201, at 43.

<sup>203</sup> See Jason S. Berman, *The Music Industry and Technological Development: Are We Winning the War?*, in WIPO, DIGITAL TECHNOLOGY, *supra* note 201, at 93, 107-10.

<sup>204</sup> See Pierre Sirinelli, *The Adaptation of Copyright in the Face of New Technology*, in WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO WORLDWIDE SYMPOSIUM ON THE FUTURE OF COPYRIGHT AND NEIGHBORING RIGHTS 37 (1994) [hereinafter WIPO, COPYRIGHT].

ing, which assumed greater economic consequences in the 1980s as libraries faced tighter budgets, along with growing demand for articles regarding science, engineering, and medicine.<sup>205</sup> Inter-library loan proliferated within the library community to the consternation of the main STM publishers, Reed Elsevier and Springer-Verlag, so a solution was found through (1) levies on copyright equipment, (2) paybacks to copyright associations, (3) increased journal prices, (4) less expensive distribution through CD-ROM, and (5) acceptance of the inter-library loan practice.<sup>206</sup> This authority speculated that the principles could be applied to electronic distribution for "[t]here is rather general agreement that displaying or viewing of protected material on a screen ought to be subject to copyright. The protection can be constituted . . . by considering a display to be a copy and the act consequently subject to the right of reproduction."<sup>207</sup> The conflict between U.S. copyright law's emphasis upon the economic rights of the risk-taking producer/distributor and Europe's emphasis upon the expressive rights of the author/director was proclaimed by a Belgian screenwriter: "It is . . . ridiculous to claim that the creator of *Citizen Kane* was RKO, Inc., in 1943, and the Turner Corporation in 1994."<sup>208</sup> "Europe," he concluded, "is the only place in the world where men have been able to combine economic progress with social and cultural progress," a situation it owes to its moral/author's rights institution.<sup>209</sup> A Stanford law professor, however, offered the counterpoint:

I know of no artist who starves in his garret because he desires to do so. Every serious creator wants to communicate his work to as large an audience as his vision can command. Copyright and author's right create the shelter of privacy that authors need, and give publishers and other risk-taking intermediaries the economic protection they

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<sup>205</sup> See Tarja Koskinen, *Reprography, Electrocopying, Electronic Delivery, and the Exercise of Copyright*, in WIPO, COPYRIGHT, *supra* note 204, at 180-87.

<sup>206</sup> See *id.*

<sup>207</sup> *Id.* at 182.

<sup>208</sup> Joao Correa, *Protection of the Rights of the Creators of Audiovisual Works*, in WIPO, COPYRIGHT, *supra* note 204, at 197.

<sup>209</sup> *Id.*



need, to make this hoped-for communication between author and audience a reality.<sup>210</sup>

The assistant director of WIPO for copyright norm creation presented a paper in Paris aiming to define controversies and summarize the issues.<sup>211</sup> First, multimedia was clearly already covered by the Berne Convention. Second, the lines between rights of reproduction, distribution, and communication to the public are becoming more blurry and may simply be stated in fact if not in law as “digital delivery.”<sup>212</sup> Finally, the technical means, of copy protection and management systems, “smart cards,” digital codes, and so forth may become more frequently applied.<sup>213</sup> In Mexico City, he offered the judgment that treaty language which could find broad support among Berne Convention members would confer the right of distribution on digital transmissions; treaty language which would likely be difficult to garner broad support among Berne Convention members would be to confer the right to authorize digital transmissions.<sup>214</sup> He noted his sense that there was a consensus that application of these technical means, such as copy protection, copy management devices, encryption, and identification, should be left with the rights owners.<sup>215</sup> However, “efficient sanctions may have to be prescribed against those who manufacture, import or distribute unauthorized devices the only or main purpose of which is to defeat or circumvent copy-protection, copy-management or encryption systems and the like . . . .”<sup>216</sup> At the October, 1995 Naples Conference, he opined that the U.S. Patent and Trademark Office position as explicated in the so-called Lehman Report offered “a very innovative solution” to the problem of defining reproduction: “The economic impact of such ‘distribution by transmission’

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<sup>210</sup> Paul Goldstein, *Copyright and Author's Right in the Twenty-First Century*, in WIPO, *COPYRIGHT*, *supra* note 204, at 261.

<sup>211</sup> Mihály Ficsor, *New Technologies and Copyright: Need for Change, Need for Continuity*, in WIPO, *COPYRIGHT*, *supra* note 204, at 209-20.

<sup>212</sup> *See id.* at 218.

<sup>213</sup> *See id.*

<sup>214</sup> *See id.*

<sup>215</sup> *See id.* at 219-20.

<sup>216</sup> Mihály Ficsor, *Speech*, in WORLD INTELLECTUAL PROPERTY ORGANIZATION, *WIPO WORLDWIDE SYMPOSIUM ON COPYRIGHT IN THE GLOBAL INFORMATION INFRASTRUCTURE* 369 (1995).

is really the same as that of distribution of tangible copies.”<sup>217</sup> He went on to say that “at the international level, this solution may not be acceptable for many countries. . . . It cannot be the only approach because, in the national laws of many countries, the notion of distribution is closely linked to the distribution of tangible copies . . . .”<sup>218</sup> The “Committee of Experts,” the representatives of the national governments which were parties to the Berne Convention, met in May 1996 at WIPO headquarters in Geneva for the purpose of moving toward a consensus so that treaties could be concluded by the end of the year. A wide range of non-governmental organizations were represented at the meetings. Most governments expressed their optimism that two treaties would be concluded in December.

The negotiators completed a Copyright Treaty<sup>219</sup> at the December 1996 Diplomatic Conference, which supplements the Berne Convention, and a Performances and Phonograms Treaty, which supplements the Rome Convention. The copyright agreement which emerged begins with the preamble that the contracting parties desire to “develop and maintain the protection of the rights of authors in their literary and artistic works” because they recognize the “profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works,” yet emphasizing the “outstanding significance of copyright protection as an incentive for literary and artistic creation” and recognizing the “need to maintain a balance between the rights of authors and the larger public interest, particularly education, research, and access to information, as reflected in the Berne Convention.”<sup>220</sup> The Convention reinforces continuity with the traditional scope of the copyright institution that “copyright protection extends to expressions and not to ideas, procedures, methods of operation, or mathematical concepts as such.”<sup>221</sup> However, further articles explicitly extend Berne Convention protections to computer programs and compilations of data (databases). Regarding databases,

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<sup>217</sup> See *id.* at 369-70.

<sup>218</sup> *Id.*

<sup>219</sup> *WIPO Copyright Treaty and Agreed Statements Concerning the WIPO Copyright Treaty*, INDUS. PROP. & COPYRIGHT, Feb. 1997, Text No. 5-01, at 002 [hereinafter *WIPO Copyright Treaty*].

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* art. 2.

the agreement qualifies that the “protection does not extend to the data or the material itself” for databases protectable by “reason of the selection or arrangement of their contents” which “constitute intellectual creations.”<sup>222</sup> Articles 6, 7, and 8 extend to authors’ exclusive rights regarding distribution, rental, and communication to the public.<sup>223</sup>

The Convention’s language is of considerable consequence for the future development of electronic communication and commerce. The Obligations Concerning Rights Management Information states that contracting parties:

shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention: (1) to remove or alter any electronic rights management information without authority; (2) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.<sup>224</sup>

The article defines “rights management information” as:

[I]nformation which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.<sup>225</sup>

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<sup>222</sup> *Id.* arts. 4-5.

<sup>223</sup> *See id.* arts. 6-8.

<sup>224</sup> *Id.* art. 12.

<sup>225</sup> *Id.*

Thus, the treaty does not ban any consumer electronics hardware, such as digital audio, video machines, or Internet connection devices, which may now or might in the future be used for the purpose of piracy. The treaty does not define transitory copies of copyrighted works in computer memory as "copyright-significant acts," which was an alternative proposed by the U.S. government.<sup>226</sup> The proposed language apparently would have meant that a copyrighted work would have to be paid for using e-cash systems at the time of calling up a copyrighted expression on-line lest infringement occur. The adopted language apparently means that identification codes and encryption will be used to permit on-line access to copyrighted works but will prevent copying of expressions, and e-cash systems will be designed to demand payment for down-loading or other use of the information.

The state representatives to WIPO also adopted a WIPO Performances and Phonograms Treaty,<sup>227</sup> on December 20, 1996, an agreement which aims to amend the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention). The preamble to the treaty states that the contracting parties desire to "develop and maintain the protection of the rights of performers and producers of phonograms" because they recognize the "profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms," yet recognize the "need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research, and access to information."<sup>228</sup>

After defining "performer," "phonogram," "fixation," "producer of a phonogram," and "publication," the Rome Convention goes on to define broadcasting as the "transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof" and includes "transmission by satellite" and "transmission of encrypted signals"

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<sup>226</sup> See *id.*

<sup>227</sup> *WIPO Performance and Phonograms Treaty and Agreed Statements Concerning the WIPO Performance and Phonograms Treaty*, INDUS. PROP. & COPYRIGHT, Feb. 1997, Text No. 6-01, at 001 [hereinafter *WIPO Performances and Phonograms Treaty*].

<sup>228</sup> *Id.* pmbl.

as broadcasts.<sup>229</sup> It defines “communication to the public” as the “transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sound fixed in a phonogram.”<sup>230</sup> This language thereby explicitly captures digital transmission within the meaning of the rights of performers as it relates to broadcasting and phonogram production. Article 4 provides that each contracting party shall provide national treatment to the nationals of other contracting parties.<sup>231</sup> The Convention goes on to provide that performers have moral rights independent of economic rights “even after the transfer of those rights . . . as regards live aural performances or performances fixed in phonograms,”<sup>232</sup> including the “right to claim to be identified as the performer of his performances” and to “object to any distortion, mutilation or modification of his performances that would be prejudicial to his reputation.”<sup>233</sup> It is noteworthy that the second right is qualified through the language “object” to any distortion rather than stronger language such as “prevent” any distortion. Regarding economic rights, Article 6 provides that performers “enjoy the exclusive right of authorizing, as regards their performances: (1) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and (2) the fixation of their unfixed performances.”<sup>234</sup> Article 7 provides performers with the exclusive right to authorize reproduction of their performances; Article 8 provides to performers exclusive distribution rights; Article 9 provides to performers exclusive rental rights.<sup>235</sup>

Producers of phonograms enjoy the “exclusive right of authorizing the direct or indirect reproduction of their phonograms”<sup>236</sup> and “exclusive right of authorizing the making available to the public of the original and copies of their phonograms through sale or other transfer of ownership,” but this right may be limited by

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<sup>229</sup> *Id.* art 2.

<sup>230</sup> *Id.*

<sup>231</sup> *See id.* art 4.

<sup>232</sup> *Id.* art. 5.

<sup>233</sup> *Id.* arts. 11-12.

<sup>234</sup> *Id.* art. 6.

<sup>235</sup> *See id.* arts. 7-9.

<sup>236</sup> *Id.* art. 11.

contracting parties to first sales.<sup>237</sup> Producers enjoy rights regarding commercial rental of the original and copies of their phonograms (which means that they can prevent it if they wish).<sup>238</sup> Article 13 also provides a grandfather clause regarding existing phonogram rental systems, provided that “equitable remuneration” is available for producers and that commercial rental is “not giving rise to the material impairment of the exclusive rights of reproduction,” these rental systems may be maintained.<sup>239</sup> There is broad language aimed at dealing with distribution through such communication means as the Internet: “Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.”<sup>240</sup>

The outcome, thus, was just as predicted by the WIPO secretariat assistant director general more than a year before at the Naples conference. The agreements aim to preserve the intent of the intellectual property policy of expression by conferring exclusive rights of authorship and distribution in order to provide incentives for risky investment in expression products while maintaining the public’s interest in access to the information and expression. Though new communication technologies make it a tricky balance to achieve, the copyright agreements were achieved through function-specific diplomacy built upon five years of WIPO educational initiative and despite the absence of the linkage bargaining opportunities. One electronic magazine described the interest group advocacy and diplomacy at the Diplomatic Conference, but, by ignoring the institutional history of the international copyright law reform process undertaken through the leadership of the WIPO secretariat over the previous five years, mischaracterized how the new international copyright law was achieved there.<sup>241</sup> However, the final text omitted crucial issues, so the 1996 Diplomatic Conference only begins the process of

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<sup>237</sup> *Id.* art. 12.

<sup>238</sup> *See id.* art. 13.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* art. 14.

<sup>241</sup> *See* John Browning, *Africa 1 Hollywood O*, WIRED, Mar. 1997, at 61-64, 185-88; Pamela Samuelson, *Big Media Beaten Back*, WIRED Mar. 1997, at 61-64, 178-84.

new rule creation regarding communication technology change and copyright.

## 7. CONCLUSION

Function-specific diplomacy contributes learning capacity to international lawmaking: Expert knowledge-rich specialists at the IGO form the organizational core of a subnational and transnational epistemic community which shares the consensual knowledge needed for learning to adapt economic law to changing technologies and market conditions. Linkage-bargain diplomacy contributes multiple policy issues to international lawmaking. Trade negotiators have at their disposal a panoply of policy issues with which to offer concessions which permit side-payments to affected domestic groups in order to bargain new economic law. Function-specific diplomacy is the grist of the law-creation mill; linkage-bargain diplomacy fixes the break-downs. International intellectual property lawmaking is both function-specific and linkage-bargain diplomacy, and policymakers will exploit the capabilities of both the WIPO and WTO forums in order to achieve new international intellectual property law. They will consider both their bargaining rules and their technical, functional expertise when planning future multilateral negotiations. Given the importance of learning and technical knowledge to successful lawmaking, policymakers ought put as much consideration into secretariat knowledge-support capabilities as into forum decision-making procedures when planning multilateral negotiations for international rule creation.

The international intellectual property diplomacy conducted in TRIPS and in the 1996 Berne and Rome convention amendments has barely addressed the Information Revolution, for TRIPS negotiators were preoccupied with the diplomacy of developing country opposition to intellectual property protection, especially to the patent institution, and the Copyright Diplomatic Conference negotiators were limited to the incrementalism of the achievable under circumstances of technological turbulence and market uncertainty. Looking toward the year 2000 and beyond, the primary catalyst for international intellectual property institutional change will be digital communication convergence, network computing, and biotechnology. Areas of special focus will likely include: (1) patenting of biotechnology products, (2) plant breeder's rights, (3) trade secrets in pharmaceutical, chemical, and

agri-product production, (4) copyrights in electronic commerce, including moral/author's rights versus producer/distributor's rights, (5) trade secrets of networked business enterprises, and (6) expression and "sweat-of-the-brow" database protection. New rule creation will be informed by ideas generated at WIPO-sponsored international conferences, from national experiences with legislation-drafting, and from dispute settlement within state judiciaries, between private parties at WIPO's Arbitration Center, and between states at WTO's dispute settlement mechanism.

Intellectual property offers some generalizations for the diplomacy of other policy areas of international economic rule creation. Deep integration with respect to environmental, labor, communication, health, and other regulatory issues will demand full exploitation of function-specific as well as linkage-bargain international lawmaking diplomacy. Thus, scholars and policy-makers alike ought not to singly focus on the trade-related diplomacy of these issues within the World Trade Organization, for the function-specific learning forum provided within the United Nations Environment Program, International Labor Organization, International Telecommunications Union, International Standards Organization, World Health Organization, and other IGOs will importantly contribute to international law creation. Linkage bargaining aided by a small WTO secretariat will be overwhelmed by the knowledge demands and ought to be reserved for the politically and diplomatically unresolvable issues.



# DEMOCRACY AND DISPUTE RESOLUTION: INDIVIDUAL RIGHTS IN INTERNATIONAL TRADE ORGANIZATIONS

ANDREA K. SCHNEIDER \*

## 1. INTRODUCTION

The question of dispute resolution systems for international organizations is of growing importance. Not only has there been a plethora of new international and regional organizations created in the last few years, but this trend is likely to continue. There are numerous proposals for multilateral free trade areas and agreements across Latin America and the Caribbean, as well as in Asia.<sup>1</sup> At the same time, existing international trade organizations have come under increasing scrutiny for their inability to reflect accurately the needs and concerns of the citizens of the member states.

For example, the debate about fast track authority for the Clinton Administration reflects concerns about the benefits of free trade agreements to the U.S. economy and fears that increased free trade with less developed states will lead to an elimination of jobs in certain manufacturing sectors.<sup>2</sup> This debate fo-

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<sup>1</sup> See, e.g., Frank J. Garcia, "Americas Agreements"—*An Interim Stage in Building the Free Trade Area of the Americas*, 35 COLUM. J. TRANSNAT'L L. 63 (1997) (discussing implementation of the Free Trade Area); Paul A. O'Hop, Jr., *Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-Based System*, 36 HARV. INT'L L.J. 127 (1995) (discussing importance of NAFTA to the establishment of the free trade zone in the Western Hemisphere); Merit Janow, *Assessing APEC's Role in Economic Integration in the Asia-Pacific Region*, 17 NW. J. INT'L L. & BUS. 947 (1997).

<sup>2</sup> Fast track allows the President to negotiate trade pacts and submit them to Congress for up-or-down votes, with no amendments allowed. See Peter Baker & Paul Bluestein, *Clinton Searches for Middle on 'Fast Track'*, WASH.

cuses on whether it is even in our citizens' interests for the United States to join international trade organizations. Meanwhile, across the Atlantic Ocean, the ongoing debate about the "democracy deficit" in the European Union ("EU") demonstrates the concern with the decreased ability of citizens to have a say in what the laws are under the EU.<sup>3</sup> This debate focuses on the ability of citizens to influence lawmakers in the substantive laws that directly affect their lives. In both of these debates, people have examined the legitimacy of international trade organizations and debated ways of structuring these organizations to be more democratic and more legitimate.

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POST, Sept. 11, 1997, at A8. Fast track supporters argue that without fast track, it would be impossible for the United States to conclude deals with other nations because the agreements are subject to Congressional approval. Many nations are hesitant to negotiate agreements when they know that Congress can reopen them in the approval process and force further negotiations. See, e.g., Bob Dole & Lloyd Bentsen, Editorial, *'Fast Track' Issue Deserves Fast Action*, N.Y. TIMES, Sept. 17, 1997, at A31. Supporters of fast track generally favor increased free trade. Those opposed to fast track are those more doubtful of the benefits of free trade and harmonization of standards, including labor and environmental groups. See Linda Clerkin, *Shut Up and Take Your Medicine: Will International Laws Force Vitamins Off U.S. Shelves?* CITY EDITION: THE WKLY NEWSPAPER OF MILWAUKEE, Nov. 20, 1997 ("We believe that each nation's needs are unique, and it shouldn't be up to an international group to decide what laws best govern that nation. It should be up to those nations themselves.") (quoting Susan Haeger, Executive Director of Citizens for Health protesting harmonized guidelines for vitamins and minerals under CODEX). For a discussion that links current trends in international trade and the economy towards strengthening the argument for fast track, see the viewpoint by the Assistant Secretary of Commerce for international economic policy from 1989 to 1993, in Thomas J. Duesterberg, *Selling the Free-Trade Story*, N.Y. TIMES, Oct. 5, 1997, at BU9. For a view of whether fast track is necessary to accomplish trade pacts, see David Sanger, *The Trade Bill: The Impact*, N.Y. TIMES, Nov. 11, 1997, at A6, and also see Lori Wallach, *Fast Track Trade Authority: Who Needs Fast Track?*, J. COM., Sept. 19, 1997, at 9A. Although fast track authority was not granted last year, it is clear that the debate over free trade in general and fast track in particular will recur.

<sup>3</sup> See, e.g., J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2466-74 (1991). Weiler's article describes "democracy deficit" as the ability of the unelected branches of the EU, the Council and the Commission to pass legislation overriding laws passed by the national parliaments. In other words, it is possible for citizens of a certain member state to be required to follow a law for which neither they nor their duly elected representatives voted. Democracy deficit also refers to the comparative lack of political power in the only elected EU body, the Parliament. See generally Anne-Marie Burley, *Democracy and Judicial Review in the European Community*, 1992 U. CHI. LEGAL F. 81 (1992) (examining the roles of legislative and judicial bodies in the EU).

<sup>4</sup> For example, the Environmental Side Agreement of the North American Free Trade Agreement ("NAFTA") was designed to assuage concerns about in-

This article takes a different approach to understanding questions of legitimacy and democracy in international organizations<sup>5</sup> by examining the dispute resolution mechanisms used in these organizations. An alternative method of assessing legitimacy and democracy in international organizations would be to look at the ability of private actors to enforce rules once they are enacted. Ultimately, I shall argue that increasing individual involvement in dispute resolution—by granting private actors rights and standing under these organizations—is an appropriate way to increase the legitimacy of international trade organizations.

Section 2 of this Article reviews the general arguments surrounding democracy in international organizations. I will examine the increased role of private actors in international law as advocated by liberal international relations theory, the arguments surrounding the democracy deficit in the EU,<sup>6</sup> and the issue of capture by narrow political interests reflected in the debate over fast track authority.

In order to understand different levels of individual involvement in dispute resolution, Section 3 of this Article examines some factors in determining different types of dispute resolution mechanisms. These factors—direct effect, standing, supremacy, transparency and enforcement—all reflect different levels of involvement between the trade organization and the citizens under it.

The Section 4 of this Article makes the argument that increased individual involvement will increase democracy in these trade organizations. This involvement will increase the role of private actors in lawmaking, make enforcement of the original trade agreement more likely, reduce the danger of capture by nar-

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adequate enforcement of environmental laws in Mexico and the resulting concern about a “race-to-the-bottom”—the fear that companies would relocate there in order to take advantage of the lax enforcement. *See* North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480 (entered into force Jan. 1, 1994).

<sup>5</sup> In an attempt to give some definition to ambiguous and critical terms, I use the term “legitimacy” to refer to the lawfulness and appropriateness of these international organizations, as well as the perceived fairness and justice resulting from these agreements. “Democracy” refers to the representative and participatory aspects of international organizations.

<sup>6</sup> *See* Treaty Establishing the European Economic Community, *opened for signature* Mar. 25, 1957, 298 U.N.T.S. 11, (entered into force Jan. 1, 1958) [hereinafter the EEC TREATY].

row interests, increase the transparency of these trade organizations and, in the end, make organizations themselves more effective. Finally, Section 5 concludes the Article.

## 2. DEMOCRACY IN INTERNATIONAL ORGANIZATIONS

There are three critiques of international organizations that can shed light on the involvement of private actors.

### 2.1. *Liberal International Relations Theory*

The first argument comes from the liberal international relations theory ("liberal IR") of political science, which has now been more regularly applied to international law.<sup>7</sup> Liberal IR argues that previous international relations theories, such as realism<sup>8</sup> and regime theory,<sup>9</sup> are too state-based in their assessment of international relations. Liberal IR focuses on the actors behind the veil of the state, looking at how the state is organized and who has power, in order to understand the motivations and interactions of states in the international realm. In examining dispute resolution, several proponents of liberal IR have looked at the European system and the role of private actors for explaining its success.<sup>10</sup> Furthermore, scholars have focused on how interna-

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<sup>7</sup> See Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993) (proposing application of "liberal" international relations theory to international law); Anne-Marie Slaughter, *The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 377 (1994) (discussing liberal conception of the United Nations); David P. Fidler, *LIBERTAD v. Liberalism: An Analysis of the Helms-Burton Act From Within Liberal International Relations Theory*, 4 IND. J. GLOBAL LEGAL STUD. 297 (1997) (using liberal IR to examine U.S. legislation).

<sup>8</sup> See Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 336-38 (1989); see also Burley, *supra* note 7, at 214-18 (discussing realism theory). For more on applying realism to international trade see generally ROBERT GILPIN, *U.S. POWER AND THE MULTINATIONAL CORPORATION: THE POLITICAL ECONOMY OF FOREIGN DIRECT INVESTMENT* (1975), and HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (5th ed. 1973).

<sup>9</sup> See, e.g., *INTERNATIONAL REGIMES* (1983) (Stephen D. Krasner ed.); Friedrich Kratochwil & John G. Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 INT'L ORG. 753 (1986); Burley, *supra* note 7, at 218-20.

<sup>10</sup> For a Kantian explanation of liberal governance and the relation to international trade, see ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* 23-24 (1997); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication* 107 YALE

tional relations theories might reflect themselves in different dispute resolution models in a variety of international trade organizations.<sup>11</sup>

This article attempts to build on this body of work by using the major beliefs of liberal IR to evaluate different models of international dispute resolution. Liberal IR argues that (1) private actors are the fundamental actors in society; (2) governments reflect some segment of society; and, (3) states behave according to their preferences.<sup>12</sup> This article examines the extent to which private actors are given roles in international dispute resolution and the impact this has on the international organization as well as their domestic government. I will examine how different dispute resolution models result in different segments of society being represented by their governments and how different models reflect and change state actions and preferences.

## 2.2. *Democracy Deficit*

A more direct line of attack on the legitimacy of international organizations comes from many of the scholars focusing on the EU. The argument here is that, as power has been centralized in the EU and as laws are increasingly passed at the EU level, citizens of member states actually have less ability to influence legislation.<sup>13</sup> What started as a union of democratic states actually re-

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L.J. 273 (1997); Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT'L L. & BUS. 398, 424-27 (1997); Walter Mattli & Anne-Marie Slaughter, *Constructing the European Community Legal System from the Ground Up: The Role of Individual Litigants and National Courts* (Harvard Law School, Harvard Jean Monnet Chair Working Papers, No. 1/95), available at Jonathan Katchen, *The Jean Monnet Chair* (visited Apr. 4, 1998) <<http://www.law.harvard.edu/Programs/JeanMonnet/>>.

<sup>11</sup> Kenneth W. Abbott, *The Trading Nation's Dilemma: The Functions of the Law of International Trade*, 26 HARV. INT'L L.J. 501 (1985) (applying realist theory to international trade); Frank J. Garcia, *Decisionmaking and Dispute Resolution in the Free Trade Area of the Americas: An Essay in Trade Governance*, 18 MICH. J. INT'L L. 357 (1997) (applying mesoinstitution theory to the Free Trade Area of the Americas); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995) (setting forth three models of dispute resolution based on three theoretical premises).

<sup>12</sup> See Burley, *supra* note 7, at 227-28.

<sup>13</sup> See Weiler, *supra* note 3; Weiler, et al., *European Democracy and Its Critique—Five Uneasy Pieces* (Harvard Law School, Harvard Jean Monnet Chair Working Papers, No. 1/95), available at Jonathan Katchen, *The Jean Monnet Chair* (visited Apr. 4, 1998) <<http://www.law.harvard.edu/Programs/>>

sults in less democracy for their citizens. In order to remedy this deficit of democracy, some argue that citizens must be given more direct representation at the EU level through the Parliament. Some of the reforms of the European Parliament in the Single European Act and the Treaty of Maastricht are explained by the desire to give citizens more direct voice in EU legislation.<sup>14</sup> Others argue that the EU has tried (unsuccessfully) to ease concerns of democracy by greater transparency and legislative review.<sup>15</sup> Citizen participation in trade policy has also become a focus of environmental and public interest groups looking at U.S. trade policy<sup>16</sup> in the General Agreement on Trade and Tariffs ("GATT")<sup>17</sup> and the World Trade Organization ("WTO").<sup>18</sup>

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<sup>14</sup> To partially remedy the democracy deficit, the Maastricht Treaty created a co-decision procedure, which essentially gives the European Parliament a legislative veto on some matters. See TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7 1992, art. 189b, O.J. (C 224) 1 (1992), [1992] C.M.L.R. 573 (1992) [hereinafter EC TREATY]; see also Alan Dashwood, *Community Legislative Procedures in the Era of the Treaty on European Union*, 19 EUR. L. REV. 343 (1994) (discussing changes to legislative procedures resulting from Treaty on EU); Trevor Hartley, *Constitutional and Institutional Aspects of the Maastricht Agreement*, 42 INT'L & COMP. L.Q. 213, 224-26 (1993); Dieter Kugelmann, *The Maastricht Treaty and the Design of a European Federal State*, 8 TEMP. INT'L & COMP. L.J. 335, 346-48 (1994) (discussing relationship between the Treaty and democracy).

<sup>15</sup> See, e.g., Juliet Lodge, *Transparency and Democratic Legitimacy*, 32 J. COMM. MKT. STUD. 343 (1994); Imelda Maher, *Legislative Review by the EC Commission*, in NEW LEGAL DYNAMICS OF EUROPEAN UNION 235, 238-240 (Jo Shaw and Gillian More eds., 1995).

<sup>16</sup> See, e.g., DANIEL C. ESTY, *GREENING THE GATT* (1994); Daniel C. Esty, *NGO's at the World Trade Organization: Cooperation, Competition, or Exclusion*, (forthcoming 1998) (manuscript on file with author); Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT'L L.J. 631 (1994) (arguing that the secrecy and lack of public input in U.S. trade policy results in a policy that is biased toward trade liberalization at the expense of other values); Robert F. Housman, *Democratizing International Trade Decision-making*, 27 CORNELL INT'L L.J. 699 (1994) (discussing undemocratic nature of international trade decision-making); Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681 (1997). Furthermore, in response to complaints about lack of transparency, a U.S. District Court ordered the United States Trade Representative to grant public access to submissions to GATT dispute resolution panels. See *Public Citizen v. Office of the United States Trade Representative*, 804 F. Supp. 385 (D.D.C. 1992).

<sup>17</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

<sup>18</sup> Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE

However, a focus on the democracy deficit alone is too narrow. In this view, the level of representation of private actors is solely measured in the legislative process. Yet the legislative prowess is only part of the equation. Lawmaking also occurs in the judicial branch of the EU, through the European Court of Justice. Additionally, the greatest changes in breadth, scope, and power of the EU have come from the Court, not from legislation.<sup>19</sup> Therefore, it is also appropriate—and indeed necessary—to examine who has the power to compel judicial change. In the EU, ironically, its citizens have the greatest ability to participate in the dispute resolution process. Instead of a democracy deficit, the EU comes closest to achieving democracy in its dispute resolution mechanism compared to other international trade organizations.

### 2.3. *Trade Liberalism Versus Political Capture by Narrow Interests*

A final critique of international trade examines the relationship between the state and its constituents. It is widely believed that trade liberalism, while making economic sense to most states, is difficult to implement in the face of nationalist interests.<sup>20</sup> First, at the U.S. political level, it has been argued that the executive branch is the logical protector of free trade, while Congress is more likely to want to protect narrow, industrial, protectionist interests.<sup>21</sup> Therefore, it is important that the President be given power over trade policy so that the broader economic interests of the state, and consumers and exporters in particular, will be protected from the well-funded, well-organized importer lobby. Second, on the international level, it has been argued that less trans-

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URUGUAY Round vol. 1. (1994), 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement].

<sup>19</sup> Weiler, *supra* note 3, at 2411-20.

<sup>20</sup> See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776); see also Frederick M. Abbott, *Trade and Democratic Values*, 1 MINN. J. GLOBAL TRADE 9, 17-18 (1992) (explaining Adam Smith's and David Ricardo's economic theories in favor of a liberal trading system).

<sup>21</sup> See DANIEL VERDIER, DEMOCRACY AND INTERNATIONAL TRADE 275 (1994); BETH V. YARBROUGH & ROBERT M. YARBROUGH, COOPERATION AND GOVERNANCE IN INTERNATIONAL TRADE 11 (1992); C. O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned Into a Battle*, 28 GEO. WASH. J. INT'L L. & ECON. 1, 18-21 (1994).

parency for trade deals is useful in shielding trade agreements from scrutiny of these national interests.<sup>22</sup>

Again, I suggest that this analysis of international trade relations overlooks the important dimension of dispute resolution. The concerns of capture are not only prevalent at the deal making stage. Whether or not a trade agreement is enforced clearly brings all of the same elements to the table.<sup>23</sup> Enforcement can separate interests along the importer-exporter divide, along the manufacturer-consumer divide, between industries, or between companies. Different methods of dispute resolution can either recognize or ignore the issue of capture.<sup>24</sup>

The involvement of private actors in the dispute resolution mechanisms of trade organizations has the ability to reduce the linkage between trade and domestic political interests.<sup>25</sup> While theoretically this link allows governments to be more responsive to their citizens, in reality, the link between trade and politics keeps governments tethered to special and well-organized interest

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<sup>22</sup> See Philip M. Nichols, *Participation of Nongovernmental Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 295, 319 (1996) ("It can be argued that the low public profile of international trade policy has been one of the largest contributors to trade liberalization over the past fifty years.").

<sup>23</sup> See Horacio A. Grigera Naon, *Sovereignty and Regionalism*, 27 LAW & POL'Y INT'L BUS. 1073, 1075 (1996) (arguing that supranational dispute settlement can "transcend the day-to-day political maneuvering of member states, local bureaucracies, and interest groups").

<sup>24</sup> "The nature of these [GATT] proceedings is not over conflicts of interests among countries but between the general interest of consumers in liberal trade and the general interests of the taxpayers in an efficient government and the interests in trade protectionism. They are about redistribution of income at home." ASIL BULLETIN, No. 9, IMPLICATIONS OF THE PROLIFERATION OF INTERNATIONAL ADJUDICATORY BODIES FOR DISPUTE RESOLUTION 44 (1995) (statement of Ernst-Ulrich Petersmann); see also John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 GEO. L.J. 535, 550, 560 (1993) (arguing that individuals ought to be able to enforce and invoke international law).

<sup>25</sup> By using the term "political interest," I am denoting those negative connotations of narrow, special or otherwise inappropriate interests that can capture the polity. For more general information on public choice theory, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991); CHARLES K. ROWLEY & WILLEM THORBECKE, *THE ROLE OF CONGRESS AND THE EXECUTIVE IN U.S. TRADE POLICY DETERMINATION: A PUBLIC CHOICE ANALYSIS IN NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW* (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993); KAY SCHLOZMAN & JOHN TIERNEY, *ORGANIZED INTERESTS AND AMERICA DEMOCRACY*, 339-46 (1986); Paul B. Stephan, III, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 745 (1995); Symposium, *Theory of Public Choice*, 74 VA. L. REV. 167-518.



groups.<sup>26</sup> Once a state has determined that it is in its national interest to join a trade organization and once rules are adopted under that organization, the link to domestic political interests can be reduced by giving private actors standing to enforce the agreement. In that way governments will be responsible for following the rules across the board rather than selectively.<sup>27</sup>

### 3. FACTORS IN DETERMINING MODELS OF DISPUTE RESOLUTION

Now that I have set forth some of the critiques of the international trade system, this Article can turn to better understanding the dispute resolution options. In order to determine the level of individual involvement there are several factors to examine.<sup>28</sup>

#### 3.1. *Direct Effect of Rights*

##### 3.1.1. *Definition*

The first factor is whether private actors are directly granted rights under the international treaty establishing the trade organization. The term “self-executing” comes from the idea that the treaty executes itself without further legislative action. For those who study EU law, the rights under the Treaty of Rome and

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<sup>26</sup> See Jeffery Atik, *Identifying Antidemocratic Outcomes: Authenticity, Self-Sacrifice and International Trade*, in Symposium, *Linkage as Phenomenon: A Multidisciplinary Approach*, 19 U. PA. J. INT'L ECON. L. 201 (1998).

<sup>27</sup> For more on how private actors can enhance government compliance, see Matt Schaefer, *Are Private Remedies in Domestic Courts Essential for International Trade Agreements to Perform Constitutional Functions with Respect to Sub-Federal Governments?*, 17 NW. J. INT'L L. & BUS. 609 (1996-97).

<sup>28</sup> The factors listed in this section are no doubt incomplete. Other factors of inquiry could include the precedential value of decisions, whether the decision is subject to review or appeal, and whether the panel is rotating or standing. See, e.g. Louis F. Del Duca, *Teachings of the European Community Experience for Developing Regional Organizations*, 11 DICK. J. INT'L L. 485 (1993); Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT'L L. 379 (1996); Miquel Montaña I Mora, *A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103 (1993). I have chosen not to discuss those factors because they focus on those dispute resolution systems that already have some sort of decision-making body. This study takes a broader approach and does not assume the existence of any such tribunal.

other legislation have been called "directly applicable"<sup>29</sup> and are said to have "direct effect."<sup>30</sup> For the purposes of this Article, the differences among the three phrases will be overlooked,<sup>31</sup> and I will use the term "direct effect" to mean those treaties that give private actors immediate rights and under which no further domestic legislative action is necessary.

### 3.1.2. *Why Directly Effective Rights Are Important*

Directly effective rights are an important issue in treaty law because the scope and depth of the treaty will vary depending on whether private actors will also be involved in the implementation of the treaty. Those treaties under which private actors get rights give these private actors another legal basis for protecting their rights under the law.

The issue of direct effect globally has most commonly arisen under human rights treaties, which are clearly drafted in order to protect and benefit individuals.<sup>32</sup> In the United States, the continual debate over self-executing treaties re-emerges every time a new human rights treaty comes up for ratification in the U.S. Senate. The Senate is traditionally reluctant to grant direct effect to these treaties because these treaties may provide additional

<sup>29</sup> See Case 26/62, *N.V. Algemene Transport-en Expositie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1 [hereinafter *Van Gend en Loos*].

<sup>30</sup> See Case 106/77, *Amministrazione Delle Finanze Dello Stato v. Simmenthal SpA (II)*, 1978 E.C.R. 629; see also, Ronald A. Brand, *Direct Effects of International Economic Law in the United States and the EU*, 17 *NW. J. INT'L L. & BUS.* 556 (1996-97); Pierre Pescatore, *The Doctrine of "Direct Effect": An Infant Disease of Community Law*, 8 *EUR. L. REV.* 155 (1983). For discussion of "direct effect" see T. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 183-218 (1988).

<sup>31</sup> This is not to say that the difference between direct applicability and direct effect is not important or has not occupied many pages of academic discussion. See, e.g., J.A. Winter, *Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law*, 9 *COMMON MKT. L. REV.* 425 (1972).

<sup>32</sup> See, e.g., *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, S. TREATY DOC. NO. 100-20; *International Covenant on Civil and Political Rights*, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171, (entered into force Mar. 23, 1976) [hereinafter *ICCPR*]; *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted Dec. 9, 1948, 78 U.N.T.S. 277; see also David Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 *MINN. L. REV.* 35 (1978) (discussing the Human Rights Covenants and President Carter's proposals for them).

rights not provided under the Constitution.<sup>33</sup> In keeping with the Senate's traditional isolationist approach to foreign relations, the idea that international law may differ or go further than U.S. domestic law remains anathema to many members of Congress and other citizens.<sup>34</sup> Thus, when the United States recently ratified the International Covenant on Civil and Political Rights ("ICCPR"), the United States made a specific reservation stating that the ICCPR would not be self-executing.<sup>35</sup> This has been the typical practice with most recently ratified human rights treaties. International trade treaties in the United States are also traditionally not self-executing.<sup>36</sup> They usually need additional implement-

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<sup>33</sup> For example, the ICCPR calls for the elimination of the death penalty for juveniles under 18. The Supreme Court, on the other hand, has held that the death penalty is permitted against juveniles to the age of 16. See *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Thompson v. Oklahoma*, 487 U.S. 815 (1988). While many countries around the world have eliminated the death penalty, the United States has expanded its use. See International Comm'n of Jurists, *Administration of the Death Penalty in the United States*, 19 HUM. RTS. Q. 165 (1997).

<sup>34</sup> See, e.g., U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS, (Richard B. Lillich ed., 1981); M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL L. REV. 1169 (1993) (discussing the U.S. concerns in ratification of the ICCPR); Kerri Ann Law, *Hope for the Future: Overcoming Jurisdictional Concerns to Achieve United States Ratification of the Convention on the Rights of the Child*, 62 FORDHAM L. REV. 1851 (1994) (discussing the reasons the United States should ratify the United Nations Convention on the Rights of the Child); Ann Elizabeth Mayer, *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution Be an Obstacle to Human Rights?*, 23 HASTINGS CONST. L.Q. 727 (1996) (discussing the U.S. reaction to Convention on the Elimination of all Forms of Discrimination Against Women); Jordan J. Paust, *Avoiding 'Fraudulent' Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257 (1993) (discussing the U.S. decision to make ICCPR non-self-executing).

<sup>35</sup> The ICCPR was adopted by the United States on September 8, 1992. The U.S. Senate gave the requisite advice and consent to the treaty, together with the declaration "[t]hat the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing. . . ." 138 CONG. REC. S4,784; see also 18 U.S.C. §§ 1091-93 (1994) (setting forth the implementing language of the Genocide Convention).

<sup>36</sup> See JOHN H JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 79-105 (1997) (discussing broadly U.S. law and the application of international trade treaties); John H. Jackson, *U.S. Constitutional Law Principles and Foreign Trade Law and Policy, in NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW* 65 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993) (reviewing the history of the application of trade treaties in U.S. law).

ing legislation or rule-making in order to have any force in domestic U.S. law.

On the other hand, when we discuss trade organizations, the private actor involvement is particularly appropriate. After all, states intend to design trade treaties to encourage private actors to import and export from other private actors. In order to encourage this trade, treaties require that states do not take actions that would adversely affect these private actors. Historically, the very basis of friendship, commerce and navigation treaties was to provide protection *for private actors* from unfair governmental treatment. Even at the lowest level of economic interaction, bilateral investment treaties today require that governments treat citizens and noncitizens equally. States grant private actors these rights as national treatment<sup>37</sup> or a minimum standard of treatment<sup>38</sup> in the host state. Once states choose to join international

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<sup>37</sup> The notion that individuals granted rights under national treatment will receive the same treatment as the state's nationals is referred to as the "Equality of Treatment Doctrine." Though gaining popular support world wide, it has been the doctrine historically preferred by communist and Third World nations. "Treaties of Friendship, Commerce and Navigation" between the U.S. and other nations used the national treatment standard. See, e.g., Treaty of Friendship, Commerce, and Navigation, Apr. 2, 1953, U.S.-Japan, art. IV, para. 1, 4 U.S.T. 2063, 2067. ("Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party . . . both in pursuit and in defense of their rights.")

<sup>38</sup> According to the Minimum Standard of International Justice, a state must accord an alien with at least a minimum standard of treatment, even if this means an alien would receive better treatment than the state's own nationals. This doctrine was traditionally favored by Western nations, particularly with regard to states with a poor record on human rights. However, third world nations have feared that the use of a minimum standard will be used as a cover for privileged status with regards to investments, inheritance and ownership of property. See Greta Gainer, *Nationalization: The Dichotomy Between Western and Third World Perspectives in International Law*, 26 HOW. L.J. 1547 (1983). Interestingly, more recent U.S. treaties combine both the national treatment and the minimum standard. For example, in the one Treaty of Friendship with Belgium it is written that

Each Contracting Party shall at all times accord equitable treatment and effective protection to the persons, property, enterprises, rights and interests of nationals and companies of the other Party. . . . Nationals of either Contracting Party within the territories of the other Party shall be accorded full legal and judicial protection for their persons, rights, and interests. Such nationals shall be free from molestation and shall receive constant protection in no case less than required by international law. To this end they shall in particular have

trade organizations, the requirement of fair treatment for noncitizens includes freedom from unfair taxation, unfair government regulation, unequal tariffs and unequal nontariff barriers. Basically, trade treaties provide a set of rights for private actors *against governments*.

Yet, trade treaties are currently structured so as to provide states these rights on behalf of their citizens rather than granting these rights directly to the citizens. Because trade treaties most affect private actors, it only makes sense that these rights have appropriate remedies.<sup>39</sup> As Stefan Riesenfeld argued almost twenty-

right of access, on the same basis and on the same conditions as nationals of such other Party, to the courts of justice and administrative tribunals and agencies in all degrees of jurisdiction and shall have right to the services of competent persons of their choice.

Treaty of Friendship, Establishment, and Navigation, Feb. 21, 1961, U.S.-Belg., arts. 1, 3(1), (2), 14 U.S.T. 1284, 1286, 1288-89; While in an investment treaty with Argentina, it is written:

Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the more favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty. . . Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Nov., 14 1991, Arg-U.S., 31 I.L.M. 124.

<sup>39</sup> As Andreas Lowenfeld stated,

I have never believed that a right without a remedy is no right at all. But there can be no doubt that the closer a legal system comes to affording remedies for breaches of rules, the stronger are the rights it confers, and the more reliance can be placed on the rules.

Andreas Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 471, 488 (1994). For more on rights without remedies in the domestic context, see Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343 (1993) (giving context to individual's rights in a structured society); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991) (examining the concept of "new" law in criminal cases from the perspective of the law of remedies in the constitutional context); Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665 (1987) (arguing that courts must

five years ago, direct effect of rights and proper judicial remedies are necessary to the continued development of free trade.<sup>40</sup> Furthermore, without appropriate remedies, these rights often are left unprotected and unenforced. Increased legitimacy and effectiveness of international trade organizations require individual involvement, not only at the stage of lawmaking, but also at the stage of remedying lawbreaking.<sup>41</sup>

### 3.1.3. *How Rights Become Directly Effective*

In many states other than the United States, international treaties are automatically self-executing and, at ratification, grant individual citizens the rights outlined in the treaty on the same basis as the state itself. Language granting individual rights under international treaties can be outlined in the constitution<sup>42</sup> or legislation.<sup>43</sup> Still other states grant individual rights under treaties through the evolution of judicial decisions that have held the rights to be self-executing or directly effective.<sup>44</sup> In the United States, for example, the U.S. Supreme Court held that a Japanese individual was granted rights directly under the Treaty of Friendship, Commerce and Navigation signed between Japan and the United States.<sup>45</sup> Similarly, although direct effect was not clearly

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presume enforcement of a law absent a showing that greater harm will occur to a plaintiff from enforcing these rights).

<sup>40</sup> See Stefan A. Riesenfeld, *Legal Systems of Regional Economic Integration*, 22 AM. J. COMP. L. 415, 443 (1974).

<sup>41</sup> In fact, the American Bar Association ("ABA") supported expanding the right of private parties to bring cases under NAFTA. See Int'l Law and Practice Section, American Bar Ass'n, *Reports to the House of Delegates*, 26 INT'L LAW. 855, 859 (1992). See also, Joint Working Group on the Settlement of Int'l Disputes, Canadian and American Bar Ass'ns, *Settlement of Disputes Under the Proposed Free Trade Area Agreement*, 22 INT'L LAW 879 (1988) (proposing a reference procedure from national courts in which individuals could bring cases to a Joint Canada-United States Free Trade Tribunal).

<sup>42</sup> See STATUUT NED. [Constitution] art. 91 (Neth.).

<sup>43</sup> For example, under the law of the United Kingdom, "although the executive has a largely unfettered power to enter into treaty obligations, such obligations normally need to be transformed into domestic law by legislation before they can be enforced by British courts." Nicholas Grief, *Constitutional Law and International Law*, in UNITED KINGDOM LAW IN THE MID-1990S 76,88 (John W. Bridge et al. eds., 1994).

<sup>44</sup> See *Etat Belge, Ministre des Affaires Economiques c. Societe Anonyme Fromagerie Franco-Suisse Le Ski*, Cour des Cass., 158 Pasic. 1971-I (1971) (Belg.) (ruling on the supremacy of the self-executing treaties over national law).

<sup>45</sup> See *Asakura v. City of Seattle*, 265 U.S. 332 (1924) (detailing suit of a Japanese national by the City of Seattle for the ability to open a pawn shop).

written into the Treaty of Rome, the European Court of Justice ("ECJ") found that the rights in the treaty did have direct effect.<sup>46</sup> Under case law from the ECJ, citizens of member states of the EU are also granted rights directly from EU legislation.<sup>47</sup> This direct effect under the Treaty of Rome is already quite revolutionary in comparison to most international treaties.<sup>48</sup> Because the practice of granting direct effect varies by state, it is necessary

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The Court quoting language from the treaty, "[t]he citizens . . . of each of the High Contracting Parties shall have the liberty to . . . reside in the territories of the other to carry on trade . . ." held in favor of the Japanese national. *See id.* at 340. For more on self-executing treaties, see Jordan J. Paust, *Self-Executing Treaties*, 82 AM J. INT'L L. 760 (1988); Carlos Manuel Vasques, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995). *See also* Charles D. Siegel, *Individual Rights Under Self-Executing Extradition Treaties—Dr. Alvarez Machain's Case*, 13 LOY. L.A. INT'L & COMP L. J. 765 (1991) (detailing case ruling that a Mexican fugitive wanted for a U.S. murder who was kidnapped had to be released because Mexico had protested under its rights under a treaty).

<sup>46</sup> *See* Van Gend en Loos, 1963 E.C.R. 1. This decision was controversial at the time and, it was argued, beyond the scope of the ECJ. *See id.*, at 19 (Opinion of the Advocate General Karl Roemer) (protesting the decision); P.P. Craig, *Once upon a Time in the West: Direct Effect and the Federalization of EEC Law*, 12 OXFORD J. LEGAL STUD. 453, 458-63 (recounting criticisms of the case).

<sup>47</sup> The ECJ has interpreted the language of Article 189 as conferring rights upon the nationals of Member States in certain circumstances. The direct effect of the legislation, treaty article, or decision is, in essence, what constitutes the right. The Court has distinguished vertical direct effect, the rights of an individual to sue a governmental entity, from horizontal direct effect, the right of an individual to sue another individual. The Court has acknowledged vertical direct effect involving disputes arising from treaty articles, regulations, and directives. *See* Van Gend en Loos, 1963 E.C.R. 1; Case 6/64, *Costa v. Ente Nazionale per L'Energia Elettrica*, 1964 E.C.R. 585; Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337; Case 152/84, *Marshall v. Southampton & S.-W. Hampshire Area Health Auth.*, 1986 E.C.R. 723. However, the Court has not been so lenient on the rights of individuals established by horizontal direct effect. Although the Courts have recognized horizontal direct effect in disputes arising from treaty articles and regulations, Case 43/75, *Defrenne v. Societe Anonyme Belge De Navigation Aeriennne Sabena*, 1976 E.C.R. 455, the Court refuses to acknowledge horizontal direct effect in disputes arising from directives. *See* Case 106/89, *Marleasing SA v. La Comercial Internacional De Alimentacion SA*, 1990 E.C.R. I-4135.

<sup>48</sup> *See* Brand, *supra* note 30; David O'Keefe, *Judicial Protection of the Individual by the European Court of Justice*, 19 FORDHAM INT'L L.J. 901 (1996); Louis F. Del Duca, *Teaching of the European Community Experience for Developing Regional Organizations*, 11 DICK. J. INT'L L. 485 (1993). In fact, the EU does not provide direct effect for other international treaties including the GATT. *See* Brand, *supra* note 30, at 575-93 (1997).

to examine the language of the treaty, the member states' practices, and any judicial interpretations of the treaty.

### 3.2. *Standing Before the Dispute Resolution Body*

#### 3.2.1. *No Standing*

Under some treaties, all disputes are resolved between states through diplomacy. Alternatively, the dispute resolution system is a court or tribunal that is only open to states, as is the case with the International Court of Justice ("ICJ"). Evolving from the Permanent Court of Arbitration,<sup>49</sup> the ICJ is the most recognized international court.<sup>50</sup> In the trade arena, the WTO Dispute Settlement Understanding is closest to this type of international adjudication. In either instance, private actors have no official role in dispute resolution.

Historically under international law, only a state could sue another state and demand reparation for the injuries inflicted on its citizens. The injured private actor did not have a directly enforceable claim against a state that violated his rights.<sup>51</sup> Therefore, it was up to each state to determine if, when, and how to press claims for injury to its own citizens.<sup>52</sup> A state could clearly choose not to pursue this remedy.<sup>53</sup>

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<sup>49</sup> On July 29, 1899, at the first Hague Peace Conference, the Permanent Court of Arbitration ("PCA") was established. The Convention for the Pacific Settlement of International Disputes detailed the PCA, which was to become the first dispute settlement mechanism between sovereign states. See Bette E. Shifman, *The Revitalization of the Permanent Court of Arbitration*, 23 INT'L J. LEGAL INFO. 284 (1995).

<sup>50</sup> The Permanent Court of International Justice ("PCIJ") was established in 1921 by the League of Nations. The Court, heard 32 cases and issued 27 advisory opinions to international organizations. At the end of World War II, the establishment of the United Nations (UN) sparked the need for a new world court in consideration of concerns by the parties who were not signatories to the League of Nations. The new world court, the International Court of Justice was, thus, formed in 1945. See Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055.

<sup>51</sup> See *Factory at Chorzów (F.R.G. v. Pol.)*, 1927 P.C.I.J. (ser. A) No. 6, at 28 (July 27) (Merits). ("The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage.")

<sup>52</sup> The Permanent Court of International Justice recognized that:

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary



Private suits in domestic courts were also not an option. Many states had laws that limited grounds on which they could be sued in their own courts which meant that foreign investors had little recourse to that domestic legal system.<sup>54</sup> Even if a private actor wanted to bring a suit in his own home court against the foreign state, most developed states had laws that provided foreign sovereign immunity.<sup>55</sup> Moreover, private actors had no international recourse in the case of a violation by their own government.

Today, under a treaty with no standing for private actors, private actors are involved only to the extent that they lobby their governments to represent their interests and to protect their industries. Examples of this would be the United States negotiating

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to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.

Mavrommatis Palestine Concessions, 1924 P.C.I.J. (ser. A) No. 2, at 13 (Aug. 30) (Jurisdiction).

<sup>53</sup> See, e.g., *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (involving U.S. government refusal to espouse the claims of the plaintiff against the government of Saudi Arabia). Individuals have traditionally been able to request that their government espouse their claims before the ICJ or other international court. See *Lotus*, (Fr. v. Tur.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7); see also David M. Reilly & Sarita Ordonez, *Effect of the Jurisprudence of the International Court of Justice on National Courts*, 28 N.Y.U. J. INT'L L. & POL. 435 (1996) (analyzing *U.S. Citizens Living in Nicaragua v. Reagan* and the denial of individuals to bring a case in front of the ICJ).

<sup>54</sup> In most countries the government had full sovereign immunity both in law and in practice. See Louis L. Jaffe, *Suits Against Government and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); see also *United States v. Lee*, 106 U.S. 196 (1882) (stating that the United States may only be sued by its own consent).

<sup>55</sup> See, e.g., Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1604 (1994) ("Subject to existing international agreements to which the United States is a party at the time of the enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States except as provided [in the exceptions]."); State Immunity Act, 1978, ch. 33 (Eng.) (granting immunity in the United Kingdom to the sovereign).

with Japan to open its automobile market<sup>56</sup> or negotiating with Russia regarding regional investment.<sup>57</sup>

### 3.2.2. *Petition Domestically for Government to Represent*

A second option is that private actors have the right to petition their governments to bring a dispute to the system. While private actors do not have the opportunity to directly bring their cases, the government may be persuaded through formal mechanisms that a dispute is sufficiently serious to warrant their attention. The closest example of this in the United States is the so-called "301 procedure" for the United States Trade Representative ("USTR").<sup>58</sup> While the state still makes the final decision about whether or not to bring such a case, there are formal mechanisms for private actors to become involved at the domestic level in this dispute resolution system.<sup>59</sup> Because the USTR's decisions have

<sup>56</sup> See *High Level Talks Slated with Japan on Auto Agreement*, 14 Int'l Trade Rep. (BNA) 1714 (Oct. 8, 1997).

<sup>57</sup> See *U.S., Russia Sign Cooperation Accords, Focus on Investment in Russia's Regions*, 14 Int'l Trade Rep. (BNA) 1633 (Sept. 24, 1997).

<sup>58</sup> Section 301 allows an individual to petition the United States government to initiate trade dispute resolutions. Under Section 302 a party can petition the U.S. Trade Representative to investigate a foreign government's policies or practices that are suspected to be hindering trade. See 19 U.S.C. §§ 2412-14 (1994). The USTR, under section 304, must investigate and determine if the foreign government has violated a trade agreement, benefits of any trade agreement are unreasonably being denied to the individual, or the foreign government is unjustifiably burdening or restricting U.S. commerce. See *id.* § 2414. If the dispute involves a trade agreement the USTR is obligated under section 303(a)(2) to first use the dispute settlement procedures provided under that agreement. See *id.* § 2413. For example, if a dispute involves infringements based on one of the Uruguay Round Agreements, the USTR must utilize the dispute resolution system of the World Trade Organization. If the USTR finds that a trade infringement is occurring and is convinced that the dispute should involve action by the United States it will pursue resolution of the dispute. The EU also has a procedure whereby private actors can request the EU take action against those governments violating free trade agreements. See Council Regulation 3286/94, 1994 O.J. (L 349) 71 [the Trade Barriers Regulation] (laying down EU procedures in the field of common commercial policy).

<sup>59</sup> Out of the 23 section 301 cases initiated by an individual between 1985 and 1996, 11 GATT panels were established. See C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organizations Dispute Settlement System*, 30 VAND. J. TRANSNAT'L L. 209 (1997). See also A. Lynne Puckett & William L. Reynolds, *Current Development, Rules, Sanctions and Enforcement under Section 301; At Odds with the WTO?*, 90 AM. J. INT'L L. 675 (1996) (detailing conflicts between Section 301 and WTO policy); Jared R. Silverman, *Multilateral Resolution over Unilateral Retaliation: Adjudicating the Use of Section 301 before the WTO*, 17 U. PA. J. INT'L ECON. L. 233 (1996).

not been reviewed by the judiciary,<sup>60</sup> a private actor seeking dispute resolution of his claim in this manner will likely have no recourse if the USTR decides to take no action.

### 3.2.3. *Individual Arbitration*

Private actors can also be granted standing before an international arbitration board. Such a dispute resolution mechanism permits standing for private actors directly affected by laws in the state in which they are investing. The move toward investment arbitration began with the creation of the International Centre for the Settlement of Investment Disputes ("ICSID") under the aegis of the World Bank.<sup>61</sup> In the model of investment arbitration under ICSID, private actors can bring cases against states. ICSID has jurisdiction over any legal dispute arising out of an investment between a member state and a national of another member state.<sup>62</sup> To initiate proceedings under ICSID, a party must submit a written request to the Secretary-General of ICSID detailing the issues in dispute, the parties, and consent to arbitration. Once certified by the Secretary-General of ICSID, a private actor can have the case heard by an arbitral panel established by ICSID.<sup>63</sup> This model of permitting private actors to bring cases against states has

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<sup>60</sup> The USTR has discretion in determining whether to initiate investigations from the petitions filed by interested individuals. See 19 U.S.C. § 2412(a) (2). If the USTR decides not to investigate, notice of such a determination with an explanation of reasons must be published in the Federal Register. See *id.* § 2412(a) (3). But see Erwin Eichman & Gary Horlick, *Political Questions in International Trade: Judicial Review of Section 301*, 10 MICH. J. INT'L L. 735 (1989) (arguing that a denial by the USTR to pursue investigations of an individual's petition should be reviewed by the judiciary).

<sup>61</sup> ICSID was established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]. See also Thomas L. Brewer, *International Investment Dispute Settlement Procedures: The Regime for Foreign Direct Investment*, 26 LAW & POL'Y INT'L BUS. 633, 655-56 (1995).

<sup>62</sup> See ICSID Convention, *supra* note 61, art. 25. The parties must, however, consent to the use of the arbitration facility. *Id.* The use of ICSID has not been initiated by a Contracting State in complaint of an individual of another Contracting State even though the potential exists under the Convention provisions. See David A. Solely, *ICSID Implementation: An Effective Alternative to International Conflict*, 19 INT'L L. 521 (1985).

<sup>63</sup> See ICSID Convention, *supra* note 61, art. 36. Unless the Secretary-General finds that the dispute falls outside the jurisdiction of ICSID, he will register the request and notify the parties. See *id.* art. 36(3).

since been copied in bilateral investment treaties in order to encourage foreign direct investment<sup>64</sup> and outlined in the North American Free Trade Agreement ("NAFTA") for investor disputes under Chapter 11.<sup>65</sup> These treaties outline limited standing provisions and permit only those private actors with investments in the state to bring such a dispute against a state.

### 3.2.4. *Private Actors Before a Court*

The furthest evolution of individual standing is when private actors have the ability to bring a case themselves to an international tribunal.<sup>66</sup> In the EU, private actors have the right to bring

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<sup>64</sup> See, e.g., Investment Treaty with the Republic of Armenia, Sept. 23, 1992, S. TREATY DOC. NO. 103-11, art. VI (1992).

<sup>65</sup> See North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289, ch. 20. [hereinafter NAFTA]. NAFTA provides the opportunity under its investment arbitration chapter to have arbitration under ICSID or Arbitration Rules of the United Nations Conference on International Trade Law ("UNCITRAL") rules. Arbitration under ICSID rules is available to member countries and nationals of member countries. Disputes where only one of the countries concerned is a member of ICSID are carried out under the Additional Facility Rules of ICSID. Because Canada and Mexico are not yet members of ICSID, arbitration is only available under the Additional Facility Rules when one of the countries involved is the United States. The first two NAFTA cases using the ICSID Additional Facility Rules were registered in January and March, 1997, and involve U.S. nationals versus the Mexican government. See *Metalclad Corp. v. Mexico* (ICSID Case No. ARB (AF)/97/1); *Robert Azinian v. Mexico* (ICSID Case No. ARB (AF)/97/2). See generally *First ICSID Additional Facility Proceedings Under the NAFTA*, 14 NEWS FROM ICSID, 1, 6, 10 (1997) (No. 1). Arbitrations involving only Canada and Mexico must be resolved using the UNCITRAL rules as the ICSID facility is not available where neither country is a member. UNCITRAL rules are reprinted in 15 I.L.M. 701 (1976). A model similar to investor arbitration is also established in the Environmental Side Accord to NAFTA, the North American Agreement on Environmental Cooperation, entered into force Jan. 1, 1994, art. 14(1), 32 I.L.M. 1480. For further information on the implementation of the Environmental Accord see David Lopez, *Dispute Resolution under NAFTA: Lessons from the Early Experience* 32 TEX. INT'L L.J. 163, 184-191 (1997); Kal Raustiala, *International "Enforcement of Enforcement" Under the North American Agreement on Environmental Cooperation*, 36 VA. J. INT'L L. 721 (1996); Rex J. Zedalis, *Claims by Individuals in International Economic Law: NAFTA Developments*, 7 AM. REV. INT'L ARB. 115 (1996).

<sup>66</sup> The first court to provide standing for individuals was the Central American Court of Justice created in 1907 by Costa Rica, Guatemala, Honduras, Nicaragua, and El Salvador. Although the court's existence was short lived, it was the first court to allow individual claims to be brought against the contracting states. Individuals were barred from bringing suit against their own nation and were required to demonstrate an exhaustion of local remedies before bringing an action before the court. All of the five cases brought by individuals

a case directly to the ECJ in certain circumstances.<sup>67</sup> Cases brought before the ECJ based on a reference made by a domestic court are more common.<sup>68</sup> The private actor brings a case to his or her national court. That court then can refer the question of EU law to the ECJ. In either case, the result is the opportunity for private actors to argue and defend their rights in front of an international tribunal.<sup>69</sup> El Mercado Común del Sur

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against a contracting state within the ten year existence of the Central American Court resulted in favor of the contracting states. See P.K. Menon, *The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine*, 1 J. TRANSNAT'L L. & POL'Y 151, 159 (1992) (citing Convention for the Establishment of Central American Court of Justice, Dec. 20, 1907, 2 AM. J. INT'L L. 231 (Supp. 1908)).

<sup>67</sup> Article 173 of the EC Treaty provides an individual with the opportunity to institute proceedings not only involving decisions explicitly against that person, but also involving any directive or regulation that is of direct and individual concern to that individual. The courts, however, have been reluctant to allow all directives and regulations to be challenged. Compare Joined Cases 16 & 17/62, Confédération Nationale des Producteurs de Fruits et Légumes v. Council 1962 E.C.R. 47 (denying standing to fruit and vegetable producers petitioning to annul a Council regulation advancing a common market in the industry) with Case 730/79, Philip Morris Holland v. Commission, 1980 E.C.R. 2671 (permitting standing for a cigarette manufacturer seeking to annul the Commission's denial of permission to Holland for the granting of state aid for the expansion of cigarette production). For more information on the application of Article 173, see Anthony Arnall, *Private Applicants and the Action for Annulment under Article 173 of the EC Treaty*, 32 COMMON MKT. L. REV. 7 (1995).

<sup>68</sup> Article 177 of the EC Treaty provides guidance to the domestic courts in referring issues to the ECJ. The ECJ is limited to providing preliminary rulings only on issues regarding the interpretation of the Treaty, the validity and interpretation of acts of the Community's institutions, and the interpretations of any statutes that provide for such a means of clarification. See *H.P. Bulmer Ltd. v. J. Bollinger S.A.*, [1974] 2 C.M.L.R. 91 (1974) (U.K.) (holding that English judges are the final court to apply community law, but the ultimate authority on interpreting community law goes to the ECJ); *Case 283/81, Srl CILFIT v. Ministry of Health*, 1982 E.C.R. 3415 (ruling that a national court is required to refer cases where there is no judicial remedy in the member state but there is a question of Community law raised). The use of Article 177 mitigates the stringent standing requirement set forth by Article 173. Thus, an individual who does not have a direct and individual concern to introduce a case directly to the ECJ can commence the action in a domestic court and request a preliminary ruling from the ECJ. See Arnall, *supra*, note 67, at 40-9 (describing the combined effect of Article 173 and 177); see also Schaefer, *supra*, note 27 (discussing rights and remedies to bring claims under international dispute settlement systems and in domestic courts).

<sup>69</sup> Case law in the EU has also determined that an individual may sue other individuals in order to protect his rights under Community law. The concept is referred to as horizontal direct effect (distinct from vertical direct effect, the

("MERCOSUR", or the "Common Market of the South") also modeled its system of dispute resolution upon the EU where private actors can go to either the MERCOSUR court or their national court.<sup>70</sup>

We cannot underestimate the impact of individual involvement in international dispute resolution.<sup>71</sup> Private actors play the important function of private enforcement agents.<sup>72</sup> As such, private actors can themselves ensure that the law is being followed rather than relying on states or an oversight body (such as the Commission in the case of the EU) to bring a case. States may feel reluctant to bring cases against other states for somewhat minor infractions as the diplomatic ramifications may not be worth the trouble. Furthermore, it may be in many states' interests not to follow the letter of the law exactly or to take their time in

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litigation between an individual and a government entity). Horizontal direct effect conclusively exists in issues involving conflicts arising from articles and regulations of the Community. See Defrenne, 1976 E.C.R. 455. However, the question of horizontal effect in conflicts arising over directives has not been as favorable. See Case 91/92, Faccini-Dori v. Recreb, 1994 E.C.R. 3325 (confirming the traditional view that horizontal direct effect does not exist in disputes involving directives rather than following the Advocate General's advice to further the scope of direct effect). If the individual is denied access to the ECJ to sue another individual, he may still have an opportunity to commence an action against the Member State for noncompliance with Community law by not properly implementing the specific directive. See Case C-106/89, Marleasing SA v. La Comercial Internacional de Alimentacion SA, [1992] 1 C.M.L.R. 305 (1992) (Spain) (emphasizing that the States have a duty to implement directives in a manner so as to achieve the intended result of the Community as closely as possible).

<sup>70</sup> See MERCOSUR: Protocol of Brasilia for the Settlement of Disputes, Dec. 17, 1991, reprinted in 36 I.L.M. 691; Cherie O'Neal Taylor, *Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?*, 17 Nw. J. INT'L L. & BUS. 850 (1996-97).

<sup>71</sup> For a review of the most recent literature assessing the impact of individual litigants and EU law, see Walter Mattli & Anne-Marie Slaughter, *Revisiting the European Court of Justice*, 52 INT'L ORG. 177 (1998).

<sup>72</sup> See Weiler, *supra* note 3, at 2421 (noting importance of citizens to the EU judicial system); P.P. Craig, *supra* note 46 (1992) (arguing that private enforcement agents are critical to the EU system of direct effect). See generally Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611 (1994) (calling for greater acceptance of nongovernmental organizations acting as amici curiae by international courts).

complying with the numerous laws set out under the EU—a kind of willing collusion to ignore the law.<sup>73</sup>

While an oversight body is more likely to bring cases, it also has the problem of measuring the value of a vast number of cases and keeping straightening out its own political agenda. In addition, an oversight body probably will not have sufficient resources to check compliance with all laws nor to bring all the cases of noncompliance to the court. Private actors, on the other hand, do not have the political baggage of bringing a case against another state. Private actors can make a direct economic assessment about whether it is worth it to them to spend the time and money on litigation. Where private actors are granted rights and where the benefits of the treaty are supposed to accrue directly to private actors, it makes sense to give private actors a remedy for violation of those rights.<sup>74</sup>

### 3.3. *Supremacy over Domestic Law*

#### 3.3.1. *Definition*

A crucial factor in examining the rights of private actors is the extent to which the system creates binding law for the member states. Supremacy can be clearly defined for international law—be it treaty or decision from the dispute resolution tribunal—to be supreme to domestic law. Yet states vary widely on their use, adoption, and interpretation of international law.

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<sup>73</sup> See Carlos A. Ball, *The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Communities Legal Order*, 37 HARV. INT'L L.J. 307 (1996).

<sup>74</sup> This avenue provided the court with the opportunity to decide some of the most important cases in the judicial history of the ECJ. Furthermore, the ECJ hears more cases as preliminary references under Article 177 than directly. In the early years of the EEC, from 1958 to 1973, nearly two-thirds of all cases in front of the ECJ came through preliminary rulings. See Stefan A. Riesenfeld, *Legal Systems of Regional Economic Integration*, 22 AM. J. COMP. L. 415, 426 (1974) (citing to Commission's Annual General Report on the Activities of the Communities). This use of Article 177 references continues to increase. In 1993, the ECJ received 203 references which more than doubled the number of cases in 1980. See Sarah E. Strasser, *Evolution & Effort: The Development of a Strategy of Docket Control for the European Court of Justice & the Question of Preliminary References* (Harvard Law School Harvard Jean Monnet Chair Working Papers, No. 3/95), available at Jonathan Katchen, *The Jean Monnet Chair* (visited Apr. 4, 1998) <[http://www.law.harvard.edu/Programs/Jean Monnet/](http://www.law.harvard.edu/Programs/Jean_Monnet/)>.

### 3.3.2. *Treaties Equal with National Law*

Some states, including the United States, treat international treaties as equal to national law. For example, the U.S. Constitution states that treaties are the supreme law of the land.<sup>75</sup> Under rules of interpretation, this means that a later law trumps the law which preceded it.<sup>76</sup> The Supreme Court has thus stated that,

By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation . . . . When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.<sup>77</sup>

In practice, a national law could overrule an international treaty under this treatment of international law,<sup>78</sup> but it still places international treaties above state law.<sup>79</sup>

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<sup>75</sup> See U.S. CONST. art. VI, cl. 2. ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .") This interpretation of treaties is similar to the one in the United Kingdom and other Commonwealth countries in which courts have found international treaties to be equal to national law. In these countries, however, separate implementing legislation beyond ratification is needed to provide direct effect under these treaties. In reality, this has been the case in the United States in more recent treaty implementation where treaties are not given direct effect unless expressly provided for in separate implementing legislation. See discussion *supra* Section 3.1.

<sup>76</sup> See C.H. McLaughlin, *The Scope of the Treaty Power in the United States*, 42 MINN. L. REV. 709, 751 (1958) ("[T]he courts have consistently held that treaties and statutes are mentioned in terms of equal dignity in the supremacy clause, and therefore in the event of a conflict between them whichever is later in time must prevail."). Cf. *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456 (S.D.N.Y. 1988) (holding that a subsequent statute would only supersede a treaty if that were the explicit purpose of the statute).

<sup>77</sup> *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

<sup>78</sup> See, e.g., Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 STAN. J. INT'L L. 479 (1990) (analyzing GATT).

<sup>79</sup> The Supreme Court has declared that legislation enacted by the federal government in order to implement the objectives of a treaty agreement will be superior to any legislation enacted by the states. See *Missouri v. Holland*, 252



### 3.3.3. *Treaties Supreme to National Law*

Another approach to international law is that it is supreme to domestic law. Therefore, no national law, no matter when it is passed, ever trumps an international law. Examples of countries that follow this approach include Belgium, France, and Holland.<sup>80</sup> A modification of this approach is that international law is supreme to all law except for the constitution or basic law of the state, as is the case in Germany and Italy.<sup>81</sup>

### 3.3.4. *Difference Between International Treaties and International Decisions*

As the U.S. Constitution discusses only those treaties concluded under Article II procedures,<sup>82</sup> it is left to the judiciary un-

U.S. 416 (1920) (holding that a treaty with Canada regulating the hunting of migratory birds is constitutional and any federal legislation therein will preempt state law). The Supreme Court furthered this notion by stating that a self-executing treaty will preempt state law, even with no federal legislation. See *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979) (reaffirming the superiority of treaties to state law governing Native American fishing rights). For more information on state law preemption see generally, Harold Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT'L L. 832 (1989).

<sup>80</sup> In Belgium, France, and the Netherlands, the constitution or courts have accorded self-executing treaties supremacy over prior or subsequent domestic legislation. See CONST. art. 55 (Fr.); STATUUT NED. [Constitution], art. 94 (Neth.).

<sup>81</sup> Article 25 of the Basic Law of Germany seems to grant both direct effect and supremacy to international law: "The general rules of public international law shall be an integral part of the federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory." GRUNDGESETZ [Constitution] [GG], art. 25. In practice, the German Constitutional Court has retained its ability to review international law, including legislation of the EU and rulings of the ECJ, to ensure its compliance with the Basic Law of Germany (the German Constitution). See BVerfGE 89, 155 (the Maastricht Decision); Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle fur Getreide und Futtermittel ("Solange I"), BVerfGE 37, 271, translated in [1974] 2 C.M.L.R. 540; In re Wunsche Handelsgesellschaft ("Solange II"), BVerfGE 73, 339, translated in [1987] 3 C.M.L.R. 225; Dieter Grimm, *The European Court of Justice and National Courts: The German Constitutional Perspective After the Maastricht Decision*, 3 COLUM J. EUR. L. 229 (1997). Both Germany and Italy required separate constitutional provisions to accept the supremacy of EU law. See Mattli & Slaughter, *supra* note 71, at 203.

<sup>82</sup> U.S. CONST., art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

der U.S. law whether decisions of international tribunals are to be treated the same way. This problem exists in other states as well. Even those states that find international treaties supreme to their national law have not necessarily treated international decisions the same way. While national constitutions may have envisioned international treaties and made provisions for their supremacy, few constitutions make provisions for decisions of international tribunals. This can be attributed to two reasons. First, when most state's drafted their constitutions, international decision-making bodies did not exist. Second, in the case of arbitration decisions, the arbitrator generally provides for damages and not a change in the domestic laws.<sup>83</sup> The issue of supremacy does not really arise because there is no new law created. Therefore, we must examine what provisions the international trade treaty has made regarding supremacy and how the member states have interpreted and acted upon this treaty. Only the EU has evolved to the point where ECJ decisions are supreme over national law in all the member states.<sup>84</sup>

### 3.3.5. *National Judges' Ability to Overrule National Law*

One last factor in determining the extent to which international tribunal decisions have supremacy is whether or not domestic judges have the power to enact this international law. Can the domestic judge overrule national law in the face of a conflicting international decision? In some states, only the highest court of the land can overrule a law. For instance, the Italian court system permits only the Italian Constitutional Court to address the constitutionality of national legislation.<sup>85</sup> Therefore, lower court

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<sup>83</sup> Neither the ICSID or UNCITRAL rules explicitly deny the panel the ability to proscribe a change in the law. However, the arbitral panels have not diverged from the issuance of monetary damages as an award. *See, e.g., American Mfg. & Trading Inc. v. Republic of Zaire*, ARB/93/1; *Southern Pacific Properties Ltd. v. Arab Republic of Egypt*, ARB/84/3).

<sup>84</sup> *See* J.H.H. Weiler & Ulrich Haltern, *The Autonomy of the Community Legal Order—Through the Looking Glass*, 37 HARV. INT'L L.J. 411 (1996) (commenting on the well-established supremacy doctrine of the ECJ and its limitations); *see also* Symposium, *The Interaction Between National Courts and International Tribunals*, 28 N.Y.U. J. INT'L L. & POL'Y (1995-96).

<sup>85</sup> This system has only been modified regarding EU law, where it was held that if the lower Italian courts are not permitted to rule on the invalidity of an inconsistent statute, the integration of Community law in the Member States is significantly hindered. For the progression of Community law in Italy, *see* Costa, 1964 E.C.R. 585; *Amministrazione Delle Finanze Dello Stato*, 1978

judges are constrained by their national rules in the implementation of international rules. Similarly, in France and Great Britain, the tradition of judicial review did not exist and took more time to implement in light of EU law.<sup>86</sup> For true supremacy of international law, all judges at all levels need the ability to evaluate national law in the face of conflicting international law.

### 3.4. *Transparency*

#### 3.4.1. *Why Transparency is Important*

Transparency in a dispute resolution system refers to the clarity and intelligibility of the procedures of the system as well as to the outcomes. The level of transparency is important for a number of reasons, which could be called the three P's: publicity, precedent and predictability. First, when the rules and procedures are clear, parties to the dispute are more likely to use the system. Government officials, as well as lawyers for individual clients, will have some comfort level with the dispute resolution system and will have an awareness of how the system works.<sup>87</sup> Second, published decisions of dispute resolution tribunals provide lessons and possible persuasive authority for other dispute resolution tribunals such as courts or arbitrations. If a decision is published, it can provide persuasive precedent for similar disputes.<sup>88</sup> Publicity of decisions also puts pressure on states to

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E.C.R. 629 (holding that Italian National Court must give full effect to Community law provisions). See generally Marta Cartabia, *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community*, 12 MICH. J. INT'L L. 173 (1990) (discussing contradictions between EU Court rulings and Italian law); Antonio La Pergola, *Italy and European Integration: A Lawyer's Perspective*, 4 IND. INT'L & COMP. L. REV. 259 (1994) (detailing growing support for EU integration in Italy and Italy's subsequent attempt to cope with EU directives which conflict with their national law).

<sup>86</sup> See, e.g., Mattli & Slaughter, *supra* note 71, at 200-04 (1998).

<sup>87</sup> This concern with transparency and legitimacy has also manifested itself in the EU. See Lodge, *supra* note 15; Maher, *supra* note 15, 238-40; Weiler, *supra* note 3, at 2421 (noting importance in the EU judicial system for citizens to act as a decentralized agent for monitoring compliance).

<sup>88</sup> See, e.g., United Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18); North Seas Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20). For a further discussion on precedent in dispute resolution, see JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMICS* (1989); ERNST-ULRICH PETERSMANN, *STRENGTHENING THE GATT DISPUTE SETTLEMENT SYSTEM* (1988);

comply with the rulings.<sup>89</sup> Finally, transparent rules and decisions increase the predictability of the system. Clear rules set forth how the system is going to work and create confidence on the part of the users of the system.<sup>90</sup> The transparency of the system provides the opportunity for both practitioners and academics to analyze, improve, and comprehend this particular international dispute resolution system. Equally importantly, well-reasoned decisions create confidence in the dispute resolution body and educate the users of the system about how the body would be likely to rule in the future.

Even if a user of the system is not happy with the particular outcome, predictability allows the parties to decide whether or not to use this particular route of dispute resolution. When systems are not predicable, both government officials and private lawyers will be reluctant to advise governments and private actors to take a chance on a haphazard outcome. The clearest example of this has been ICSID, where the small number of cases over the years and the unpredictability in terms of appeals has led many government and corporate lawyers to advise their clients against this route of dispute resolution.<sup>91</sup>

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MOHAMMED SHAHABUDEEN, PRECEDENT IN THE WORLD COURT (1996); Yong K. Kim, *The Beginnings of the Rule of Law in the International Trade System Despite U.S. Constitutional Constraints*, 17 MICH. J. INT'L L. 967 (1996).

<sup>89</sup> See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 22 (1995).

<sup>90</sup> See Yair Baranes, *The Motivations and the Models: A Comparison of the Israel-U.S. Free Trade Agreement and the North American Free Trade Agreement*, 17 N.Y.L. SCH. J. INT'L & COMP. L. 145, 156 (1997) (arguing that the lack of specificity in the Israel-U.S. Free Trade Agreement is problematic).

<sup>91</sup> The problem with ICSID is only partially a result of the lack of transparency in the decisions. In its 32 year history, ICSID has only handled about 45 cases. ICSID lacks the history and case load to provide predictability and assurance to investors in need of an efficient and effective arbitration facility. Another problem with ICSID is that the decision is subject to review by an internal review committee. Any party may request an interpretation, revision, or annulment of an award. See ICSID Convention § 5, arts. 50-52, *supra* note 61. The tribunal that rendered the award or, if unavailable or not practical, a new review tribunal shall decide on the reviewable issue. Revisions of an award may be provided if new information is discovered within three years of the rendered decisions. See *id.*, art. 51. Article 52 lists five reasons why an award may be annulled: (1) the tribunal was not properly constituted, (2) the tribunal manifestly exceeded its powers, (3) a member of the tribunal was corrupted, (4) the tribunal seriously departed from the fundamental rule of procedure, and (5) the award fails to state the reasons on which it was based. See *id.*, art. 52. Although whether a decision is subject to review is not a factor used to determine the

### 3.4.2. *Lack of Rules and Procedure*

The lowest level of transparency is when the rules and procedure do not exist in advance of the dispute. Resolution is left up to the parties and no system is set forth. This is most typical in bilateral treaties, where disputes in compliance or interpretation of the treaty are left to the states to negotiate as they arise.<sup>92</sup>

### 3.4.3. *Decisions/Agreements Not Published*

When the rules and procedures are clear but the decisions of the tribunal or the agreement between the parties are not published, this creates an additional transparency issue. For example, an ICSID arbitration decision can also be kept confidential if requested by the parties.<sup>93</sup> This means that this decision cannot provide precedent or predictability in the system because uninvolved lawyers cannot analyze the panel's thinking.<sup>94</sup> In this case,

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type of dispute resolution system, it clearly affects the overall effectiveness of any system. In addition to further time and expense associated with the decision, in ICSID's case, it further diminished the predictability of the dispute resolution system. See INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARD "JUDICIALIZATION" AND UNIFORMITY? (Richard Lillich & Charles Brower eds.) (1992); W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR 46-106 (1992); Thomas L. Brewer, *International Investment Dispute Settlement Procedures: The Evolving Regime for Foreign Direct Investment*, 26 LAW. & POL'Y INT'L BUS. 633 (1995); David A. Soley, *ICSID Implementation: An Effective Alternative to International Conflict*, 19 INT'L LAW 521 (1985).

<sup>92</sup> See example of the renegotiation of the U.S.-Japanese auto agreement discussed *infra* note 99.

<sup>93</sup> Article 48(5) of the ICSID Convention explicitly prohibits the publishing of awards without the consent of the parties. See ICSID Convention, *supra* note 61, art. 48(5). Thus, the transparency of such a system remains questionable. See John B. Attanasio, *Rapporteur's Overview and Conclusions of Sovereignty, Globalization, and Courts*, 28 N.Y.U. J. INT'L L. & POL. (1996) (addressing the factors that make the ICSID less credible than ICJ judgments). See also J.A. Freedberg, *The Role of the International Council for Commercial Arbitration in Providing Source Material in International Commercial Arbitration*, 23 INT'L J. LEGAL INFO. 272 (1995) (stating that even though the ICSID Convention requires consent to publish, many awards get published).

<sup>94</sup> The ICSID's lack of case law precedent as well as the review process make the arbitral facility less appealing to investors. Difficulty with interference by national courts has made ICSID even more unreliable. See *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094 (D.C. Cir. 1983) (ICSID, Case No. ARB/84/4) (refusing to enforce the ICSID arbitral award); Monroe Leigh, *Judicial Decisions*, 81 AM. J. INT'L L. 206, 222-25 (1987). (detailing *AMCO Asia Corp. v. Republic of Indonesia*, 25 I.L.M. 1439, ICSID

parties are able to understand how the system works, but are not confident using it. Outsiders either have no idea about the outcome of the dispute, or, when they do, the lack of an explanation for the decision still leaves gaps in their understanding of how the tribunal works. In addition, a body of case law with persuasive force is not established, and the rules of the organization remain to be interpreted on an ad hoc basis.

#### 3.4.4. *Decisions Are Published*

The highest level of transparency is when the decisions of the dispute resolution body are published regularly. In this case, the decisions can be read by practitioners, government officials, other jurists, and academics.<sup>95</sup> Decisions can be analyzed, explained, and used as a basis for other cases. Only in this way can persuasive authority be established. This is also the best way for private actors and their lawyers to become comfortable with the dispute resolution mechanism. Furthermore, public decisions increase the pressure on states to comply. This level of transparency currently exists only in the EU although the WTO has made progress towards this goal.

#### 3.5. *Compliance/Enforcement*

The fifth and final factor in determining the value of individual involvement is the level of enforcement mechanisms provided for in the dispute resolution system. Compliance and enforcement are often targeted as the main weakness of the international legal system.<sup>96</sup> Because international courts have thus far not had

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(Case No. ARB/81/1) (1986), where the Indonesian government annulled ICSID decision on the grounds that ICSID "manifestly exceeded its powers.").

<sup>95</sup> See Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948*, 31 COMMON MKT. L. REV. 1157, 1227 (1994) (explaining the necessity of publishing decisions in a timely manner).

<sup>96</sup> John Austin, for example, called international law "public international morality" at best because he defined law to require the threat of enforcement, while international law is merely enforced by moral obligation rather than direct subjection to a nation's laws. See John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (New York, Jane Cockcroft & Co., 1875), vol. 1, p. 121; see also LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (2d ed. 1979) (discussing the effects of international law on how nations behave among one another); J. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* (4th ed. 1949) (discussing origins and peculiarities of international law).

military forces to enforce their decisions, many critics of the international system focus on those cases where states choose to ignore the international court.<sup>97</sup> The apparent uselessness of the United States bringing a case against Iran for holding U.S. hostages and the attempt of the United States to avoid prosecution by Nicaragua are often cited as classic examples of what happens before an international court. Similarly, the breakdown of GATT in the 1980's as the most powerful states ignored GATT panel recommendations<sup>98</sup> shows the weakness of relying on states to comply without effective enforcement measures. Without arguing whether international dispute resolution can ever truly "work," it is important to assess the level of enforcement a court can have.

### 3.5.1. *No Formal Enforcement of the Treaty Rights*

The first level of enforcement of treaties is where there is nothing specific written into the treaty or dispute resolution system. Enforcement under this system of dispute resolution is clearly left to the respective states. There is no oversight institution. Any noncompliance would put the parties back at the negotiation table in order to work out this dispute as well. In other words, a negotiation system which relies on first-order compli-

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<sup>97</sup> Louis Henkin says "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." HENKIN, *supra* note 96, at 47. But, skeptics point to plenty of contrary evidence such as the Iran-United States or United States-Nicaragua cases before the ICJ. See United States Diplomatic and Consular Staff in Tehran, (U.S. v. Iran) 1981 I.C.J. 45 (May 12); Military and Paramilitary Activities, (Nic. v. U.S.) 1986 I.C.J. 14 (June 27).

<sup>98</sup> GATT procedure provided the losing parties with successful means of delaying the appointments of panels, effectively blocking adoption of the panel reports, and merely ignoring panel decisions. For instance, after the U.S. asserted a complaint in 1981 under GATT against the EC concerning pasta export subsidies, the EC effectively blocked adoption of the panel report in favor of the United States. The United States resorted to indirect retaliation efforts which sparked countermeasures by the EC. See ROBERT HUDEC, ENFORCING INTERNATIONAL TRADE LAW 151-54 (1993) (citing Subsidies on Exports of Pasta Products, SCM/43, May 19, 1983, an unadopted decision, and other cases detailing GATT's ineffectiveness); see also Petersmann, *supra* note 95, at 1203-04 (enumerating some further problem areas of the GATT dispute settlement system).

ance requires following the agreement at all times. States either follow the agreement, or they must negotiate a new one.<sup>99</sup>

### 3.5.2. *Second-Order Compliance—Remedies for Ignoring the Treaty*

Second-order compliance occurs when a dispute resolution mechanism exists under the treaty which would rule on compliance by the member states. Without a separate mechanism, rules for treaty compliance and breach follow the default rules of the Vienna Convention.<sup>100</sup> The rules of the Vienna Convention, however, are generally perceived as insufficient in terms of dealing with treaty breach,<sup>101</sup> and therefore create an incentive for in-

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<sup>99</sup> For example, Japan and the U.S. have had to renegotiate their agreement on the auto parts market several times. See *U.S. Frustrated by Japan's Progress on Car Sales, Dealerships in Auto Talks*, 14 Int'l Trade Rep. (BNA) 1759 (Oct. 9, 1997); *High Level Talks Slated with Japan on Auto Agreement*, *supra* note 56; David Sanger, *Trade's Bottom Line: Business over Politics*, N.Y. TIMES, July 30, 1995, at D5.

<sup>100</sup> See Vienna Convention on the Laws of Treaties, opened for signature May 23, 1969, U.N. Doc. A/Conf. 39/27 [hereinafter Vienna Convention]. Articles 31 and 32 of the Vienna Convention specifically address issues of treaty interpretation. According to Article 31, a treaty shall be interpreted first by looking at the text of the treaty itself in light of the object and purpose. Methods for interpretation shall then recognize the entire treaty taking into consideration subsequent treaties and practices. The negotiation history of the treaty will also be taken into consideration. If the treaty remains ambiguous after those considerations, Article 32 allows for recognition of the preparatory works for the final method of interpretation. Subsequent articles deal with the conditions under which a party may terminate its obligations under the treaty. For instance, Article 46 invalidates a treaty if it violates an international law of fundamental principle; Articles 49 through 52 deal with the termination of obligations when a treaty was procured through fraud, corruption, or coercion; Article 61 discharges a party for impossibility of performance; and, Article 62, *rebus sic stantibus*, allows for termination of a treaty in which a circumstance that was an essential basis for consent fundamentally changes to the extent of radically transforming the scope of obligation. As a last resort, a party to a treaty may terminate its obligation by breach but must confront the consequences addressed by Article 60.

<sup>101</sup> See Frederic Kirgis, Jr., *Some Lingering Questions about Article 60 of the Vienna Convention on the Laws of Treaties*, 22 CORNELL INT'L L.J. 549 (1989) (discussing the unresolved issues of breach); John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 VA. L. REV. 1 (1997) (explaining that, in addition to Article 60, remedies for breach of a treaty exist in the form of an uncodified law); see also SHABTAI ROSENNE, *BREACH OF TREATY* (1985) (generalizing breaches of treaties). Article 60 of the Vienna Convention delineates the consequences for breach of a treaty. In the instance of a material breach involving a bilateral treaty, the ter-



ternational organizations to set up more complete mechanisms of dispute resolution.

Any of the formal mechanisms discussed here—including arbitration under ICSID, panels under GATT, the dispute resolution system under the WTO, and cases under the ECJ—act as second-order compliance mechanisms. They permit cases to be brought for noncompliance with the treaty rules. Both GATT and the ICJ are examples of court systems that provide for little realistic enforcement beyond censure of the international community.<sup>102</sup> These systems stop at second-order compliance, whereby states *should* obey the law, but if they violate the law, they should pay a fine (or change the law).

One important factor to note at this stage is how and when cases are brought to the dispute resolution system. For example, in the EU, the Commission acts as an oversight body and can

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mination or suspension of obligations may be instituted by the nonbreaching party. With a multilateral treaty, all nonbreaching parties must consent to the termination or suspension of the treaty in whole or in part. Specifically, the affected party may suspend its obligations with the breaching party, or if the material breach radically changes the scope of the treaty any nonbreaching party may invoke suspension or termination of the treaty. See Vienna Convention, *supra* note 100, art. 60.

<sup>102</sup> Although GATT provided for retaliation and the ICJ provides for enforcement under the Security Council, neither of these remedies were real possibilities for enforcement. The Security Council has never authorized military action nor economic sanctions for noncompliance with an ICJ decision. See Mark Janis, *Somber Reflections on the Compulsory Jurisdiction of the International Court*, in *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 144, 145 n.16-17 (Harold G. Maier ed., 1987) (stating that although the U.N. Charter authorizes the Security Council to enforce decisions of the ICJ, no action has ever been taken). Retaliation authorized under GATT was only used once by the Netherlands against the United States. See ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 198 (1990). However, the enforcement of decisions in international law through voluntary compliance in the face of international pressure should not be underestimated. Many countries regularly abide by unfavorable rulings in order to remain a law abiding member of the international community. See CHAYES & CHAYES, *supra* note 89, at 28. Furthermore, direct foreign aid, foreign investment, and World Bank projects are often linked to compliance under international law. For example, the World Bank has played a major role in the compliance of environmental laws in Mexico. See Mexico's Environmental Controls for New Companies, 2 MEX. TRADE & L. REP. 15 (1992); David Barans, *Promoting International Environmental Protections through Foreign Debt Exchange Transactions*, 24 CORNELL INT'L L.J. 65 (1991). But see Stephanie Guyett, *Environment and Lending: Lessons of the World Bank, Hope for the European Bank for Reconstruction and Development*, 24 N.Y.U. J. INT'L L. & POL. 889 (1992) (criticizing the shortcomings of such an enforcement mechanism).

bring cases of noncompliance to the ECJ.<sup>103</sup> Other organizations do not provide standing for any oversight body, meaning that cases will be brought, if at all, by other states. Under GATT, states could also delay or avoid a case.<sup>104</sup> Under the new WTO procedures, the dispute resolution system has become much more judicialized.<sup>105</sup>

### 3.5.3. *Third-Order Compliance—Remedies for Ignoring Decisions*

Third-order compliance can be demonstrated by way of a traffic law example. If we conceive that following the traffic laws is first-order compliance and paying the traffic ticket when one does not it is second-order compliance, an arrest warrant or contempt citation for nonpayment of the traffic ticket would be third-order compliance. This is yet another level of forcing one to comply with the original laws set forth. In the international arena, the analogy would be following the trade treaty as complying in the first-order, and agreeing to change the tariff in response to a determination that the tariff was unfair would be the second-order

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<sup>103</sup> Article 169 of the EEC Treaty gives the Commission the authority to enforce community law compliance for all Member States. The Commission will first give the State notice in the form of an opinion letter, detailing the method and timeliness of compliance. If the Member State refuses to comply, the Commission can sue the Member State in the ECJ. See Case 7/61, *Commission v. Italy*, 1961 E.C.R. 317 (forcing Italy to terminate its ban on imported pork in compliance with community law). See Karen Banks, *National Enforcement of Community Rights*, 21 COMMON MKT. L. REV. 669 (1984). Article 170 gives a Member State the right to sue another Member State for the enforcement of community law. The complaining State must first submit its concern with the Commission and allow the Commission to enforce the issue. See Case 232/78, *Commission v. France*, 1979 E.C.R. 2729 (describing Commission action on complaints from the United Kingdom). Although a rare occurrence, if specific measures are not taken the complaining State can take the infringing State directly to the ECJ. See, e.g., Case 141/78, *France v. United Kingdom*, 1979 E.C.R. 2923. For more on enforcement of these articles, see generally *Enforcement Actions under Articles 169 and 170 EEC*, 14 EUR. L. REV. 388 (1989).

<sup>104</sup> See C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT'L 209, 236-37 (1997) (discussing the delays brought about by the United States when Brazil pursued under GATT complaints about Section 301); see also John Jackson, *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 AM. J. INT'L L., 747, 779-81 (1978) (concluding that the some GATT dispute cases, due to interference from other states, severely injure GATT's prestige).

<sup>105</sup> See Petersmann, *supra* note 95; Arie Reich, *From Diplomacy to Law: The Judicialization of International Trade Relations*, 17 NW. J. INT'L L. & BUS. 775 (1996-97).

of compliance. The third-order of compliance would be a system by which the affected state, private actor or even the international organization would be able to bring noncompliance with the international decision back to the dispute resolution system.

In some situations, this third-order compliance mechanism is available. For example, if an international arbitration body awards a certain amount of money to a party that is then not paid, many states now provide that the winner of the arbitral award can bring a case in domestic court to enforce the judgment.<sup>106</sup> Another example is the EU, which provides that a state or the Commission can bring a case to the ECJ against a member state that has not complied with a court decision.<sup>107</sup> Enforcement under the EU is even more likely because the decisions themselves are integrated into the domestic legal fabric as is done with the referral system under the ECJ.<sup>108</sup> Because the ECJ makes the ruling

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<sup>106</sup> Signatories of the New York Convention permit individuals and nations access to their courts in order to attach assets of nonpaying parties to an arbitration. See Convention of the United Nations on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 30 U.N.T.S. 38. [hereinafter New York Convention]; *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie Du Papier ("RAKTA")*, 508 F.2d 969 (2d Cir. 1974) (enforcing an award on the basis of the New York Convention). Article V of the New York Convention recognizes only seven circumstances in which a signatory state may refuse enforcement and, thus, this treaty has been credited with drastically strengthening the appeal of international arbitration. See Susan Choi, *Judicial Enforcement of Arbitration Awards Under ICSID and the New York Convention*, 28 N.Y.U. J. INT'L L. & POL. 175 (1995); Eric Green, *International Commercial Dispute Resolution*, 15 B.U. INT'L L.J. 175, 177 (1997); Elise P. Wheelless, *Article V(1) (B) of the New York Convention*, 7 EMORY INT'L L. REV. 805 (1993). In addition to the New York Convention other treaties exist for the purpose of enforcement of arbitral awards such as the Panama Convention, the Washington Convention, and the European Convention. See Inter-American Convention on International Commercial Arbitration of 1975, entered into force June 16, 1976, 14 I.L.M. 336; Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 4 I.L.M. 532; European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 8 I.L.M. 229.

<sup>107</sup> See, e.g., Case 169/87, *Commission v. France*, 1988 E.C.R. 4093 (forcing the Commission to bring France in front of the ECJ for the second time for noncompliance with an earlier court ruling on tobacco pricing); Case 48/71, *Commission v. Italy*, 1972 E.C.R. 527 (allowing a claim against Italian government for failure to levy an EU tax); Case 131/84, *Commission v. Italy* 1985 E.C.R. 3531 (allowing action against Italy for failure to enforce the "Collective Redundancies"); Case 69/86, *Commission v. Italy*, 1987 E.C.R. 773 (enforcing a previous judgment against Italy for the quality control of produce).

on the law alone, the domestic court then renders the final decision applying the EU law to the facts at hand. Since the decision is from a domestic court, not an international court, many commentators believe that states are far less likely to ignore the decisions.<sup>109</sup> Each additional order of compliance means that private actors have increased ability to force states to comply with the treaty.

#### 3.5.4. *Punishment*

A final component of enforcement is the type of punishment permitted under the treaty and dispute resolution system. Retaliation apart from an international treaty is generally seen as a violation of international law.<sup>110</sup> Treaty-approved retaliation, on the other hand, can provide an effective enforcement mechanism. This approved retaliation does not constitute a breach or termination of the treaty but rather an appropriate means of punishment for the treaty violation. The retaliation can be carried out by the state against which the harm has been committed or even by other states.

For example, the WTO outlines stringent enforcement measures in terms of providing a menu of enforcement options.<sup>111</sup>

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<sup>108</sup> For more information on this process see Attanasio, *supra* note 93, and Lenore Jones, *Opinions of the Court of the EU in National Courts*, 28 N.Y.U. J. INT'L L. & POL. 275 (1996).

<sup>109</sup> See generally Symposium, *supra* note 84, (portraying several views concerning the problems and inconsistencies between national and international bodies).

<sup>110</sup> See JAGDISH BHAGWATI ET AL., *AGGRESSIVE UNILATERALISM* (1990) (describing various opinions on the debate over U.S. trade sanctions and the GATT); see also Clay Hawes, *The Pelly Amendment Sanctions*, 3 MINN. J. GLOBAL TRADE 97 (1994) (debating whether sanctions imposed on Norwegian goods for violation of the Fisherman's Protective Act, 22 U.S.C. § 1978 (1994) is a violation of international law); Myles Getlan, Comment, *TRIPS and the Future of Section 301*, 34 COLUM. J. TRANS. NAT'L L. 173 (1995) (evaluating sanctions in the area of intellectual property); Lopez, *supra* note 65 (discussing the controversy of the Helms-Burton Act as a potential violation of NAFTA).

<sup>111</sup> Under the WTO, if a party does not comply with a decision within the specified time period, the party must start negotiations for mutually accepted compensation. If no compensation is agreed upon after twenty days, the complainant, under Article 22, can request authorization from the Dispute Settlement Body ("DSB") to retaliate. The DSB consists of one representative from each member of the agreement in dispute and has the authority to administer rules and procedures, adopt reports from panels, maintain surveillance of implementation, and authorize suspension of concessions. Unless there is a consensus against retaliation, the DSB must grant authorization within 30 days.

First, a state has the opportunity to follow the ruling and, usually, change the offending practice. Second, the state can continue the practice and pay damages to the harmed state.<sup>112</sup> If neither of these options are taken, the harmed state can retaliate.<sup>113</sup> The WTO provides that the harmed state must first retaliate in the same sector of trade. However, if this is not seen as effective, the WTO permits cross-sector retaliation.<sup>114</sup> This newer form of the international adjudication has more teeth than its predecessors and attempts to correct some of the problems of the past.<sup>115</sup>

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Retaliation will first be taken in the same sector as the violation. If, however, such retaliation is not practical or effective, action will be taken in another sector in the same general area. If this still proves ineffective or impractical, action will be taken as a suspension of benefits under the related Uruguay Round Agreement. The determination as to whether retaliation is practical or effective will be made by the complaining party rather than the WTO panel or the defending party. See Thomas J. Dillion, Jr., *The World Trade Organization: A New Legal Order for World Trade*, 16 MICH. J. INT'L L. 349 (1995) (discussing the effectiveness of the WTO with a comparison of the lack of enforcement under compliance mechanisms of the International Monetary Fund ("IMF") or the World Bank); Matthew Schaefer, *National Review of WTO Dispute Settlement Report: In the Name of Sovereignty or Enhanced WTO Rule Compliance*, 11 ST. JOHN'S J. LEGAL COMMENT 307 (1996).

<sup>112</sup> Under Article 21 of the Dispute Settlement Understanding ("DSU"), if the party does not, within thirty days, state intentions for implementing recommendations of the adopted panel report and set a time period for compliance, the parties must commence negotiations for mutually accepted compensation. See, e.g., John Maggs, *US May Buck Tide, Take on the WTO*, J. COM. 1 (1998) (detailing that in the face of a recent WTO preliminary report that the U.S. embargo on shrimp imports, designed to protect sea turtles, was illegal, speculation has begun that the United States would prefer to pay compensation or accept sanctions rather than change the law).

<sup>113</sup> Article 22 of the DSU allows the complaining party to request authorization from the DSB to retaliate. The DSB must grant authorization within thirty days unless there is a consensus against such retaliation.

<sup>114</sup> Article 22 of the DSU permits cross-sector retaliation if the previous retaliation, within the sector, is not deemed practical or effective. The determination of whether retaliation is "practical" or "effective" will be made by the complaining party, rather than the DSU. However, paragraph four limits the retaliation a government can impose to the equivalent of benefits that the defending country was impairing. See also 19 U.S.C. § 2411(a)(3) (1994) (imposing the same limitations).

<sup>115</sup> See Paul Demaret, *The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization*, 34 COLUM. J. TRANSNAT'L L. 123 (1995); Mary E. Footer, *The Role of Consensus in GATT/WTO Decision Making*, 17 NW. J. INT'L L. & BUS. 653 (1997); Patrick Moore, *The Decisions Bringing the GATT 1947 and the WTO Agreement*, 90 AM. J. INT'L L. 317 (1996); Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555 (1996).

Another type of enforcement is a fine levied against the member state for a violation of the treaty. This fine could be paid to the international organization, the affected state or the private actor who is directly harmed. Under traditional international law, once a state took up a private actor's claim of harm, the money to be paid would go to the state.<sup>116</sup> A more recent innovation in international law is the idea that states can be directly liable to individuals for the harm they have suffered. This is the case under EU law.

This type of punishment directly rectifies the harm caused by the noncompliance with the international law and also puts a price tag on noncompliance. The ECJ acts like a domestic court since it awards damages directly to aggrieved private actors.<sup>117</sup> The power to award damages may alter a national government's decision whether to comply with an international law since it puts a price tag on noncompliance. The costs of noncompliance can be severe and direct.<sup>118</sup> The EU has gone even further since

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<sup>116</sup> See RICHARD B. LILICH & BURNS H. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS* 45 (1975). The problem arising with enforcing claims in this manner is a concern of timeliness. The claims are only settled years after the harm was done and, thus, the settlement is often not an effective resolution. See Brice M. Clagett, *Title III of the Helms-Burton Act is Consistent with International Law*, 90 AM. J. INT'L L. 434, 436, 440 n.15 (1996) (discussing the ineffectiveness of settlements in the 1980's between the U.S. and China for less than 40% of the claim and in 1992 between the U.S. and Germany for around 6% of the claim).

<sup>117</sup> See Case 14/83, *Von Colson & Kamann v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891 (allowing individual workers to enforce their rights under a Community Directive on equal employment); Case 33/76, *Rewe-Zentralfinanz eG v. Landwirtschafts-Kammer Für Das Saarland*, 1976 E.C.R. 1989 (forcing Germany officials to refund illegal money charged to individuals for the inspection of imported apples even though the German statute of frauds had run on the claim). For more on this aspect of the ECJ's damages awards see David O'Keefe, *supra* note 48, and April Phillipa Tash, *Remedies for European Community Law Claims in Member State Courts: Toward a European Standard*, 31 COLUM. J. TRANSNAT'L L. 377 (1993).

<sup>118</sup> See Case C-271/91, *Marshall v. Southampton and S.-W. Hampshire Area Health Auth.*, 1993 E.C.R. I-4367 (imposing damages that exceeded the United Kingdom's statutory limitations); Case C-6/90 & 9/90, *Francovich v. Italy*, [1993] 2 C.M.L.R. 66 (1993) (Italy) (forcing Italy to compensate workers for damages suffered by nonimplementation of a community directive dealing with worker's protection against bankrupt employers); Case 70/72 *Commission v. Germany*, 1973 E.C.R. 813 (forcing Germany to not only cease the illegal payments of state aid, but also, recover any aid already granted to its nationals). Remarkably, the ECJ has not imposed any fine thus far in a case brought by the Commission. Article 171 specifically states that the ECJ may, by the request of the Commission, impose a lump sum or penalty payments upon a

1991 and found that member states can be liable to private actors for damages suffered through the nonimplementation of EU laws.<sup>119</sup> And, in some ways, these fines make compliance in the first place easier since a government can demonstrate how non-compliance will directly hurt the national treasury. A potentially large damage award helps the governments protect themselves against strong domestic lobbies as well.

These damage remedies in the EU are additional to a requirement to change the law, unlike in the WTO system which grants choice. By replacing the traditional international law remedy of retaliation, a damages system is closer to a domestic court system. Violations of international law are treated like any other violation of the law. By eliminating retaliation, the EU avoids escalation between states retaliating and cross-retaliating. It also avoids linkage between different trade issues; each problem is treated separately and judged on its own merits. An enforcement system with damages to private actors clearly protects private actors the most of the trade systems established.

#### 4. INCREASING INDIVIDUAL PARTICIPATION INCREASES DEMOCRACY

The purpose of this Article has been to outline the factors that measure individual participation in dispute resolution and com-

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Member State that refuses compliance. This Article was added to the Treaty at the request of Parliament concerned with the enforcement of Community law. Article 171(1), stating that necessary measures shall be taken for enforcement of compliance, has been used by the ECJ. See Lisa Borgfeld White, Comment, *The Enforcement of EU Law*, 18 HOUS. J. INT'L L. 833, 898 n.207 (1996) (listing the fifteen cases in violation of Article 171). However, the imposition of a fine, under Article 171(2), has yet to be employed. See Kenneth M. Lord, Note, *Bootstrapping an Environmental Policy from an Economic Convent*, 29 CORNELL INT'L L.J. 571, 606 n.325 (1996) (commenting on the lack of enforcement through use of fines). See also Michael J. McGuinness, *The Protection of Labor Rights in North America*, 30 STAN. J. INT'L L. 579, 596 n.81 (1994) (reasoning the lack of enforcement by use of Article 171).

<sup>119</sup> In 1991, the ECJ instituted remarkable advancement for the enforcement of Community law through the preliminary reference ruling in *Francovich v. Italy*. See Joined Cases 6/90 & 9/90, *Francovich*, [1990] 1 C.M.L.R. 66 (1990); Rene Valladares, *Francovich: Light at the End of the Marshall Tunnel*, 3 U. MIAMI Y.B. INT'L L. 1 (1995). The ruling conferred liability upon a Member State to an individual for damages incurred by nonimplementation of a directive. Thus, because Italy failed to implement a directive concerning the coverage of employees under insolvent employers, Italy was liable for the damages the employees suffered. See Valladares, *supra*.

pare them to the dispute resolution models currently used in international trade organizations. By doing so, we can understand how each of these factors either adds or detracts from the legitimacy of international trade organizations. In the end, we can recognize that individual participation has the ability to increase democracy in several significant ways.

#### 4.1. *Judicial Decisionmaking is Lawmaking*

The first step in recognizing the importance of individual participation is to recognize the importance itself of dispute resolution. Historically, states handled trade disputes through negotiation and little attention was given to other methods for resolving them. Only with the evolution of the EU, and the regional human rights systems, has appropriate focus been given to the importance of dispute resolution.<sup>120</sup>

In focusing on dispute resolution, we are recognizing the evolution of trade organizations that do more than rely on states to resolve their disputes. The creation of the Dispute Resolution Body under the WTO and the NAFTA system evolving from the Canada-U.S. Free Trade Agreement clearly demonstrate that focus on dispute resolution is warranted. As trade organizations continue to evolve, it will be their dispute resolution systems that herald this evolution.

The result of dispute resolution mechanisms is that each of the organizations will be creating a body of law *in addition to the original agreement*. This body of law may have varying levels of precedence and supremacy but will be the area in which these organizations could primarily evolve. Therefore, it is crucial that we also focus on ways to ensure this stage of lawmaking is democratic and legitimate.

Even when national governments determine that trade policy and agreements should be negotiated in secret or solely by the executive branch, once the agreement is reached this original decision should not preclude citizen involvement in the enforcement

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<sup>120</sup> Karen J. Alter, *Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice*, 52 INT'L ORG. 121 (1998); Geoffrey Garrett, *The Politics of Legal Integration in the EU*, 49 INT'L ORG. 171 (1995); Geoffrey Garrett et al., *The European Court of Justice, National Governments, and Legal Integration in the EU*, 52 INT'L ORG. 149 (1998); Walter Mattli and Anne-Marie Slaughter, *Law and Politics in the EU: A Reply to Garrett Union*, 49 INT'L ORG. 183 (1995); Andrew Moravcsik, *Negotiating the Single European Act*, 45 INT'L ORG. 19 (1991); Weiler, *The Transformation of Europe*, *supra* note 3.



stage. Legislating original law and resolving disputes about that law are two separate functions. As I noted earlier, the debate over the “democracy deficit” in the EU focuses on the first function. We should also look to the second function and recognize the importance of dispute resolution.

#### 4.2. *Individual Involvement Promotes Legitimacy*

There are several specific ways in which granting standing to private actors can remedy typical conflicts in a national government. First, giving private actors the right to bring cases, rather than requiring them to lobby or petition the government to take action, eliminates the problem of capture at the dispute resolution stage.<sup>121</sup> Otherwise, only states participate in the process and, therefore, rely on political pressures to determine whether to pursue violations of trade agreements. Understandably, a state will not choose to spend its limited attention and energy on trade problems which have little impact on the domestic economy. States will weigh the impact on certain industries, the political clout of those industries, and pressures from other domestic constituencies before embarking on negotiations. A state may not even know of any violation until a domestic interest alerts them.

For example, if a company in the US feels that another state is violating the GATT rules, it must petition the USTR under the 301 procedure in order to pursue a judicial remedy. The USTR must then make a decision as to whether it is worth the time and energy to pursue a remedy through the WTO. This procedure probably operates very well for the “Kodaks” and “IBMs” of the world, but if the company affected by the violations is relatively small, lacks political influence or power, or has not suffered large losses, the USTR could, legitimately, conclude that out of the

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<sup>121</sup> Of course, there is always the issue of adjudicatory capture in which interest groups are able to use the judicial system for their own interests. One example in the context of trade dispute resolution could be the EU where public interest groups in Great Britain have used the EU in order to advance changes in the domestic law. See Catherine Barnard, *A European Litigation Strategy: The Case of the Equal Opportunities Commission*, in *NEW LEGAL DYNAMICS OF EU* 253 (Jo Shaw & Gillian More eds, 1995); see also Mattli & Slaughter, *supra* note 71, at 185-190 (1998). Another example could be if environmental NGO's use NAFTA to force Mexico to comply with its own environmental laws. See Atik, *supra* note 26.

numerous trade violations it polices, this particular violation is not worth the government's limited resources.

A government may also choose not to bring a case because it does not want the violation addressed. A state could decide not to bring a case against a particular state for political reasons in dealing with that state or because other domestic interests would prefer to keep the law unchanged. Furthermore, intergovernmental pressure may result in cases not being brought to the international adjudicatory body. The best example of this is the controversy over the Helms-Burton law, which restricts trade with Cuba and punishes those who engage in such trade.<sup>122</sup> The EU initially lodged a complaint with the WTO, which has repeatedly postponed the issue to allow the EU and the United States time to negotiate. There is no doubt that domestic pressure in the United States has led to the United States placing pressure on the EU not to pursue the case. In this way, the WTO has become politicized. Rather than adjudicating appropriate restrictions on trade, the forum is hijacked by the domestic pressure and politics of U.S. policy towards Cuba. If there were private actor standing in the WTO, this case would already be in the process of being heard.

Furthermore, giving private actors standing may be the best method of ensuring that their own state actually follows the trade agreement.<sup>123</sup> For example, under the current system, it is unlikely that the United States or any other state would agree to bring a case against itself in the WTO. One only has to examine the jurisprudence of the ECJ to recognize that the right to bring cases in the EU has resulted, as often as not, in private actors suing their own government for violations of EU law.<sup>124</sup> This ensures that a commitment to trade liberalization is not later overridden by specific exceptions or changes to the law agreed to by

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<sup>122</sup> For an explanation of the Helms-Burton Act, its domestic and international effect, and foreign responses, see Symposium, 20 *The Helms-Burton Act: Domestic Initiatives and Foreign Responses*, HASTINGS INT'L & COMP. L. REV. 713-814 (1997).

<sup>123</sup> See Robert Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, in NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER 51-93 (Martha Minow et al. eds., 1992) (arguing that jurisdictional redundancy, as exists between the federal and state system in the U.S. and also between the domestic systems and the EU, can effectively deal with the problems of the elite in a political system and is an appropriate method of dealing with conflicting values in a society.)

<sup>124</sup> See discussion *supra* section 3.2.4.

lawmakers under pressure from powerful and narrow lobbying interests.<sup>125</sup>

In addition, individual involvement will also lead to increased transparency and use of the dispute resolution system. Transparency of procedures and decisions is a crucial part of building the legitimacy of any organization. As private actors use the system and become comfortable with the rules, it will build momentum and its use will increase. This promotes understanding and, in the end, confirms the legitimacy of the organization and its procedures.

Finally, examining the role of private actors in dispute resolution is consistent with a liberal IR approach. The level of individual participation can vary with each of factors examined in Section 3. This level of participation clearly affects how governments order their preferences and which segments of society are most represented in dispute resolution. Increased individual involvement would certainly broaden the spectrum of society so-represented, and perhaps affect government preferences to act more legitimately in its own decisionmaking.

#### 4.3. *Individual Participation Will Increase the Effectiveness of International Organizations*

Granting private actors standing will also promote the effectiveness of the underlying trade agreement. Private actors can make the determination when a violation is of sufficient harm to bring a case. We neither rely on states policing one another, with all of the attendant political concerns, nor rely on an oversight body, which may have political concerns and limited resources or research capabilities. Better policing of a trade agreement will occur if enforcement relies on those who are most invested with protecting their rights and benefits under the trade agreement.<sup>126</sup>

The result of better policing is twofold. First, more enforcement actions will be brought, and second, these actions will be narrowly tailored to deal directly with the particular law causing harm. In the area of trade law, this direct involvement makes sense. The trade agreements are designed to influence private ac-

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<sup>125</sup> See Atik, *supra* note 26.

<sup>126</sup> See Robert E. Hudec, *Dispute Resolution Under a North American Free Trade Area: The Importance of the Domestic Legal Setting* 12 CAN.-U.S. L.J. 329, 332-333 (1987).

tor behavior based on state promises. The state promises to lower tariffs, or eliminate barriers, or reduce taxation. In exchange, companies invest, start businesses, or increase trade. When those state promises are broken—laws are not changed or new barriers are erected—it is private actors who suffer the consequences. As is the case with human rights, individuals should have some recourse.<sup>127</sup> We have already recognized this in the area of labor rights under the International Labor Organization (“ILO”) and even under the WTO for intellectual property rights.<sup>128</sup> Under the ILO, workers’ organizations can bring noncompliance cases in the area of human rights and labor rights against a state.<sup>129</sup> Under the Agreement on Trade-Related Intellectual Property Rights (“TRIPS”), private actors will be able to bring cases in domestic courts for noncompliance.<sup>130</sup> It is somewhat anachronistic and curious that trade rights should be moving in the other direction.

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<sup>127</sup> PETERSMANN, *supra* note 10, at 8 (“Political theory, and historical experience (e.g. in the context of EC law and of the European Convention on Human Rights) confirm that granting actionable rights to self-interested citizens offers the most effective incentives for self-enforcing liberal constitution.”).

<sup>128</sup> *See id.* at 33 & 62 (1997).

<sup>129</sup> The International Labor Organization (“ILO”) utilizes a tripartite system divided into government, employment, and labor to promote the global recognition of human and labor rights. The Governing Body consists of 28 government members, 14 employer members, and 14 worker members. Committees and delegations for annual conferences are similarly structured. The ILO is unique in allowing organizations of employers or workers to allege non-compliance complaints against the contracting states. Although private individuals are not allowed direct access without the backing of an established organization, the democratic process is strengthened by the employers’ and workers’ involvement. *See* Petersmann, *supra* note 10, at 433-34 (commenting that the increase of private individual participation “reflect[s] the democratic functions of international liberal rules and organizations for the participation of individual rights”). *See generally* HECTOR BARTOLOMEIDE LA CRUZ ET AL., THE INTERNATIONAL LABOR ORGANIZATION (1996) (providing overview of the ILO procedures).

<sup>130</sup> *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1125 (1994) [hereinafter TRIPS Agreement]. The TRIPS Agreement recognizes that intellectual property rights are private rights. Although implementation is at the discretion of the members, the agreement encourages recognition of private party participation.

#### 4.4. *Responding to the Democracy Deficit*

Of the existing models of dispute resolution, clearly the EU provides for the most individual involvement. Individuals are directly granted rights and the standing to protect those rights. Court decisions are supreme to national law and, can be integrated directly into the domestic legal fabric. The procedures and rulings are transparent and highly accessible to private actors. Finally, enforcement through the domestic legal system gives the best chance that the judgments of the supranational court will be followed. While no model of dispute resolution can be completely de-politicized, the EU best tries to ensure that member states comply with international trade law without allowing them to make short-term, narrow decisions about compliance.

In comparison, other trade organizations fall short. Investment arbitration under ICSID or UNICTRAL does provide for limited democracy. It has the advantages of allowing investors to bring cases against states when their rights have been violated. Furthermore, increased enforcement of arbitration awards makes it likely that states will comply and pay the damages awarded. The problem with this type of model, however, is the limited scope of the arbitration action. First, the rights provided in Chapter 11 of NAFTA or in bilateral investment treaties are the most basic of free trade rights. States can protect, and have protected, their most sensitive national issues and industries in the agreement in the first place.<sup>131</sup> Second, an arbitration decision does not change the law of the offending state and any settlement can also be kept private if the parties so wish. In this way, a state can choose to pay in order to continue to break the law. Third, since this is a single arbitration case, rather than an authoritative court decision, a state can deal with this one instance quietly without creating the problem of numerous cases brought on the same issue. Although arbitration reduces the likelihood of capture somewhat in terms of the choice as to when to bring a case, the scope of the rights and the decision are severely limited.

The WTO model also provides only partial answers to the questions of political capture and institutional effectiveness. The new procedures and enforcement capabilities of the WTO are de-

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<sup>131</sup> See NAFTA, *supra* note 65, arts. 1120, 1138, annexes 1120.1, 1138.2, chs. 21, 32 (noting several exceptions).

signed to reduce dramatically the link between trade and domestic political interests. Once a dispute is brought to the WTO, a state will have much less ability to avoid complying with the law. The fault of the WTO, and other systems that rely on states to bring cases, is that the lack of rights and the lack of standing for private actors make the system less responsive to the citizenry and less democratic in the end. Under the WTO, private actors must rely on their governments to assert and defend their trading rights.

It is ironic that the EU has been the focus of the democracy deficit debate. While I do not dispute the validity of argument in reference to the legislative process in the EU, we need to recognize that the EU's accomplishments in providing for democracy in its dispute resolution are unique.

#### 4.5. *Objections to Individual Participation*

There are numerous objections to the increased participation of private actors in international trade organizations. I will focus on three of them.

##### 4.5.1. *States Will Not Join International Organizations*

The first objection could well be that states will be more reluctant to join organizations that give their citizens such power. Involving private actors means that the government has less control over dispute resolution and, ultimately, the legal interpretation of the treaty.<sup>132</sup> This distribution of power to the citizens rather than the government can be threatening to states risky for them.

This objection has been raised most frequently in the case of human rights organizations where states are reluctant to either join the organization or are reluctant to sign the additional protocol which would permit cases being brought by their citizens.<sup>133</sup> Therefore, the argument goes, states will not join trade agree-

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<sup>132</sup> This objection has also been used in the application of extraterritorial securities laws, where the argument has been made that the existence of private plaintiffs improperly moves the locus of foreign policy decisionmaking from the executive branch to the judicial branch. See Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 SUP. CT. REV. 289, 320-21.

<sup>133</sup> For example, of the 140 countries who are parties to the ICCPR only 93 have ratified the Optional Protocol. See ICCPR, *supra* note 32; Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 383.

ments if their citizens can enforce it against them. However, this objection overlooks the key difference between these types of agreements. Other governments create human rights treaties for the purpose of protecting citizens from the actions of their own government.<sup>134</sup> (Aliens have long had the right under international law to be protected from abuse and their home state has long had the right to demand reparation for their harm.) One mechanism created to protect these individual rights under human rights treaties is to allow the individual to sue his or her own government for violation of their rights under the international treaty.

International trade treaties, however, are completely different in their purpose and in the benefits accruing to each state. While human rights treaties could be characterized as ambitious in that all states are individually responsible for protecting their citizens,<sup>135</sup> a trade agreement is more of a contractual treaty with promises and exchanges between each of the member states. There are strong economic reasons to join these trade agreements beyond the altruism and moral leadership that motivates signature of human rights treaties. In addition, while private actors could bring a case against their own government if private actor partici-

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<sup>134</sup> On example is the U.N. CHARTER:

We the peoples of the United Nations determined . . . to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in large freedom . . . and for these ends . . . to employ international machinery for the promotion of the economic and social advancement of all peoples

See U.N. CHARTER, preamble. For another examples see the ICCPR, *supra* note 32, pt. II, art. 2 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."); Nigel Rodley, *On the Necessity of the United States Ratification of the International Human Rights Conventions*, in HUMAN RIGHTS TREATIES, WITH OR WITHOUT RESERVATIONS?, 3, 15 (Richard B. Lillich ed., 1985) ("I would be remiss if I did not reaffirm the principle of the inherent desirability of providing individuals who think they have been victimized by their governments with a forum for bringing such alleged victimization to the attention of an international body.<sup>5</sup>") (regarding the Convention on the Elimination of All Forms of Racial Discrimination).

<sup>135</sup> See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW, 13-14 (1993).

pation were permitted in international trade agreements, that is hardly the sole purpose of allowing private actor participation.

Arguably, private actor standing undermines the authority of the government to negotiate trade treaties.<sup>136</sup> Professor Nichols argues that domestic groups opposing their governments would create a "spectacle."<sup>137</sup> First, this assumes, somewhat condescendingly, that other states and trade bureaucracies could not distinguish between the government and private parties or interest groups if they took opposing sides in dispute resolution.<sup>138</sup> Second, this misses the point of a dispute resolution procedure. Dispute resolution is designed to resolve disagreements *after* an agreement is signed. The extension of standing in dispute resolution does not, for better or worse, give these private actors a voice as the trade agreement is being negotiated.

In the end, the benefits accruing from international trade agreements will outweigh nations' reluctance to join organizations where their own citizens could have standing. For example, Turkey has had a traditional reluctance to recognize individual rights and standing under human rights treaties<sup>139</sup> but has apparently calculated that the economic benefit of joining the EU outweighs these concerns and so has applied for EU membership.

A separate objection could be that individual participation is neither appropriate nor efficient given the particular goals of the international organization. The idea that certain organizations would not benefit from individual participation, is an important one in evaluating when and how private actors should be involved. Clearly, a blanket statement that private actors will always improve an organization is naïve. The distinction between "facilitative" and "producing" international organizations, made by Kenneth Abbott in outlining mesoinstitution theory, would

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<sup>136</sup> See Philip M. Nichols, *supra* note 22, 316-18 (1996).

<sup>137</sup> See *id.* at 317.

<sup>138</sup> See G. Richard Shell, *The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359, 374 (1996).

<sup>139</sup> Turkey has not signed the ICCPR or the Protocol to the European Convention of Human Rights ("ECHR") providing for individual standing. See ICCPR, *supra* note 32; Protocol No. 9 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, *entered into force*, Oct. 1, 1994, Europ. T.S. No. 140.



perhaps shed the most light.<sup>140</sup> If the goal of the organization was “facilitative”—public awareness, convening negotiations, organizing meetings—then private actor involvement appears to be less compelling. As the goals of the organization becomes more “producing,” i.e., adjudicating behavior, creating norms, setting negotiation agendas, and the organization is more centralized, the importance of private actors become more compelling. These producing organizations become lawmakers and the concerns of democracy and legitimacy must be recognized. Perhaps one of the reasons this debate over democracy and legitimacy has arisen in the first place is that more trade organizations are moving along the facilitative-producing continuum to become more important players in the creation of international law.

#### 4.5.2. *Individual Participation is Logistically Unfeasible*

Another objection to individual participation is that the mechanics of such a system would overwhelm the structure of the trade organization.<sup>141</sup> A corollary of this argument is the fear that there will be numerous frivolous suits or that individual participation will be limited to the wealthy.<sup>142</sup>

While the logistics of involving private actors are undoubtedly complex, this is hardly a reason not to set up an organization properly. Certain standing requirements or a screening system, such as exists with the European and Inter-American human rights systems,<sup>143</sup> could be established.<sup>144</sup> The issue of logistics is

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<sup>140</sup> See Kenneth Abbot & Duncan Snidal, *Mesoinstitutions: The Role of Formal Organizations in International Politics* (unpublished manuscript on file with authors).

<sup>141</sup> Ambassador John McDonald notes that the bureaucracy and funding requirements of setting up such a system should not be underestimated. See interview with John McDonald (Ambassador to International Labor Organization) (March 17, 1998); see also Nichols, *supra* note 22, at 312-13 (casting doubt on the practicality of a system that would allow equitable, direct participation by all the world's citizens).

<sup>142</sup> See Nichols, *supra* note 22, at 318-19.

<sup>143</sup> See American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (1970); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

<sup>144</sup> See Glen T. Schleyer, Note, *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 FORD. L. REV. 2275 (proposing a Commission for Free Trade to screen disputes for the WTO); see also Shell, *supra* note 138, at 375 (noting that both the United States Supreme Court and the E.C.J. have established rules regulating standing that,

an issue of money and support for the organization. It is a question of what the member states choose to support. The expansion of the WTO legal service in comparison to the previous service under GATT demonstrates what can be accomplished with the will of the governments.

The concern about the availability of the necessary resources to pursue international remedies is a valid one. It is, however, the same concern that should exist in the current situation where private actors need resources in order to lobby their governments. Arguably, leaving it to each private actor to evaluate his or her economic gains and losses from bringing a case provides for less distortion than filtering that choice through the national government.

#### 4.5.3. *Trade is Politics*

A final objection to individual involvement could be that the premise behind separating trade and domestic politics is inherently flawed. This argument maintains that ultimately politics and political interests should determine the enforcement of trade agreements. Individual injustice, if it occurs, is not really the focus of trade policy. Trade policy focuses on the good of the state as a whole and the government is in the best position to determine that interest. This objection goes back to the idea that diplomacy, secrecy, and negotiation are the best way to handle disputes between sovereign states.<sup>145</sup> The process of judicialization—which individual involvement moves forward—is not appropriate for trade policy.

This objection attacks the heart of how one thinks about the international system. If trade should be bound to politics, if states should be the focus of the international system, if diplomacy is the best way to resolve disputes, my proposal is yet another step on the slippery slope of giving more power to citizens and eroding the sovereignty of states. On the other hand, if increased legalization and judicialization of international law make the international system more effective and more responsive,<sup>146</sup> then this

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while not perfect, are sufficient to satisfy participants in the system that decisions are not political judgments).

<sup>145</sup> Nichols, *supra* note 22, at 319.

<sup>146</sup> See Petersmann, *supra* note 95 (explaining the importance of increased judicialization in the GATT context).

proposal might hold some interest.<sup>147</sup> It is really a question of one's views the continuing evolution of the international system. Increased legitimacy and democracy are appropriate goals under a view of liberal governance.

## 5. CONCLUSION

The article intended to demonstrate two things. My first goal was to turn the focus to dispute resolution as a way of dealing with some of the traditional critiques of international trade organizations. Increasing individual participation addresses the liberal international relations goals of examining the role of private actors behind the state. Individual participation can also be used as a measure for democracy and legitimacy of trade organizations. Finally, I argue individual participation can help reduce the issue of capture.

My second goal was illustrating that as regional and international organizations are created, states should examine carefully the type of dispute resolution mechanism they establish.<sup>148</sup> International trade organizations diminish the returns of the treaty by limiting their dispute resolution mechanisms to states. By providing rights without a remedy, these international trade organizations are limiting both their impact and their legitimacy. The solution is to reduce the link between domestic or short-term

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<sup>147</sup> See Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33, 58 (1996) (arguing that judicial institutions make international trade agreements more binding and more attractive); see also Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331, 343-46 (1996) (arguing that increased transparency of the WTO system is inevitable and appropriate); G. Richard Shell, *supra* note 138, at 374 (arguing that issues which pit governments against governments and governments against interest groups will not result in confusion on the position of each entity); YARBROUGH & YARBROUGH, *supra* note 21, at 86-106 (discussing how the development of "minilateralism" or the creation of supranational institutions for small groups of countries leads to more effective trade liberalism).

<sup>148</sup> Some focus has already been given to the impact of different dispute resolution mechanisms on emerging organizations and I this will hopefully continue. See Taylor, *supra* note 70 (examining NAFTA and MERCOSUR); Garcia, *supra* note 11 (analyzing the Free Trade Area of the Americas ("FTAA") and applying the mesoinstitutional theory); David Lopez, *Dispute Resolution under a Free Trade Area of the Americas: The Shape of Things to Come*, 28 INTER-AM. L. REV. 597 (1997) (discussing the alternatives for developing a dispute resolution mechanism under the FTAA).

political interests of states and their trade policy by granting private actors standing to bring cases for treaty violation.

The arguable purpose of international trade treaties is broad encouragement of trade by requiring, at the outset, that member states do not take actions that would adversely affect individual players. The rights provided in these treaties and the benefits therefrom accrue most directly to private actors, and only to their governments indirectly through better economies, more tax income, and reelection. The benefits of trade treaties are best protected and enforced by those most directly affected.

To examine the EU, although it poses its own questions about the democracy deficit, is to observe an international organization committed to ensuring that the guidelines set forth in the Treaty of Rome are followed. The dispute resolution system in the EU guarantees more compliance by allowing private actors directly affected by each country's actions to bring cases in the national courts (and in certain cases to the ECJ directly).

This result allows for the use of private attorneys general to enforce the law based on their own assessment of the harm they are suffering and the cost of litigation *devoid of political concerns*. In the EU system, we do not rely on states, each of which may have an interest in allowing others to continue violating the treaty or may not want to bring a case against another state for political reasons. When we are left to rely on states to enforce the law under a trade treaty we are left with an incomplete system.

If states are actually committed to the trade treaties they sign and to bringing the benefits of those treaties to their constituents, they must allow their own citizens to bring cases directly to the dispute resolution mechanism established under the treaty. Furthermore, these cases should not be decided under arbitration, as is the system under NAFTA for investor disputes. An ever-changing arbitration panel creates neither a uniform body of law nor precedent and, in the end, can never carry the weight of an international standing body.

As the number of regional and international trade agreements grows, their dispute resolution mechanisms will only increase in importance. In order to ensure real change in the trade laws and real compliance by the constituent states, we must provide for individual standing. Rights without a remedy are hollow rights.

**LINKAGE AND RULE-MAKING:  
OBSERVATIONS ON TRADE AND INVESTMENT,  
AND TRADE AND LABOR**

C. O'NEAL TAYLOR\*

One of the consequences of the growth in world trade, the expansion in the jurisdiction of the World Trade Organization ("WTO"), and the new and ongoing experiments in regionalism has been a re-awakening of interest in the linkage between all areas of economic activity. The international community has always been aware of linkage. The International Labor Organization ("ILO") Constitution of 1919 discusses the link between trade and labor rights.<sup>1</sup> The Havana Charter of the International Trade Organization contained an article on labor standards and trade, as well one on investment and trade.<sup>2</sup> The re-awakening of this interest is im-

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<sup>1</sup> The International Labor Organization ("ILO") was established by the Treaty of Versailles, June 28, 1919, pt. XIII, 225 Consol. T.R. 188, 112 B.F.S.P. 1, *amended on several occasions and current revision reprinted in, CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANISATION AND STANDING ORDERS OF THE INTERNATIONAL LABOUR CONFERENCE 3-23 (1963)* [hereinafter Treaty of Versailles]. The Preamble of the ILO Constitution expressly discusses one possible link between trade and labor. It reads, "[w]hereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries . . ." Treaty of Versailles, pmbl.

<sup>2</sup> The Havana Charter, which established the International Trade Organization ("ITO") recognized that:

[A]ll countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labour conditions, particularly . . . for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.

U.S. DEP'T OF STATE, HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION 32 (1948), Pub. No. 3206.

portant because calls for examining linkage have often been accompanied by calls for the negotiation of new international rules to be overseen by the World Trade Organization. Studying linkage now may, therefore, help to explore how the world's operating trading system operates, and spur, if necessary or timely, the development of additional international rules.

The addition of the Trade-Related Intellectual Property Rights ("TRIPS")<sup>3</sup> and Trade-Related Investment Measures ("TRIMS")<sup>4</sup> Agreements to General Agreement on Tariffs and Trade as amended in 1994 ("GATT 1994") the formation of the WTO Working Groups on Environment and Investment<sup>5</sup> and the battle

The Havana Charter also contains provisions related to investment. The Charter recognized that "international investment, both public and private, can be of great value in promoting economic development and reconstruction, and consequent social progress." *Id.* at 35. A signatory country was to pledge not to "take unreasonable or unjustifiable action within its territory injurious to the rights or interests of nationals of other Members in the enterprise, skill, capital, arts or technology which they have supplied." *Id.* at 34. Nevertheless, the Charter did reserve rights of a signatory to "prescribe and give effect on just terms to requirements as to the ownership of existing and future investments." *Id.* at 35. The Charter was never ratified and, therefore, the ITO never came into existence. Instead, the international community signed and ratified the limited portion of the charter that dealt with trade, which was the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

For further information on the ITO, see William Diebold, Jr., *The End of the ITO*, in *ESSAYS IN INTERNATIONAL FINANCE* (No. 16, 1952); Jacob Viner, *Conflicts of Principle in Drafting a Trade Charter*, 25 *FOREIGN AFF.* 612 (1947); CLAIR WILCOX, *A CHARTER FOR WORLD TRADE* (1949).

<sup>3</sup> See Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization (1994) [hereinafter WTO Agreement]; Annex 1C, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 31, 33 *I.L.M.* 81 (1994) [hereinafter TRIPS Agreement].

<sup>4</sup> See Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 2, 33 *I.L.M.* 1244 (1994) [hereinafter TRIMS Agreement].

<sup>5</sup> The World Trade Organization has confronted the push of some of its Member states for increased linkage by establishing working groups to examine the relationship between trade and environment as well as trade and investment. See Steve Charnovitz, *A Critical Guide to the WTO's Report on Trade and Environment*, 14 *ARIZ. J. INT'L & COMP. L.* 341 (1997) (discussing the efforts of the Working Group on Trade and the Environment). The Working Group on the Relationship of Trade and Investment held its first meeting in June 1997. At the first meeting, the Group identified a checklist of issues it would pursue in its future work: I. Implications of the relationship between trade and investment for development and economic growth. . .; II. The economic rela-

over linkage preceding and during the WTO's first Ministerial Meeting<sup>6</sup> reveal that the multilateral body which creates and en-

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tionship between trade and investment . . . ; III. Stocktaking and analysis of existing international instruments and activities regarding trade and investment. . . . WORLD TRADE ORG., *The Growing Impact of Investment and Trade*, FOCUS (June-July 1997) at 2.

The goals of the working party are to identify: (1) common features and differences . . . as well as possible gaps in existing international instruments; (2) advantages and disadvantages of entering into bilateral, regional and multilateral rules on investment, including from a development perspective; (3) the rights and obligations of home and host countries and of investors and host countries; and (4) the relationship between existing and possible future international cooperation on investment policy and existing and possible future international cooperation on competition policy. *See id.*

<sup>6</sup> The WTO's first Ministerial Meeting was held in Singapore in December of 1996. The developing countries, with support from some developed countries, including the United Kingdom, blocked efforts by the United States to get the issue of the relationship between trade and labor standards on the work agenda of the WTO. The argument against inclusion of trade and labor standards in the WTO's work was that the lack of high standards would lead some developed countries to seek imposition of trade sanctions. *See Gary G. Yerkey, Developing Countries Block U.S. Plan to Include Labor Issue in Work Agenda*, 13 Int'l Trade Rep. (BNA) 1925 (Dec. 11, 1996).

At the end of the Singapore meeting, a Ministerial Declaration was issued which contained the following statement about labor standards:

We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.

Singapore Ministerial Declaration, Dec. 13, 1996, 36 I.L.M. 220, 221. This portion of the Ministerial Declaration closely follows the four points for labor consensus that had been suggested by WTO Director-General, Renato Ruggerio, at the beginning of the meeting. Those four points were as follows:

1. All WTO member nations oppose abusive work place practices, through their approval of the United Nations Universal Declaration of Human Rights;
2. The ILO holds primary responsibility for labor issues;
3. Trade sanctions should not be used to deal with disputes over labor standards; and

forces trade rules has begun to recognize and accept some linkages. Activities in other organizations further illustrate the interest of the international community in linkage and rule-making. For example, ILO, energized by the trade-linkage debate, has been rethinking its approach to fostering labor rights. Member states of the Organiza-

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4. Member states agree that the comparative advantage of low-wage countries should not be compromised.

*WTO Ministers Reach Consensus on Labor, Investment, Procurement*, Int'l Trade Daily, (BNA) (Dec. 13, 1996).

See Brian A. Langille, *Eight Ways to Think about International Labour Standards*, 31 J. WORLD TRADE 27, 49 (1997) (discussing linkage, and how a move to the WTO led to a refocusing on the International Labor Organization and its operations, and to that group refocusing its efforts).

Even before the Singapore Ministerial Declaration, the ILO had set up a working party to discuss how it should respond to demands to link labor and trade. Discussions on the linkage were first held by the ILO Governing Body in 1994. See Virginia A. Leary, *Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)*, in 2 FAIR TRADE AND HARMONIZATION 177, 190 (Jagdish Bhagwati & Robert E. Hudec eds., 1996). Prior to that discussion, the ILO Director-General, Michel Hansenne, had written about linkage in his 1994 Annual Report to the ILO Labour Conference. See Report of the Director-General: Defending Values Promoting Change—Social Justice in a Global Economy, INTERNATIONAL LABOR ORG., International Labor Conference, 81st Sess. (1994). The Director-General expressed concerns about the use of a social clause that allowed trade sanctions to be used in response to substandard labor conditions, and suggested possible ILO responses. *Id.* at 58-60. After the 1994 Governing Body meeting, a working party was set up to discuss all aspects of the social dimension of the liberalization of trade. The ILO Office produced for that working party a working paper entitled *The Social Dimensions of the Liberalization of World Trade*, International Labour Office, Governing Body, 261st Sess., ILO Doc. GB. 261/WP/SLD/1 (1994). The ILO Office Report discussed several ways in which social issues could be dealt with in the GATT/WTO framework:

- (1) considering abnormally low social conditions to be a subsidy under Article XVI of the GATT; (2) extending the General Exceptions article of the GATT (Art. XX) to cover workers' rights; (3) through use of the GATT art. XXIII dispute settlement provision's concepts of nullification and impairment.

See Leary, *supra* note 7, at 193-94 (describing the Social Dimensions Report). The Social Dimensions Report was never acted upon.

Following the Singapore Ministerial Meeting, the ILO again refocused on the linkage between trade and labor. The 1997 Director-General's Report also questions how the ILO should deal with the social dimensions of globalization. Report of the Director-General: The ILO, Standard Setting, and Globalization, International Labor Org., International Labor Conference, 85th Sess. (1997) [hereinafter 1997 Director-General Report]. During the 1997 International Labor Conference, Director-General Hansenne tried to get the Organization to establish a program on the relationship between trade and labor rights.



tion for Economic Cooperation and Development ("OECD") are in what is supposed to be the final stages of negotiations on the Multilateral Agreement on Investment ("MAI").<sup>8</sup>

Some of the areas "linked" to trade have gained rules and enforcement mechanisms for them (i.e., trade-related intellectual property rights). In other areas, linkage as a foundation for rule-making has been more deliberate (i.e., trade and investment)<sup>9</sup> or heavily resisted (i.e., trade and labor rights).<sup>10</sup> Why have some link-

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The developing countries strongly resisted some of the suggestions made in the 1997 Director-General's Report, particularly that there be some new ILO supervisory mechanism to assess Member State compliance with the mandates of the ILO Conventions and voluntary "social labeling" of products (to show the products were made under adequate labor conditions). See John Parry, *United States Supports ILO Official's Call for Linking Trade and Labor Standards*, Int'l Trade Daily (BNA) (June 13, 1997). The ILO Governing Body has put the issue of core labor standards on the agenda for the 1998 International Labor Conference. See *infra* note 11.

<sup>8</sup> The current status of MAI negotiations and any ultimate agreement is unclear. The OECD member states have issued the February 14, 1998 draft of the MAI. The MAI Negotiating Text, as it is referred to, was made public by its posting on the OECD home page. A proviso on the cover page states that "[t]he text reproduced here results mainly from the work of expert groups and has not yet been adopted by the MAI Negotiating Group." *MAI Negotiating Text, available at MAI TEXT* (visited Feb. 14, 1998) <<http://www.oecd.org/daf/cm/ma/MAITEXT>>PDF>. During the February meeting of the OECD States, the United States argued that the MAI will not be ready for submission to the membership in April 1998, which is the deadline for the MAI. See *U.S. Negotiators See No Chance of Signing MAI at OECD April Ministerial*, 15 Int'l Trade Rep. (BNA) 251 (Feb. 18, 1998).

<sup>9</sup> The linkage of trade and investment has proven difficult in the GATT/WTO system. The Uruguay Round did adopt two agreements which cover some aspects of investment: the TRIMS Agreement and the GATS Agreement. See Bernard Hoekman, *General Agreement on Trade in Services, in THE WORLD TRADING SYSTEM: READINGS 177* (1994); Joseph W.P. Wong, *Overview of TRIPS, Services and TRIMS, in THE WORLD TRADING SYSTEM: READINGS 173* (1994).

Nevertheless, it is clear that neither the TRIMS nor the GATS represents a full treatment of investment rights and protections. This is made obvious by the fact that the WTO decided to take up the issue of investment again at the end of the Singapore Ministerial by setting up a Working Party on Trade and Investment. See *supra* note 5.

<sup>10</sup> The gap between the views, of the developing and developed countries over the need for or value of linking trade with labor, has remained wide since the United States got the issue on the agenda for the WTO's first Ministerial Meeting. The setback of the United States on this issue during the 1996 Ministerial Meeting, has consigned the issue to the ILO. See *supra* note 5. Given the ILO's most recent discussions on trade and labor, however, it is unclear what will occur in that organization. At the conclusion of the International Labor Conference in June 1997, the ILO displeased both developing and developed

ages been more readily accepted and acted upon by the international community than others? This Article will attempt to arrive at some answers by examining both trade and investment, and trade and labor from several different perspectives.

First, this Article will attempt to explain why linkage does not play out the same for both trade and investment and trade and labor. The first section will examine the essential nature of investment rights and labor rights, along with the implications of this analysis for linkage as well as how investment and labor rights relate to trade. Second, this Article will analyze the current process of multilateral trade and trade-related rule-making<sup>11</sup> and offer an analysis of what trade-related investment and labor rules might look like. Finally, this Article will discuss what would be achieved and who would gain if trade-related investment and labor rules were negotiated and adopted.

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countries by leaving the linkage issue on its agenda without specifying what would be done. See John Parry, *ILO Balks at Trade, Labor Rights Link*; *U.S. May Press Harder*, Int'l Trade Daily (BNA) (June 24, 1997).

The Asian governments and unions which oppose the linkage concept have asked that the United States and other developed countries refrain from pushing the linkage of trade and core labor standards at either the ILO or WTO until there is consensus between the groups of nations. See Eileen Drage O'Reilly, *Asian Governments, Unions Oppose Linkage Between Trade, Labor Standards*, Int'l Trade Daily (BNA) (July 2, 1997).

In November 1997, the ILO's Governing Body decided to put a "declaration of principle" concerning fundamental workers' rights on the agenda of the June 1998 International Labor Conference. The proposal will include an ILO "follow-up" mechanism that would allow the organization to review whether countries are in compliance with seven core labor standards which cover freedom of association and collective bargaining, forced labor, non-discrimination and minimum age for employment. See Eileen Drage O'Reilly, *Singapore Minister Urges Asian Nations to Reject ILO Proposal on Core Standards*, BNA Int'l Trade Daily, Dec. 15, 1997 [hereinafter *Singapore Minister Urges*].

Although Asian nations remain opposed to the ILO's efforts, the United States has taken the position that the ILO will not be a credible institution if it fails to adopt the declaration and a follow-up mechanism. See Pamela M. Prah, *Opponents of Labor Standards Declaration Feed Protectionism, U.S. Tells Asian Nations*, Int'l Trade Daily (BNA) (Dec. 15, 1997).

<sup>11</sup> The approach taken towards examining the process of multilateral rule-making is not based on any scheme of international rule-making. Rather, it is based upon a review of how trade-related rules have recently been negotiated in the WTO. See *supra* Section 2.1. (discussing what may be the theoretical underpinnings for this approach).

## 1. LINKAGE OBSERVED: WHY LINKAGE IS NOT ALWAYS THE SAME

### 1.1. *Unpacking the Linkage*

Both investment and labor are part of trade; each is a factor of production. Yet an examination of how the world perceives the linking of investment and labor rights to trade reveals that linkage does not always succeed by fully considering and negotiating new rules are fully considered or negotiated. In the case of labor rights, for example, trade linkage has been firmly resisted in the WTO<sup>12</sup> and shows signs of moving slowly, if at all, in the ILO.<sup>13</sup> The linking of trade and investment was turned back or truncated in the GATT,<sup>14</sup> accepted for study at the WTO<sup>15</sup> and is actively being

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<sup>12</sup> See *supra* note 6 (discussing how linkage between trade and labor rights was left at the WTO).

<sup>13</sup> See *supra* notes 8 and 11 (discussing the ILO's efforts regarding linkage).

<sup>14</sup> The "turning back" is a reference to the fate of the TRIMS Agreement. Before the Uruguay Round, the United States pushed for a comprehensive set of rules on investment. See Daniel M. Price & P. Bryan Christy, III, *Agreement on Trade-Related Investment Measures (TRIMS): Limitations and Prospects for the Future*, in THE WORLD TRADE ORGANIZATION: MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION 447 (Terence P. Stewart ed., 1996) [hereinafter MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY].

According to the Omnibus Trade and Competitiveness Act of 1988, which, after The Round, began to set out the negotiating objectives for investment, the focus was to be as follows: (1) reducing and eliminating artificial or trade distorting barriers to investment; (2) expanding the concept of national treatment; (3) reducing unreasonable barriers to the establishment of investment; and (4) developing rules, including dispute settlement procedures. See Omnibus Trade and Competitiveness Act, Pub. L. No. 104-418, Sect. 1101(b)(11), 102 Stat. 1107, 1124.

The TRIMS negotiations proved difficult to get on the Uruguay Round agenda. See generally Carl W. Schwarz & Bennett A. Caplan, *Trade Related Investment Measures (TRIMS): Scrutiny in the GATT and Implications for Socialist Countries*, 11 HASTINGS INT'L & COMP. L. REV. 55 (1987). The Ministerial Declaration for the Uruguay Round provided for discussion on the "trade restrictive and distorting effects" of trade-related investment measures. See Uruguay Round Ministerial Declaration, Sept. 20, 1986, GATT B.I.S.D. (33rd Supp.) at 19 (1987).

From the beginning, the United States' agenda, as demanded in the round, was completely different from that of the developing countries. See *Trade-Related Investment Measures*, in 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) 2001, 2073 (Terence P. Stewart ed., 1993) (describing the developed countries as seeking a new regime which would prohibit certain behavior of governments towards investment, versus the develop-

pursued by the OECD.<sup>16</sup> The difference in the treatment of trade linkage regarding the two areas seems to spring from two sources: the nature of investment and labor rights and their varying degrees of trade-relatedness.

*1.1.1. Examination of the Nature and Reality of Investment Rights and Labor Rights*

The response of governments and the international community to labor and investment (and the rights that come from each), as well as any trade linkage, appears to be dictated by the differences in their inherent natures. What follows is a descriptive and comparative catalogue of the essential characteristics of labor and investment, accompanied by a commentary on how each relates to trade.

Capital is a factor of production. Capital is a property which is a commodity under the control of persons. Capital, and investment as a use of this property, exists because legal systems created a medium of exchange and then dictated its uses. Investment exists when capital is devoted to a purpose. The trade-related aspect of investment is its contribution to the creation of goods and services that are traded.<sup>17</sup>

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ing countries which wanted to limit TRIMS negotiations to an elaboration of existing GATT articles that would be accompanied by an "effects" test to determine whether an activity was covered by the agreement). The TRIMS Agreement that came out of the Uruguay Round was not exactly what the developed or developing countries sought; however, it is closer to the latter's views. The TRIMS Agreement, Article 2, is based around a listing of the investment measures which are prohibited because they violate Articles III (National Treatment) and XI (Prohibition on Quantitative Restrictions) of the GATT. See TRIMS Agreement, *supra* note 4, art. 2.

The truncation refers to the GATS Agreement which covers only one aspect of investment, the right to establish. The GATS had to reach this investment issue because commercial presence was recognized by the agreement as one of the four modes by which services are traded. See General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 1B, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 142 (1994) [hereinafter GATS].

<sup>15</sup> See *supra* note 5 (describing the WTO Working Party on Trade and Investment).

<sup>16</sup> See *supra* note 8 (discussing the MAI).

<sup>17</sup> See Ibrahim F.I. Shihata, *Factors Influencing the Flow of Foreign Investment and the Relevance of a Multilateral Guarantee Scheme*, 22 INT'L LAW. 671, 675 (1987) (pointing out that foreign direct investment provides "an integrated package of financial resources, managerial skills, technical knowledge and marketing connections").

Labor is a factor of production. Yet, the international labor community has frequently reiterated that "labor is not a commodity."<sup>18</sup> Labor derives from the efforts of human beings and, therefore, implicates human dignity. Unlike capital (and investment) human beings and their efforts exist beyond commerce and legal systems.

Limiting the comparison between labor and investment to this level, may suggest some of the reasons why trade linkage provokes different responses. The trade and trade-related rules of the GATT/WTO system as they currently exist can be viewed as responses and prescriptions for economic and governmental policies concerning the commodities, services or property rights that are part of or are related to trade. For example, the core rules of the General Agreement on Tariffs and Trade (GATT "1947") seek the progressive liberalization of trade in goods and elimination of discrimination in that trade.<sup>19</sup> The General Agreement on Trade in Services ("GATS") is devoted to defining the different modes of supply for the services that exist in commerce and the liberalizing of services trade.<sup>20</sup> The TRIPS of GATT 1994 was negotiated to

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<sup>18</sup> The ILO adopted this American Federation of Labor ("AFL") motto as a basic principle of the organization during its early history. *See generally* THE ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION (James T. Shotwell ed., 1934). The 1997 Director-General, reporting on a financial expert's comments that social justice cannot be achieved through unrestrained competition in the market, noted that "[t]hese words are very close to the ILO's basic tenet: labour is not a commodity. Even if it were proved that child labour brings economic advantages to those resorting to it, it must still be abhorred by anyone with a healthy conscience." *See* 1997 Director-General Report, *supra* note 7, at 5.

<sup>19</sup> *See* GATT, *supra* note 2, art. II (discussing tariff binding which provides for countries to lower tariffs and bind them.). The lowering and binding of tariffs have been a crucial part of the eight negotiating rounds of the GATT/WTO.

<sup>20</sup> *See* GATS, *supra* note 14, arts. I (on defining the modes of supply), XVI, XVII, XVIII (dealing with market access, National Treatment and additional commitments which explain the limitations that countries were allowed to make on the schedules that represented their service commitments).

Specific commitments are scheduled by modes of supply and apply *only* to listed service sectors and subsectors (that is, a positive-list approach was taken towards sectoral coverage), subject to sector-specific qualifications, conditions and limitations that may continue to be maintained, either across all modes of supply or for a specific mode (that is, a negative-list approach for policies that violate national treatment or market access).

Hoekman, *supra* note 9 at 178.

create minimum levels of intellectual property rights protection and enforcement.<sup>21</sup> In the case of intellectual property rights, the owner is allowed to exclude others from activities related to their property, the products of their mind,<sup>22</sup> and thereby, gain the true value of that property. The trade-relatedness of intellectual property rights stems from their existence as essential elements in the international trade of technology.<sup>23</sup>

Investment rights and protections fall within the ambit of existing trade and trade related rules. Investment rights<sup>24</sup> are created when a country chooses to allow foreign investors into its economic system by granting them the right to establish themselves in the market and to control and/or own assets that produce goods or services. Investment protections<sup>25</sup> are designed by governments to

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<sup>21</sup> See TRIPS Agreement, *supra* note 3, pt. II, arts. 9-39 (setting out the substantive minimum standards for the intellectual property rights recognized by the agreement, which include: copyright, trademarks, patents, geographical indicators, layout designs of integrated circuits, protection of undisclosed information (trade secrets) and industrial designs). Part III of the TRIPS Agreement contains provisions regarding the enforcement of intellectual property rights such as, civil and administrative procedures, provisional and final remedies, criminal penalties, and border enforcement. See *id.* arts. 41-61.

<sup>22</sup> See Laurinda L. Hicks & James R. Holbein, *Convergence of National Intellectual Property Norms in International Trading Agreements*, 12 AM. U. J. INT'L L. & POL'Y 769, 772 (1997).

<sup>23</sup> According to Jagdish Bhagwati, "[R]ules about intellectual property protection while different in essential respects in economic logic from those regarding trade, do have some essential trade aspects: the transfer and diffusion of technology, and payments for the same, across countries can be legitimately viewed as international trade in technology . . ." Jagdish Bhagwati, *Policy Perspectives and Future Directions: A View from Academia*, in INTERNATIONAL LABOR STANDARDS AND GLOBAL ECONOMIC INTEGRATION: PROCEEDINGS OF A SYMPOSIUM 57-58 (Bureau of Int'l Labor Affairs, U.S. Dept. of Labor, eds., 1994) [hereinafter INTERNATIONAL LABOR STANDARDS].

<sup>24</sup> Investment rights are those which allow the investment to exist in the first place, such as the right to establish, own and control. The GATS covers investment because one of the modes for the supply of services is commercial presence establishment. See GATS, *supra* note 14, art. I, 2(c). In the MAI draft text, these rights are combined with the crucial standards of national treatment and most-favored nation ("MFN") treatment. See MAI Negotiating Text, *supra* note 8, art. 3(1) (setting forth the national treatment standard), and art. 3(2) (setting forth the MFN standard).

<sup>25</sup> Investment protections "are generally deemed necessary for the creation of a favourable investment climate," and include provisions on government measures, such as expropriation, which could cause the investor to lose most if not all of the investment and other measures, such as limits on the repatriation of funds, which could cause disruption in an investment. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT ("UNCTAD"), WORLD INVESTMENT REPORT 1996: INVESTMENT, TRADE AND INTERNATIONAL

secure the continuing existence of or non-interference with the property rights obtained through investment activity. The creation and recognition of international investment rights and protections, therefore, facilitates international trade.

By contrast, the usual focus in a discussion of labor rights is on the human factor. There is emphasis on the premise that labor rights are an aspect of human rights.<sup>26</sup> Labor is not a commodity because acceptance of such a characterization would demean human dignity. Viewing labor rights only in this way, however, cuts off most trade-related dialogue. Labor rights, so viewed, must be protected by a system which focuses on the unique nature of the rights.<sup>27</sup>

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POLICY ARRANGEMENTS 189, 190 (1996) [hereinafter 1996 WORLD INVESTMENT REPORT]. No WTO agreement currently covers investment protections.

The MAI draft text has provisions listed under Section IV, Investment Protection. Those provisions include: General Treatment (IV, 1.) (Contracting Parties are to accord investments and investors "fair and equitable treatment and full and constant protection and security"); Expropriation and Compensation (IV, 2.); Protection from Strife (IV, 3.); Transfers (IV, 4.) (Contracting Parties are to "ensure that all payments relating to an investment in its territory . . . may be freely transferred in and out of its territory without delay."). *MAI Negotiating Text*, *supra* note 8, at 57.

<sup>26</sup> There is general agreement among scholars that core labor rights are a part of human rights. See Langille, *supra* note 7, at 34 (discussing the importance of defining a core list of labor rights and not simply looking at all labor standards, because if they are rights, they cannot be taken away); see also Steve Charnovitz, *Trade, Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labor Standards Debate*, 11 TEMP. INT'L & COMP. L.J. 131 (1997). According to Charnovitz, it is important to argue that the best motive for international labor law is based upon altruism, with the goal of raising labor conditions in all countries. Of all the motivations, including commercial concerns and domestic welfare, "[t]he altruistic motivation is the most compelling of the three motivations since it interweaves labor standards into the larger framework of human rights." *Id.* at 159; see also Virginia A. Leary, *The Paradox of Workers' Rights as Human Rights*, in HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE 22 (Lance A. Compa & Stephen F. Diamond eds., 1996) (stating that "workers' rights are human rights, yet the international human rights movement devotes little time to the rights of workers . . . [a] regrettable paradox: the human rights movement and the labor movement run on tracks that are sometimes parallel and rarely meet").

<sup>27</sup> This argument is frequently made to explain why the ILO is the international institution most capable of dealing with labor rights. See Charnovitz, *supra* note 26, at 160-63 (observing that ILO is better suited than WTO to deal with the labor rights issue, although ILO needs to extend its powers); Langille, *supra* note 7, at 49-50 (asserting that the ILO cannot simply rely on its history and record of accomplishment, but rather needs to decide what to do about linkage).

A reconceptualization of labor rights may be necessary, therefore, if there is ever to be a useful trade-related discussion of these rights. A useful alternative description would involve seeing labor rights, like investment rights, as necessary for the creation of a type of property.<sup>28</sup> Those entitled to labor rights should be seen as having a property right in the product of their efforts. Such a reconceptualization makes the recognition and protection of "core labor rights,"<sup>29</sup> as rules devoted to ensuring minimally acceptable standards for the exploiting of these property rights, more closely akin to investment and intellectual property rights.<sup>30</sup> Once such analogies are drawn, it becomes difficult to argue that the international trade community has no interest in labor rules. Expanding the traditional understanding of labor rights to include their consideration as protections for a property right would not undercut the human rights view. Rather than demeaning the nature of labor, a property rights description captures the role labor plays in the commercial world. Defining core labor rights would also establish the limits that must be placed on government's restrictions of these property rights for human dignity to be ensured.

Other large differences between investment and labor rights affect how each area relates to trade. The capital of investment is inherently mobile.<sup>31</sup> Capital can be transferred easily if a currency is freely convertible. The restrictions that exist on this inherent mobility come from government regulation aimed at restricting, attracting and retaining capital or by the market value of the investment. Labor, by contrast, is more likely to be less mobile.<sup>32</sup>

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<sup>28</sup> The suggestion for this rethinking of the nature of labor rights came from a question posed during the IELIG Linkages Conference by Steve Charnovitz.

<sup>29</sup> Recent academic literature and other studies on labor rights have made a distinction between core labor rights and labor standards. See *supra* note 7, for the universe of core rights identified by the Director-General of the ILO, and *infra* notes 78 and 87 for those identified by the OECD.

<sup>30</sup> The reconceptualization is not that drastic a step to take. It is commonplace to talk about intellectual property, which simply is a legal characterization of the creative work product of individuals.

<sup>31</sup> See generally WORLD BANK, WORLD DEVELOPMENT REPORT 1995: WORKERS IN AN INTEGRATING WORLD 61 (1995) ("[O]ne fact is indisputable: capital crosses borders more easily than labor and despite the best efforts of national governments to control it.") [hereinafter 1995 WORLD DEVELOPMENT REPORT].

<sup>32</sup> Labor is currently less mobile than capital. See *id.* at 62. This was not always the case. According to Rodrik, "[R]estrictions on immigration were not as common during the 19th century, and consequently labor's international



People tend to live and work in their own countries because their market value is low, they choose to do so,<sup>33</sup> or their options for exiting and working in another country are limited by government policies.<sup>34</sup> Assuming that there is a demand for their work, workers frequently choose to limit their mobility because economic goals are not their only considerations. Labor, as discussed earlier, cannot simply be understood as an element of commerce. Work, which is the non-economic name for the productive activity of individuals,<sup>35</sup> is a major component of the social structure of a country. Work is so crucial to the individual's sense of identity, and so linked to a particular society's values,<sup>36</sup> that workers frequently follow goals other than purely economic ones. Even if this is not true, workers may be limited in their options because other countries'

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mobility was more comparable to that of capital. Consequently, the asymmetry between mobile capital (physical and human) and immobile 'natural' labor, which characterizes the present situation, is a relatively recent phenomenon." DANI RODRIK, *HAS GLOBALIZATION GONE TOO FAR?* 8 (Institute for Int'l Econ. ed., 1997).

<sup>33</sup> There is a difference in labor mobility for certain portions of the labor force. The globalization of the world economy has only intensified this. As Rodrik points out:

[R]educed barriers to trade and investment accentuate the asymmetry between groups that can cross borders (either directly or indirectly, say, through out sourcing) and those who cannot. In the first category are owners of capital, highly skilled workers, and many professionals, who are free to take their resources where they are most in demand. Unskilled and semiskilled workers and most middle managers belong in the second category.

RODRIK, *supra* note 32, at 4. Not all workers would relocate if they could. They choose to remain in their home country and work there because work is part of their social experience. *See infra* note 36.

<sup>34</sup> Immigration is treated differently by governments from other issues such as trade. Why do governments liberalize trade but manage migration? According to the World Bank, there are non-economic and economic reasons. The non-economic reason is that "large migrations disturb the way a society thinks of itself. . . ." 1995 World Development Report, *supra* note 31, at 67. The economic reasons are that migrants would not necessarily move to enhance their productivity. Industrial countries with welfare states are afraid of attracting too many migrants, and, therefore, admit them selectively "using instruments ranging from visa restrictions and border controls to legislated criteria for admission." *Id.*

<sup>35</sup> *See* RICHARD C. HALL, *DIMENSIONS OF WORK* 13 (1986) ("Work is the effort or activity of an individual performed for the purpose of providing goods or services of value to others; it is also considered to be work by the individual so involved.")

<sup>36</sup> *See generally* Philip M. Nichols, *Trade Without Values*, 90 *NW. U. L. REV.* 658, 682-83 (1996).

immigration policies do not encourage their exit.<sup>37</sup> The crucial distinction between mobility for investment and labor has consequences in any discussion about trade-relatedness and the need for international trade-related rule-making. Given capital's mobility, an international set of standards for investment would provide certainty for investors which would facilitate more investment and ultimately more trade. By contrast, mobility of most workers, particularly the limited mobility of that part of the workforce that suffers most from low labor standards, means that their main connection with the international community is through the products they produce for trade. The existing rules of the international trading regime, however, are not based on how goods are produced. Indeed this is one reason why it is frequently argued that there should not be rules on trade-related labor rights or that we should not use trade sanctions to enforce compliance with such rights.

The final difference between investment and labor is how each is shaped by market forces. Investment is highly responsive to market forces. Given its mobile character, investment would tend to flow where it can obtain the best rate of return. Investment does not flow freely, however, because governments often dictate limits as to its mobility, by either by limiting investment to certain individuals<sup>38</sup> (usually because of nationality) or into certain sectors.<sup>39</sup> Either for reasons of sovereignty or economics no government believes in complete freedom of investment.<sup>40</sup>

Labor is affected, but not solely influenced, by market forces. Some governments resist labor rules, or develop certain kinds of

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<sup>37</sup> See HALL, *supra* note 35.

<sup>38</sup> There are a wide variety of measures that governments can take to restrict investment that can be divided into categories. There are measures that restrict admission and establishment, those that restrict ownership and control, and those affecting how an investment operates. See 1996 WORLD INVESTMENT REPORT, *supra* note 25, at 174-78 for a comprehensive list of the different types of measures. A large number of these are aimed at protecting local producers. See *id.* at 175.

<sup>39</sup> The reasons for restricting entry and ownership are that a country has made a decision about "the proper apportionment of resources between the public and private sectors;" as a result, some sectors may be closed to private entry or ownership altogether. See *id.* at 174.

<sup>40</sup> The best illustration for this comes in the form of the MAI itself. The text of the agreement is attached to a long list of country specific exceptions that the Member states will be taking to MAI obligations. No OECD Member State of the developed world wants a completely liberalized investment regime. See *infra* Section 2.2.3. and accompanying notes (discussing the MAI exceptions).

rules, in order to exploit the full comparative advantage of labor costs.<sup>41</sup> Nevertheless, most government actions regarding labor rights reflect, to some degree, the basic requirements and preferences of the work force since that work force is the body politic.<sup>42</sup> The social values of work are so fundamental that all governments have some rules about labor rights and working conditions that are not focused on the economic benefits of the rules.<sup>43</sup>

### 1.1.2. *How Investment and Labor Relate to and Interrelate with Trade*

#### 1.1.2.1. *The Economics of Trade Linkage*

The frequent international debates over linkage in the last few years inevitably have begun with some type of economic justification for linking an issue to trade.<sup>44</sup> The reason for this focus is

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<sup>41</sup> See DAVID RICARDO, *PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* 74-76 (1969) (pointing out the comparative advantages of labor). Of course, those advocating protection of core labor rights argue that some countries resist such standards to gain an unfair competitive advantage.

We're not trying to impose our standards or values on other countries. We're not trying to deprive low-wage developing countries of their legitimate comparative advantage. That concept is a foundation for free trade in the global trading system. However, we are opposed to a comparative advantage built on the unfair abuse of people.

Mickey Kantor, *The Perspective of the U.S. Trade Representative, in INTERNATIONAL LABOR STANDARDS*, supra note 23, at 15-16.

It is interesting to note that in public statements of this type it is not uncommon to see the United States try to distance itself from a perception of protectionism rather than concern about proper comparative advantage.

<sup>42</sup> "Societies intervene when unfettered labor markets fail to deliver the most efficient outcomes, or when they want to move market outcomes into line with their preferences and values. Four reasons are often given for intervention: uneven market power, discrimination, insufficient information, and inadequate insurance against risk." 1995 WORLD DEVELOPMENT REPORT, supra note 31, at 70.

<sup>43</sup> "Governments also intervene directly in the labor market to achieve particular social goals. Some of the more common interventions include bans on child labor, protection for women and minority workers, setting of minimum wages, and legislation on workplace safety and health standards." *Id.* at 71.

<sup>44</sup> See OECD, *TRADE, EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE* (1996) [hereinafter OECD STUDY] (discussing labor standards); Richard B. Freeman, *International Labor Standards and World Trade: Friends or Foes, in THE WORLD TRADING SYSTEM: CHALLENGES AHEAD* 87 (1996); T.N. Srinivasan, *International Labor Standards Once Again!*, in *INTERNATIONAL LABOR STANDARDS*,

fairly obvious: why should the international trade community add to or transform existing multilateral rules unless doing so would further trade and economic efficiency?<sup>45</sup> Accordingly, the linkage debate has spurred attempts to analyze the economics of trade and investment,<sup>46</sup> and trade and labor.<sup>47</sup> An examination of these analyses, and their critiques, reveals that the economics of the two linkages are not the same.

#### 1.1.2.1.1. Investment

There is a body of academic literature on the general economics of foreign direct investment ("FDI").<sup>48</sup> The most recent and comprehensive report for the purposes of linkage analysis, however, was done by the WTO Secretariat and is entitled "Trade and Foreign Direct Investment."<sup>49</sup> This 1996 Secretariat Report focused on the "interlinkages—economic, institutional, legal—with world trade."<sup>50</sup> According to the Secretariat Report most of the empirical work on the economic linkage between trade and FDI has not focused on causation,<sup>51</sup> but rather on whether trade and FDI are substitutes (negatively correlated) or complements (positively corre-

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supra note 23, at 73; see also 1996 WORLD INVESTMENT REPORT, supra note 25, at 95-128.

<sup>45</sup> "[T]he trade rules are for economic efficiency, which generally helps everyone (with internal distribution problems being tackled by other policies); they are not there simply to assist specific factors of production (i.e., capital) or economic agents (i.e., multinationals)." Bhagwati, supra note 23, at 57.

<sup>46</sup> The literature on the economics of the linkage between trade and investment is fairly large. For the best compilation of sources see WORLD TRADE ORGANIZATION, TRADE AND FOREIGN DIRECT INVESTMENT (Oct. 9, 1996), available at Annual Report-Investment (visited May 8, 1998) <<http://www.wto.org/wto/archives/chpiv.htm>> [hereinafter TRADE AND FDI].

<sup>47</sup> The most recent study of the economics of the linkage between trade and labor rights is the OECD Study. See supra note 44. The OECD Study itself is not without problems. For a thorough critique and analysis, see Charnovitz, supra note 26. Another study on the issue is supposed to be forthcoming from Rodrik. See RODRIK, supra note 32 (summarizing the author's conclusions).

<sup>48</sup> See generally KAR-YIU WONG, INTERNATIONAL TRADE IN GOODS AND FACTOR MOBILITY (1995); J.R. Markusen, *The Boundaries of Multinational Enterprises and the Theory of International Trade*, 9 J. ECON. PERSP. 169 (1995).

<sup>49</sup> See TRADE AND FDI, supra note 46.

<sup>50</sup> *Id.* at 2.

<sup>51</sup> "[T]he empirical work . . . has not tried to establish causation—that is, to determine, for example, whether inflows of FDI cause exports to be greater than they would otherwise be or if, instead, expanding exports attract increased FDI." *Id.* at 7.

lated).<sup>52</sup> The Secretariat Report reviews and analyzes this work from two perspectives: (1) what the driving force (motivation) is behind FDI at the level of the firm; and, (2) the empirical evidence of linkage.<sup>53</sup> Since the motivations for why a firm invests rather than exports or licenses its technology help to explain the phenomenon of FDI, they are examined first. Multinational corporations come about as the result of three circumstances. First, a firm may own assets that can be profitably exploited on a large scale.<sup>54</sup> Second, profitability of the firm is increased if it produces in different countries.<sup>55</sup> Third, the profits to be made from such investments are greater than from licensing the assets.<sup>56</sup>

The empirical evidence on the linkage is far from complete: most of the useful work has been done only on relationship between FDI and trade in goods<sup>57</sup> and there is limited availability and quality of data.<sup>58</sup> Despite these limitations, the Secretariat Report

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<sup>52</sup> The WTO Secretariat does not believe that it is important for linkage purposes to establish whether FDI and trade are substitutes or complements since "[a] substitute relationship can create just as strong an interlinkage as a complementary one. And if they are interlinked, it means that trade policy affects FDI flows, . . . and therefore that both sets of policies would benefit from being treated in an integrated manner." *Id.*

<sup>53</sup> *See id.*

<sup>54</sup> *See id.* at 8. The Secretariat points out that research conducted on why firms invest rather than export or license has been studied for forty years and there is a general consensus on this and the other points.

<sup>55</sup> *See id.*

<sup>56</sup> *See id.*

<sup>57</sup> *See id.* at 12-13

<sup>58</sup> *Id.* at 13. According to the report:

The available statistics on FDI, which are far from ideal, come mainly from three sources. *First*, there are statistics from the records of ministries and agencies which administer the country's laws and regulations on FDI. The request for a license or the fulfillment of notification requirements allows these agencies to record data on FDI flows. Typically, re-invested earnings, intra-company loans, and liquidation's of investment are not recorded, and not all notified investments are fully realized in the period covered by notification.

*Second*, there are the FDI data taken from government and other surveys which evaluate financial and operating data of companies. While these data provide information on sales (domestic and foreign), earnings, employment and the share of value added of foreign affiliates in domestic output, they often are not comparable across countries because of differences in definitions and coverage. *Third*, there are the data taken from national balance-of-payments statistics, for which internationally agreed guidelines exist in the fifth edition of the IMF *Bal-*

assesses the information available on FDI and its effects on the home and the host countries.<sup>59</sup> FDI and trade are not simply substitutes or alternative means for reaching a foreign market.<sup>60</sup> The relationship between trade and the dynamic effects of FDI are more generally complementary.<sup>61</sup> However, the trade policies of countries can affect whether FDI is a complement or substitute. Low and bound tariffs (the WTO goal) attract export-oriented FDI, while high tariffs serve to induce tariff jumping FDI to serve the local market.<sup>62</sup> FDI can also be undertaken as a quid pro quo, which would be a way of lessening the impact of protectionist trade policies.<sup>63</sup> The FDI which responds to low costs of production and a liberal trading regime is likely to be complementary with imports.<sup>64</sup> By contrast, the tariff-jumping FDI acts as a substitute for trade.<sup>65</sup> Overall, a combination of liberal trade and investment policies increases FDI.<sup>66</sup> The Secretariat Report also concludes that FDI adds to overall economic development of states by producing

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*ance of Payments Manual.* The three main categories of FDI described above are those used in balance-of-payments statistics.

*Id.* at 3.

<sup>59</sup> See *id.* at 13-14.

<sup>60</sup> See *id.* at 14-18.

<sup>61</sup> "[T]here is no serious empirical support for the view that FDI has an important negative effect on the overall level of exports from the home country." *Id.* at 12. Rather, the empirical evidence points to a modestly positive relationship between FDI and *home country* exports and imports. *Id.* at 13-15 (which contains a review of the empirical evidence).

<sup>62</sup> See *id.*

<sup>63</sup> See *id.*

<sup>64</sup> See *id.* at 13.

<sup>65</sup> See *id.* at 10, 39.

<sup>66</sup> See *id.* at 37. Trade policy is only one aspect of which determines whether FDI will enter a country but it plays a special role in assisting with the largest FDI problem at the level of the firm—the degree of risk and uncertainty over time.

It follows that the structure and stability of current and possible future trade policies, both of potential host countries and of potential foreign markets, will be important influence on the willingness of firms to seek customers in foreign markets, locate production processes in host countries, or separate the production processes into stages located in different countries.

*Id.*

intangibles, particularly the transfer of technology,<sup>67</sup> and by stimulating growth and competitiveness.

The economic evidence illustrates that FDI is linked with trade. While FDI is much more than simply another way of trading it clearly facilitates trade with benefits running to countries at all levels of development. The WTO Secretariat believes that taking some measures, such as achieving some form of policy coherence regarding investment, might also assist in boosting the least developed countries.<sup>68</sup>

#### 1.1.2.1.2. Labor

A review of the existing literature on the economics of linking labor rights and trade leads to several conclusions. First, there is an extraordinarily limited base of empirical evidence.<sup>69</sup> Second, there are disagreements between those who have studied the limited empirical data.<sup>70</sup> Third, because of the limited data and disagreements only a few observations can be made.

The first issue—a lack of a thorough empirical study of the links between core labor rights and trade flows—poses a serious problem. The 1996 OECD Study bases its conclusions about the trade linkage solely on statistical evidence about freedom of association and collective bargaining.<sup>71</sup> As a result, it is impossible to calibrate how and to what extent governments discriminate, use forced or exploited child labor, and, consequently, how much these practices

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<sup>67</sup> See *id.* at 7-8. The transfer of technology that occurs through FDI, which is the primary channel for developing countries, leads to greater productivity. See *id.* at 7. The characteristics of the countries does matter. The more competitive the conditions, the higher the levels of local investment in fixed capital accompanied by the fewest restrictions on affiliates increases in the amount of technology transfer. See *id.*

<sup>68</sup> See *id.* at 40.

<sup>69</sup> See OECD STUDY, *supra* note 44, at 11, 48, 86; see also Charnovitz, *supra* note 26, at 138. Charnovitz criticizes the OECD for failing to make estimates of the value of annual trade in products made by violating core labor rights especially given some of its own findings. For example, the Secretariat provides evidence of child labor exploitation in a few export-oriented industries in some countries. See *id.* at 138, n. 64.

<sup>70</sup> OECD STUDY, *supra* note 44, with the conclusion reached by Charnovitz, *supra* note 26, at 143 & n.111-12. Rodrik also suggests a different result from the one reported in the OECD STUDY conclusion. See RODRIK, *supra* note 32, at 45-46.

<sup>71</sup> See OECD STUDY, *supra* note 44, at 86.

affect trade performance.<sup>72</sup> Prescribing new international rules to encourage the enforcement of minimum standards seems unlikely in the face of limited information about the scope and dimension the "problem."<sup>73</sup> Without a clear picture of the extent to which low standards exist and what their effects are, it is unclear whether there will ever be an agreement on the need to develop trade-related rules regarding labor, much less what the proper set of multilateral rules and any enforcement mechanism should look like. This data gap demands that additional studies be conducted which may offer a more complete picture and help resolve the second problem.<sup>74</sup>

The second problem is the disagreement about what the existing data reveals. The OECD Study, which examines the linking of trade and labor, begins by identifying what it considers to be the limited universe of "core labor rights."<sup>75</sup> Some attempt must be made to identify core labor rights in order to compile and make sense of the limited economic data on government practices. The list arrived at by the OECD is identical to that adopted by the World Social Summit in 1995<sup>76</sup> and by the ILO itself when it has discussed "core" labor rights.<sup>77</sup> The body of core labor rights identified by the OECD for its economic analysis includes the freedoms of association and collective bargaining, and the prohibitions of forced labor, exploitative child labor, and discrimination.<sup>78</sup>

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<sup>72</sup> See *id.* at 11. ("The lack of reliable indicators of enforcement of standards on child labour, forced labour and non-discrimination is especially acute. Available evidence in this area is mostly anecdotal, making any attempt to analyse the economic implications of these standards problematic.")

<sup>73</sup> The collection of data on labor standards would be a logical job for the ILO. If that organization could set core labor rights identified and put a supervisory mechanism in place there would ultimately be a reliable data base.

<sup>74</sup> This same observation was made following a symposium on international labor standards in 1994. See Kenneth A. Swinnerton & Gregory K. Schoepfle, *Emerging Themes*, in INTERNATIONAL LABOR STANDARDS, *supra* note 23, at 63.

<sup>75</sup> See OECD STUDY, *supra* note 44, at 25-73.

<sup>76</sup> See *id.* at 25.

<sup>77</sup> The ILO Office produced a report in 1994 which pointed to the same core labor standards as those the ILO Governing Body has suggested by considered at the 1998 International Labor Conference. See *infra* note 7.

<sup>78</sup> All of the core rights, with the exception of exploitative child labor, are embodied in existing ILO Conventions:

*Freedom of Association:* is the right of workers and employers; to establish and join organizations of their choosing without previous authorization; to draw up their own constitutions and rules, elect their representatives, and formulate their programs; to joint in confederations



The study then proceeds to examine whether protection of these core rights enhances or impairs economic efficiency.<sup>79</sup> It concludes that the protection of the identified core labor rights actually enhances economic efficiency.<sup>80</sup> The reasons for this effect differs

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and affiliate with international organizations; and to be protected against dissolution or suspension by administrative authority.

Faye Lyle, *Workers Right in U.S. Policy*, FOREIGN LABOR TRENDS, at 20 (Bureau of Int'l Labor Affairs, U.S. Dept. of Labor ed., 1991); cf. Convention Concerning Forced or Compulsory Labour, as Modified by the Final Articles Revision Convention, Sept. 15, 1946, 39 U.N.T.S. 55, 56 [hereinafter Convention Concerning Forced Compulsory Labour].

*Collective Bargaining* (the right to organize and bargain collectively) is the right of workers to be represented in negotiating the prevention and settlement of disputes with employers; to protection against interference with union activities; to protection against acts of anti-union discrimination; and to protection against refusal of employment, dismissal, or prejudice due to union membership or participation.

Lyle, *supra* at 22; cf. Convention (No. 98) Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257, 258.

*Forced Labor*: "[W]ork or service exacted from any person under the menace of penalty and for which the person has not volunteered. 'Menace of penalty' includes loss of rights or privileges as well as penal sanctions." Lyle, *supra* at 24; cf. Convention Concerning Forced or Compulsory Labour, *supra* at 58.

*Discrimination in Employment*: "[D]iscrimination implies that if discrimination is practiced, employment and earnings opportunities are allocated based on considerations not related to how well someone does a job, intuition suggests that some individuals may end up not employed in jobs to which they are best suited." Kenneth Swinnerton, *An Essay on Economic Efficiency and Core Labour Standards*, in THE WORLD ECONOMY 73, 78 (1997); cf. Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31, 32-33.

The issue of exploitative child labor is more difficult to define. Obviously, the issue of how old a child worker should be is an issue. The ILO does have a Convention on the Minimum Age of Employment. See Convention (No. 138) Concerning Minimum Age for Admission to Employment, June 6, 1973, 1015 U.N.T.S. 297, 298.

According to United Nations Children's Fund ("UNICEF"), child exploitation is "characterized by children who work too young, too long hours, for too little pay, in hazardous conditions or under slave-like arrangements." OECD STUDY, *supra* note 44, at 37. See also Janelle M. Diller & David Levy, *Child Labor, Trade and Investment: Toward the Harmonization of International Law*, 91 AM. J. INT'L L. 663, 666, n. 24 (Oct. 1997) (noting that while a definition of exploitative child labor has yet to be adopted, the ILO is in the process of working on a new convention, based upon the existing ILO conventions such as forced labor, for a convention that will be considered by the International Labor Conference in 1999).

<sup>79</sup> See OECD STUDY, *supra* note 44, at 77-82.

according to the type of rights. The core labor rights that are based on prohibitions—of forced labor, exploitative child labor<sup>81</sup> and discrimination—enhance economic efficiency by being the appropriate response to distortions in the allocation of labor resources created by the prohibited practices.<sup>82</sup> For example, in the case of forced labor, such laborers by definition are not allowed to maximize their utility or move to other activities that match their abilities and desires.<sup>83</sup> Similar distortions arise both from the use of exploitative child labor and discrimination in labor laws and regulations.<sup>84</sup>

The other core labor rights, specifically the freedoms, are important because they can produce positive efficiency effects.<sup>85</sup> The freedom to associate and to bargain collectively do this by counterbalance the market power of employers, providing organizational and legal support for individual workers and providing the channel through which workers share their knowledge of the business with employers.<sup>86</sup> Since the protection of core labor rights enhances economic efficiency, the crucial issue becomes why all countries do

<sup>80</sup> See *id.* at 215-30; Analytical Appendix entitled *Core Labour Standards, Economic Efficiency and Trade*, 215-230; see also Swinnerton, *supra* note 78.

<sup>81</sup> [E]mployment discrimination unambiguously reduces economic efficiency. The reason is that such a practice causes a misallocation of resources while also reducing the availability of production factors. Forced labour and child labour exploitation also cause a misallocation of resources, thus reducing economic efficiency, but they might also raise the quantity of labour available for production.

OECD STUDY, *supra* note 44, at 230.

<sup>82</sup> See *id.* at 80.

<sup>83</sup> See *id.* at 79.

<sup>84</sup> See *id.* The OECD concludes that as a result, prohibition is the appropriate policy response for forced labor and exploitative child labor and discrimination. See *id.* at 80, 82.

<sup>85</sup> See *id.* at 80-81.

<sup>86</sup> See *id.* at 81. The OECD Study, however, points out that there are other issues that arise concerning the freedoms of association and to collectively bargain. It is not clear, for example, what level of bargaining is likely to produce the best results. See *id.* Unions also produce costs. See *id.* at 82. As a result the OECD concludes that:

[t]he form of union and employer organization that is conducive to the highest level of efficiency is likely to differ from country to country, as it depends on specific historical and cultural factors. Although freedom of Association is a basic human right and may help reduce certain distortions in the economy, it is no less true that particular forms of union organization and collective bargaining may introduce new ones.

*Id.* at 82.

not act accordingly.<sup>87</sup> The existing commentary disagrees on the number<sup>88</sup> of reasons and why.<sup>89</sup> Among the various reasons for non-compliance, however, it is clear that some are trade-based.<sup>90</sup> Some countries remain persuaded that protecting core labor rights limits their ability to enhance trade performance.

There is disagreement among those reporting and reviewing the existing data on the correlation between the protection of core labor rights and trade.<sup>91</sup> According to the OECD, the empirical results of its study fail to support the view that countries with low labor standards have gains in export market share as compared to high standards countries.<sup>92</sup> The OECD conclusion may have limited value in persuading errant countries, however, because as Steve Charnovitz has pointed out, the conclusion in the study does not appear to fully match the OECD data.<sup>93</sup> Some of the OECD statistics do, in fact, indicate that countries with low standards have benefited in the shape of increased trade gains.<sup>94</sup> This OECD data

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<sup>87</sup> The OECD offers five reasons why states may fail to adopt core labor standards: (1) Public Good Argument: public goods cannot be accomplished by market forces alone because of the free rider problem; (2) Blocking Minority Argument: if a country lacks standards and then takes them on, a significant minority (perhaps powerful) would be worse off and try to block; (3) Endogeneity Argument: that core labor standards are not shaped by policies but by market outcomes that are influenced by economic growth; (4) Economic Development: non-observance of standards is used as a strategy for promoting export trade and attract foreign direct investment. *Id.* at 83-85.

<sup>88</sup> Charnovitz argues that the OECD does not consider, at this point, one other argument it does raise later for countries that fail to adopt core standards. It may be argued that they lack the financial and legal resources to enforce such standards. See Charnovitz, *supra* note 26, at 141, n. 101. Charnovitz also offers yet another reason for failure to adopt standards. Countries may want to raise standards but feel constrained because of fears about competing with other countries that will not. See *id.* at 142.

<sup>89</sup> Charnovitz points out that the public goods argument makes no sense and that the blocking minority and endogeneity arguments are not proven by the OECD analysis. See *id.* at 140-41.

<sup>90</sup> The economic development argument proffered by the OECD and Charnovitz's suggestion about the perception/reality of fear of competition are trade based. Under both theories, governments are failing to adapt core labor rights protections because they believe that acting otherwise will increase trade and economic growth.

<sup>91</sup> Compare OECD STUDY, *supra* note 44, at 80-101, with Charnovitz, *supra* note 26, at 143, n.112-13.

<sup>92</sup> See OECD STUDY, *supra* note 44, at 92.

<sup>93</sup> See Charnovitz, *supra* note 26, at 143 & n.112.

<sup>94</sup> See OECD STUDY, *supra* note 44, at 92-93, 132-33.

thus may be more in line with another study which has indicated that "comparative advantage in labor-intensive goods . . . was associated with indicators of labor standards in the expected manner: the more relaxed the standard, the larger the revealed comparative advantage in labour-intensive goods."<sup>95</sup> The disparity between the OECD conclusion and its own evidence could explain why the developing countries cling so fiercely to the belief that the introduction of international labor standards would be harmful to their ultimate economic development. If this is true it is not clear that these same countries will alter their views simply because they engage in trade liberalization. While there appears to be a positive relationship between the liberalization of trade and the actual protection of labor rights, the OECD Study failed to find any causality between them.<sup>96</sup>

The observations that can be reached despite the limited data and disagreements are that: (1) the protection of core labor rights can promote economic efficiency; (2) there *may* or *may not* be some link between a low level of labor rights protection and increased trade performance; and, (3) there is a generally positive relationship between the protection of labor rights and trade liberalization. For the purpose of the debate about linking trade and labor rights the second observation could pose the most serious barrier to obtaining trade-based rules on core labor rights. If low standards countries do obtain a trade advantage then those advocating that countries should adopt such rules are robbed of the argument that protecting core labor rights will not impair trade gains or growth.

#### 1.1.2.2. *The Interests and Abilities of Governments and the International Community*

For both investment and labor, a government has a sovereign interest in regulation. Labor and capital are core components of a country's wealth, productivity and competitiveness. Whether a government should regulate all aspects of labor and investment, however, is not clear. In some areas to achieve both the most eco-

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As Charnovitz points out, the OECD's statistics reveal that the countries with low and little to no standards had significant increases in exports (44.1% and 45.3% compared to the groups with high standards and some limitations (2.6% and 5.1% respectively). Charnovitz also points to other evidence. *See id.* at 143 & n.113.

<sup>95</sup> RODRIK, *supra* note 32, at 46. *But see* Freeman *supra* note 44 at 101-04.

<sup>96</sup> *See* OECD STUDY, *supra* note 44, at 112.

nomically sound and humane results a government must see a mixture of restrictions and comprehensive intervention and near or total withdrawal from regulation.<sup>97</sup> Whatever a country does regarding investment or labor, however, it cannot insulate its decisions from outside influences.

The interests of the international community in both areas comes from globalization.<sup>98</sup> World wide trade and investment make it impossible for most countries labor and investment rules to be without some consequences both for other countries and for ultimate overall world wide economic growth. The international community has ways of pressing or encouraging change in government laws and regulations. Intergovernmental organizations, like the WTO, the ILO, the OECD, and non-governmental organizations can monitor existing governmental practices and rules while governments can negotiate new multilateral rules (binding or nonbinding) on the protection of investment and labor rights. Any such rule-making process may or may not be accompanied by a mechanism for enforcing the multilateral rules, such as binding dispute settlement and sanctions.

With regard to current international efforts regarding labor rights, there are numerous multilateral conventions that identify rights and standards. The ILO conventions, however, only bind a country if ratified by that country.<sup>99</sup> Moreover, the conventions are voluntary as to scope of convention adoptions and enforcement comes from persuasion exercised by ILO Member states. Regional integration arrangements have identified labor rights as a concern to monitor (National American Free Trade Agreement) or a component of the operation of a single market (European Community) and have acted accordingly. In the sense of investment rights and protections, bilateral, regional, and multilateral efforts exist to liberalize and protect investment.<sup>100</sup> Although they differ in applica-

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<sup>97</sup> See generally 1995 WORLD DEVELOPMENT REPORT, *supra* note 31, at 70-79; see also Charnovitz, *supra* note 26, at 139-40.

<sup>98</sup> See generally Eddy Lee, *Globalization and Labour Standards: A Review of Issues*, 136 INT'L LAB. REV. (1997).

<sup>99</sup> The ILO has adopted over 170 different conventions dealing with labor rights and standards.

<sup>100</sup> See TRADE AND FDI, *supra* note 46, at 23-38 (analyzing the current status of national regulations, bilateral investment treaties, regional and plurilateral agreements and multilateral agreements); see also, 1996 WORLD INVESTMENT REPORT, *supra* note 25, at 131-59 (surveying the same field). Given the focus of the WTO and UNCTAD, it is not surprising that the WTO report is concerned with policy coherence, while UNCTAD is interested in the devel-

bility, scope, and enforcement power, all attempt some general harmonization of the basic rights and protections to give some certainty or stability for an investor's decisions.

The interplay between a government's interest in regulating each area and its inability to control completely the consequences of its choices currently spurs arguments about the need for multilateral trade-related rules. Multilateral arguments for trade-related rules on investment and labor have often begun with the statement that the existence of lower standards acts as an unfair trade practice or as an unnecessary restraint on possible trade growth. Nongovernmental organizations and scholars often argue for strong and enforceable multilateral rules because they believe only a worldwide recognition, and agreement on how to combat abuses, will solve the identified problem.<sup>101</sup>

## 2. LINKAGE AND THE PROCESS OF TRADE-RELATED RULE-MAKING

### 2.1. *Possible Rule-Making Preconditions for Trade-Related Rule-Making*

Another perspective from which to examine the linkage between trade and investment and trade and labor focuses not on the nature of each, and of its trade-relatedness,<sup>102</sup> but on how linkage is made concrete. When and why should the international community, as represented by the WTO,<sup>103</sup> choose rule-making in re-

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opmental aspects of FDI rules. Compare TRADE AND FDI, *supra* note 46, at 42, with 1996 WORLD INVESTMENT REPORT, *supra* note 25, at 158-59.

<sup>101</sup> Even then, the advocates do not always agree on the method to be used. For example, those arguing for labor rights differ on whether it is a trade or labor issue for rule-making and institutional oversight. See generally Erika de Wet, *Labor Standards in the Globalized Economy: The Inclusion of a Social Clause in the General Agreement on Tariff and Trade/World Trade Organization*, 17 HUM. RTS. Q. 443 (1995); Ray Marshall, *Trade-Linked Labor Standards*, 37 PROC. OF ACAD. OF POL. SCI. 67 (1990); Gijsbert Van Liemt, *Minimum Labour Standards and International Trade: Would a Social Clause Work?*, 128 INT'L LAB. REV. 433 (1989); Brian A. Langille, *General Reflections on the Relationship of Trade and Labor (Or: Fair Trade is Free Trade's Destiny)*, in FAIR TRADE AND HARMONIZATION, *supra* note 7, at 231.

<sup>102</sup> See *supra* Sections 1.1. and 1.1.2. (discussing of the nature of labor and investment and the economic linkages each has with trade).

<sup>103</sup> The WTO is chosen as the focus for this part of the article because its focus has been on the linkage to trade. As the organization with jurisdiction over trade, and some trade-related rules, the WTO is the logical choice.

sponse to a suggested linkage? Different approaches exist for finding an answer to that question. One approach would be to examine whether a suggested linkage constitutes a proper subject for consideration by the WTO.<sup>104</sup> This type of examination focuses on the WTO as an institution<sup>105</sup> and can illustrate the desirability of such a linkage.<sup>106</sup> Another approach is to study linkage by examining not the object but the process of trade-related rule-making. This section of the article follows the second approach.

In order to conduct such an analysis some retracing must be done of the recent past and of how trade-related rules were negotiated in the Uruguay Round.<sup>107</sup> After this review of the history,

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<sup>104</sup> Philip Nichols has chosen this approach in recent articles. Drawing upon the theoretical work by Paul Taylor on the typology of international organizations, Nichols points out that the WTO can be best explained as engaging in coordination style of intergovernmental cooperation. See Philip M. Nichols, *Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority*, 28 N.Y.U. J. INT'L L. & POL. 711, 721 (1996).

<sup>105</sup> Applying Taylor's coordination model to the WTO leads Nichols to characterize it "as an organization [that] is legally mandated to create a framework for the regulation of international trade, and will supervise the compliance of members' national policies with this framework." *Id.* It is against this characterization that Nichols poses his question of what issues should be pursued by the WTO. He arrives at four criteria drawn from Taylor's characterization. The criteria are as follows: (1) whether an issue is within the legal jurisdiction of the WTO; (2) whether the issue is substantial; (3) whether the WTO will be able to enforce compliance with any requirements it imposes; and (4) whether the issue requires international coordination by the WTO. See *id.* at 722-40.

<sup>106</sup> While this article does not follow the Nichols' approach his explication of the theory of institutionalism and its relevance to WTO rule-making is quite enlightening and useful. Applied to the issue of whether the WTO should involve itself with labor standards Nichols points out that it should not because the issue of labor standards fails to meet the second and third criteria. If the WTO had supervision of labor rights such a resolution would not significantly increase trade (thus, it is not a substantial issue) and the WTO would have great difficulty enforcing labor rules. See Philip M. Nichols, *Forgotten Linkages—Historical Institutionalism and Sociological Institutionalism and Analysis of the World Trade Organization*, in Symposium, *Linkage as Phenomenon: An Interdisciplinary Approach*, 19 U. PA. J. INT'L ECON. L. 201 (1998).

<sup>107</sup> This article focuses on the recent past during the Uruguay Round because that set of negotiations marked the first time "new" subjects were proposed for the agenda. The focus on history does appear to be in line with historical institutionalism, a theory of international relations. See Nichols, *supra* note 106. In designing his criteria for whether a subject belongs before the WTO, Nichols explains that they are drawn from regime theory and examines the characteristics of the World Trade Organization regime and applies them, but states that the WTO fails to constraints imposed upon the World Trade Organization. *Id.* According to Nichols, attempting such an examination would be an exercise in historical institutionalism. See *id.*

some analysis must be conducted of the steps and the rule-making process itself. The history of past rule-making is not being examined for its predictive value. How trade-related rules were negotiated in the Uruguay Round does not necessarily predict how future linkages can or should be approached. Rather, examining the Uruguay Round experience is necessary because it marked a critical change in the GATT approach to rule-making.

The history of the GATT is replete with illustrations of the institution's expanding legal jurisdiction. The core rules for trade in goods were followed with the Tokyo Round Codes aimed at non-tariff barriers and later with new rules in the Uruguay Round which either recaptured areas of trade never properly disciplined (agriculture and trade in textiles) or left uncovered by the old definition of trade (trade in services).<sup>108</sup> The Uruguay Round broke new ground, however, in the area of rule formation because it first tackled, and subsequently struggled with trade-related areas, particularly in the negotiations over intellectual property rights and investment. The tackling of trade-related issues in the Uruguay Round uncovered in stark detail some of the realities of rule-making as conducted by an institution such as the GATT. First, the GATT was regarded as an institution rooted in its primary mission: the liberalization of trade. For many of the negotiating countries, this history required opposition, or at least hostility towards expanding beyond trade as it was then understood. Second, the GATT was comprised of Contracting Parties with drastically divergent levels of economic development, who were inclined to view any expansions of GATT jurisdiction through the eyes of self-interest.<sup>109</sup> Any expansion of GATT rules to cover trade-related

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<sup>108</sup> See John H. Jackson, *The Uruguay Round and the Launch of the WTO: Significance and Challenge*, in MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY, *supra* note 14, at 5 ("[O]ne of the major Uruguay Round objectives was to extend a GATT-type treaty rule-based discipline to three new subject areas: trade in services, agriculture product trade and intellectual property matters.") Of these three, services and intellectual property were truly new for GATT. GATT had always formally applied to agricultural product trade, but for a variety of reasons agriculture had escaped the GATT discipline.

<sup>109</sup> The best illustration for this is the prolonged fight to bring "new" issues into the Uruguay Round. For discussions of the battles between the developed and developing countries over the content of the agenda, see generally Carlos A. P. Biaga, *The Economics of Intellectual Property Rights and the GATT: A View from the South*, 22 VAND. J. TRANSNAT'L L. 243 (1989); A. Jane Bradley, *Intellectual Property Rights, Investment and Trade in Service in the Uruguay Round: Laying Foundations*, 23 STAN. J. INT'L L. 57 (1987).



rules was bound to come under attack if viewed as clearly in the interest of one set of GATT parties over another. Third, the GATT process of rule-making with its open-ended agenda, accompanied by need to compromise over the scope or discipline of rules, has created a tradition whereby the content of some agreements are influenced by choices allowed in others.<sup>110</sup>

A brief examination of the history of the TRIMS and TRIPS agreements illustrates these points. Both the TRIMS and TRIPS agreements were so named to emphasize the only acceptable linkage: the rules covered in each agreement were "trade-related." Limiting the agreements to issues that were properly related to trade was regarded a necessary precondition to their completion.<sup>111</sup> The rules on trade-related investment measures and trade-related property rights were developed in similar fashions. Each agreement reached the Uruguay Round agenda in the same way. In both cases the United States, acting as the demander in negotiations, pushed for inclusion of each area in the ministerial meeting that launched

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<sup>110</sup> The GATT negotiating process is often described as involving trade-offs between the interests of the negotiating countries. See Frederick M. Abbott, *Commentary: The International Intellectual Property Order Enters the 21st Century*, 29 VAND. J. TRANSNAT'L L. 471 (1996); John H. Jackson, *GATT and the Future of International Trade Institutions*, 18 BROOK. J. INT'L L. 11, 13 (1992).

<sup>111</sup> In the case of the TRIMS negotiations, the United States had been seeking an expansive set of rules while the developing countries viewed such laws "as inimical to their development interests and as a one-sided approach which failed to account for the restrictive business practices of multilateral enterprises." Price & Christy, *supra* note 14, at 448. The investment measures issue actually reached the Uruguay Round agenda only as a compromise and was added to the list of "New Subjects." See Edward M. Graham & Paul R. Krugman, *Trade-Related Investment Measures*, in *COMPLETING THE URUGUAY ROUND* 147, 150 (Jeffrey Schott ed., 1990). Notably, the Ministerial Declaration for the Uruguay Round provided that "following an examination of the operation of GATT Articles related to the trade restrictive and distorting effects of trade measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade." Uruguay Round Ministerial Declaration, *supra* note 14. The declaration had similar language with respect to TRIPS:

In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify existing GATT provisions and elaborate, as appropriate, new rules and disciplines.

*Id.*

the round.<sup>112</sup> Similarly, both agreements provoked sustained resistance at the time and during the negotiations themselves. Both the TRIMS and TRIPS Agreement negotiations were marked and ultimately defined by the gaps between the positions of the developed and developing countries.<sup>113</sup> Initially, the developing countries wanted neither issue in the Uruguay Round, viewing neither set of rules as in their interest. The developing countries strongly argued that the GATT was not the proper institutional home for TRIPS, claiming that only the World Intellectual Property Organization ("WIPO") had jurisdiction.<sup>114</sup> As the negotiations proceeded, the developed and developing countries compromised. The developed countries moved their negotiating objectives on TRIPS and Services ahead of those for TRIMS.<sup>115</sup> TRIMS emerged as the agreement where both sides limited their initial goals.<sup>116</sup>

Although both TRIMS and TRIPS represent exercises in trade-related rule-making and faced similar obstacles, the agreements reached were quite different. The TRIMS Agreement does not represent a complete set of investment rules. Instead, TRIMS achieved only the following: (1) established which core GATT rules prohib-

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<sup>112</sup> See Graham & Krugman, *supra* note 111, at 147-50 (regarding TRIMS); see also Michael P. Ryan, *The Function-Specific and Linkage-Bargain Diplomacy of International Intellectual Property Lawmaking*, in Symposium, *Linkage as Phenomenon: An Interdisciplinary Approach*, 19 U. PA. J. INT'L ECON. L. 201 (1998) (discussing the U.S. business communities' efforts to develop a GATT strategy to move intellectual property rights onto the GATT agenda). The United States also used Section 301 of the Trade Act of 1974 to push trading partners in particular, to adopt "adequate" intellectual property rights and investment legislation. This strategic use of Section 301 was aimed at setting the Uruguay Round agenda. See C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT'L L. 209, 218-37 (1997).

<sup>113</sup> See Price & Christy, *supra* note 14, at 445; see also 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) 2072-119 (on TRIMS) and 2213-75 (on TRIPS) (Terence P. Stewart ed., 1993).

<sup>114</sup> The issue of whether WIPO rather than the GATT was the appropriate institutional home for intellectual property issues was not dropped from discussion during the TRIPS Negotiations until 1989, three years after the Uruguay Round began. See Gail Evans, *Intellectual Property as a Trade Issue—The Making of an Agreement on Trade Related Aspects of Intellectual Property Rights*, 1 WORLD COMPETITION 169 (1994).

<sup>115</sup> See Patrick Low, *Market Access Through Market Presence: A Look at the Issues*, in NEW DIMENSIONS OF MARKET ACCESS IN A GLOBALIZING ECONOMY 49, 55 (OECD, 1995).

<sup>116</sup> See Price & Christy, *supra* note 14, at 451.

ited certain investment measures;<sup>117</sup> (2) provided for the gradual phasing out of the identified non-conforming measures;<sup>118</sup> and (3) committed the WTO Member states to a review and possible amendment of the agreement within a short time.<sup>119</sup> By contrast, the TRIPS Agreement is a comprehensive set of rules that dictates not only minimum international standards for intellectual property rights but also how Member states must align their domestic legislation to achieve these goals.<sup>120</sup> The WTO process for promulgating trade-related rules appears capable of producing limited agreements that reiterate existing concepts (TRIMS) and equally capable of producing innovative agreements (TRIPS) that setting international standards and specify, in a manner never before used in trade agreements, how to guarantee enforcement of those standards.<sup>121</sup>

The history of the TRIMS and TRIPS negotiations and the contents of the resulting agreements suggest that there may be several preconditions for successful trade-related rule-making. The preconditions constitute three levels of consensus that should be reached before trade-related rules can be successfully promulgated. These three levels of consensus do not have to be reached in any

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<sup>117</sup> TRIMS Agreement, *supra* note 4, at art. 2 (noting that member states are supposed to refrain from applying a trade-related investment measure that is inconsistent with the GATT obligations of National Treatment (Art. III), and the Prohibition on Quantitative Restrictions (Art. XI)). An illustrative list of TRIMS that are inconsistent with those obligations was attached as an Annex to the Agreement.

<sup>118</sup> *See id.* art. 5.

<sup>119</sup> *See id.* art. 9 (calling for a review of the operation of the agreement within five years as well as a consideration of whether the agreement should be complemented with provisions on investment policy and competition policy).

<sup>120</sup> *See* TRIPS Agreement, *supra* note 3, at pt. II (covering copyrights, trademarks, geographical indications, industrial designs, patents, lay-out designs of integrated circuits, and protection of undisclosed information in arts. 9-39), and Part III Enforcement of Intellectual Property Rights (arts. 41-60). It was acknowledged that countries had the right to use measures to control anticompetitive practices in contractual licenses. *Id.* art. 40.

<sup>121</sup> The portion of the TRIPS agreement dealing with enforcement provides, for the first time, binding international obligations for the effective enforcement of intellectual property both internally and at the border. The importance of this innovative section of the TRIPS agreement cannot be overstated. It will make domestic legal procedure subject to international dispute settlement, not in the context of establishing an appeals procedure for the domestic courts' individual cases but in ensuring the effective operation of each WTO member's domestic system in enforcing intellectual property rights. *See* John Gero & Kathleen Lannan, *Trade and Innovation Unilateralism v. Multilateralism*, 21 CAN.-U.S. L.J. 81, 91 (1995).

particular order. Practically speaking, it is only after all three levels have been reached that an issue becomes acceptable to the international community as one for trade linkage.

The first consensus is on the core principles that must be vindicated or rights that must be protected. Rule-making must be aware of its subject. To develop rules that will bind and inspire compliance, there needs to be agreement on what problem is being addressed and how best to address it. Illustrations from the TRIMS and TRIPS experience may prove illuminating. One reason why commentators have described the TRIMS Agreement as a failure is because it did not address many of the investment issues raised by the United States and other capital-exporting states as key aspects of investment protection.<sup>122</sup> The history of the negotiations reveals that the limited scope of the TRIMS rules can be traced to the universe of investment rights and protections not being conclusively determined prior to the round.<sup>123</sup> By contrast the TRIPS Negotiating Group had the benefit of a well-defined universe of intellectual property rights as developed by existing international intellectual property agreements and the efforts of WIPO.<sup>124</sup> The TRIPS negotiating group was thereby capable of reaching the issue of what intellectual property rights were and how they should be protected during the first phase of negotiations.<sup>125</sup>

The second consensus that must be achieved is about how the issue or area is linked to trade. No issue has ever been accepted for study by the GATT/WTO, for working group examination, or as an agenda item for a negotiating round unless trade-relatedness was offered as a justification. There is no common understanding of how trade-relatedness must be established.<sup>126</sup> Clearly, if rules have

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<sup>122</sup> See Jonathan Startup, *An Agenda for International Investment*, in *THE NEW WORLD TRADING SYSTEM: READINGS* 189 (OECD ed., 1994); Wong, *supra*, note 9.

<sup>123</sup> See Price & Christy, *supra* note 14, at 455 (comparing the TRIPS experience with that of TRIMS).

<sup>124</sup> See *id.*; see generally Ryan, *supra* note 112 (arguing that the TRIPS Agreement was possible because it built upon the "function-specific" work already done by the intellectual property community, and because linkage-bargain diplomacy was available in the Uruguay Round to facilitate trade-offs).

<sup>125</sup> *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY*, *supra* note 113, at 2265-67; *but see* Ryan, *supra* note 112 (pointing out that it was actually the creation of the Draft Composite Text in 1991 by the chair of the negotiating committee that crystallized the form of the final agreement).

<sup>126</sup> See Nichols, *supra* note 104, at 733-34 (acknowledging that there are "many possible indicia of substantial effect" on trade and that it cannot simply

the capacity for liberalizing or distorting trade, they would be trade-related. The GATT has frequently expanded its jurisdiction to include rules on government practices that act as barriers to trade. The newer subjects proposed for linkage, such as labor and investment rights, however, do not fall neatly into this characterization. In the case of both labor and investment, new rules would provide a standard of treatment for those participating in the creation of tradable goods and services. At best, such rules might facilitate trade. There is precedent for this type of trade-relatedness. By negotiating the TRIPS Agreement, the GATT went beyond focusing on liberalization of trade or barriers to trade.<sup>127</sup> Adopting investment standards would appear to facilitate trade given what is understood about the economic inter-linkage between trade and foreign direct investment.<sup>128</sup> By contrast, the adoption of minimum standards in the area of labor rights may or may not facilitate trade given what is currently known about the economics. Rather, the creation of trade-related labor rules would arguably legitimize trade and make it fair trade.<sup>129</sup> Justifying WTO jurisdiction under

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be limited to a statistical measurement of trade flows; at the macro level, it is possible that there are issues that cannot be depicted through statistical evidence, but whose resolution is critical to international trade governance); see also Leary, *supra* note 7, at 220.

It is argued that only "trade-related" issues, and not issues such as workers' rights, should have a place in trade negotiations (i.e., note the use of the terms "trade-related" intellectual property to justify the inclusion of intellectual property issues in Uruguay Round negotiations). The categorization of "trade-related issues," however, appears to depend on the eyes of the beholder.

<sup>127</sup> See Jeffrey L. Dunoff, *Rethinking International Trade*, in Symposium, *Linkage as Phenomenon: An Interdisciplinary Approach*, 19 U. PENN. J. INT'L ECON. L. 201 (1998) (describing the TRIPS Agreement).

<sup>128</sup> See *supra* Section 1.2.1.1.1. (discussing the relationship between trade and investment).

<sup>129</sup> See Langille, *supra* note 101, at 236 (pointing out the long-held assumption of trade theory, that there is a natural or non-controversial mode of economic ordering and that distortions or perversions of this "normalcy" can be detected, measured and taken into account by trade theory). But this is not the case. This is why the debate over fair trade is so intractable. There is no way for trade policy or its economic principles to be insulated from the political issues at stake. Fair trade is free trade's destiny. That is, once governmental action or non-action in labor policy (for example) is problematized a potential subsidy, then there is not alternative to engaging in the debate about the appropriate scope of market regulation (of labor relations, for example). *Id.*

such a theory of trade-relatedness, however, strikes at the heart of the efficiency model of the trade regime.<sup>130</sup>

The third level of consensus that must be reached for multilateral rule-making concerns how it should be realized and enforced. Multilateral rule-making takes place in an institutional framework and requires institutional oversight and enforcement once the rules are negotiated. Before reaching this consensus, the international community must be convinced that there is a need for cooperation or coordination, and that the issue is best dealt with at the international level.<sup>131</sup> Given the nature and reality of investment and labor, and the current international regime for dealing with both, there is an argument that such international cooperation and coordination is necessary. Assuming that an international solution is required, concrete issues of the proper institution to conduct the rule-making and the proper enforcement mechanism for any rules that might be developed, must be addressed. Selecting an institution (along with its enforcement methods) for rule-making, to a large extent, dictates the form, scope, and content of the international rules. What is less clear is what kind of international cooperation is needed. Does the area present the case for one exclusive jurisdiction by one institution, for shared jurisdiction, or for true collaboration?

## 2.2. *How Investment and Labor Rights Satisfy or Fail to Satisfy the Preconditions for Trade-Related Rule-Making*

### 2.2.1. *First Consensus*

Both investment and labor satisfy, in some fashion, the first consensus by identifying what core rights or principles need to be protected. With regard to investment, there has been an extensive attempt to develop a comprehensive understanding of the rights

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<sup>130</sup> Dunoff reaches this conclusion by indicating that as 'trade and' disputes increase, the efficiency model's welfare for maximizing calculus does not correctly account for these non-economic values. Dunoff, *supra* note 127.

<sup>131</sup> The WTO Secretariat Report on Trade and Investment argues that a lack of rule and policy coherence, both of which exist in the investment regime, pose a "danger to security and stability, which are basic goals of trade and investment agreements." TRADE AND FDI, *supra* note 46, at 44; see also Nichols, *supra* note 104, at 738-40 (setting this out as one of the criteria for judging whether the WTO should have jurisdiction over a subject).

and protections necessary to create a liberal investment regime.<sup>132</sup> The views of the capital exporting states have coalesced around several crucial ideas, building from the earliest international investment agreements, the Friendship, Commerce and Navigation treaties,<sup>133</sup> through the European and American bilateral investment agreements,<sup>134</sup> and into regional efforts, such as the Energy Charter Treaty and the NAFTA investment chapter.<sup>135</sup> First, for a set of international investment rules to be effective, there must be an expansive definition of "investment."<sup>136</sup> Second, the traditional investment problem of discrimination against foreign capital and investments must be addressed.<sup>137</sup> Third, a core of investment rights must be included in any investment regime such as the rights of establishment, and operation. Investment protections,<sup>138</sup> such as a thorough standard for expropriation, adequate compensation, and the right to transfer funds, should be included as well. Whether the capital importing countries share the view that all of these elements are required at all, much less in the form represented by an agreement such as NAFTA, is doubtful. During the Uruguay Round, there was active opposition to such ideas and the MAI negotiations by the OECD have had only limited developing country participation.<sup>139</sup>

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<sup>132</sup> See 1996 WORLD INVESTMENT REPORT, *supra* note 25, at 161-200 (compiling the policy issues (i.e., whether there should be a comprehensive multilateral framework) as well as a surveying all the existing international rules).

<sup>133</sup> See Price & Christy, *supra* note 14, at 440.

<sup>134</sup> See generally KENNETH J. VANDELDELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE (1992); see also 1996 WORLD INVESTMENT REPORT, *supra* note 25, at 134-47 (comparing existing BITs).

<sup>135</sup> The North American Free Trade Agreement, Dec. 8-17, 1992, 32 I.L.M. 605, 639-48 (1993) [hereinafter NAFTA].

<sup>136</sup> Compare Model U.S. Bilateral Investment Treaty, art. 1(b), reproduced in 1 Basic Documents of International Law 655 (Stephen Zamora & Ronald A. Brand eds., 1990), with NAFTA, *supra* note 135, art. 1139.

<sup>137</sup> The non-discrimination issues are addressed by adopting National Treatment and MFN provisions. Most bilateral agreements have both. See TRADE AND FDI, *supra* note 46, at 23. Chapter 11 of NAFTA extends the National Treatment and MFN standards to pre- and post-establishment aspects of an investment. See NAFTA, *supra* note 135, arts. 1102(1), (2), 1103(1), (2).

<sup>138</sup> See 1996 WORLD INVESTMENT REPORT, *supra* note 25, at 189-92.

<sup>139</sup> See Joanna R. Shelton, *Symposium on the MAI* (presented on Oct. 20, 1997), available at *OECD/MAI Symposium in Cairo*, (visited May 7, 1998) at <<http://www.oecd.org/daf/cm/mai/shelton.htm>> (noting that those non-OECD Member states that expressed interest in acceding to the MAI, including

In the case of labor, a review of the recent multilateral discussions and negotiations,<sup>140</sup> as well as scholarly efforts, reveals that a consensus is developing about what constitutes core labor rights.<sup>141</sup> Although different sources exist from which these rights are drawn, such as human rights treaties, domestic legislation with social clauses and ILO Conventions, a small list of rights has increasingly been identified as enumerating core rights. That core list includes: the freedom to associate, the freedom to bargain collectively, the prohibition of forced labor, discrimination in employment, and exploitative forms of child labor.<sup>142</sup> Given the comprehensive nature of what could be described as labor rights, which cover all realities of the workplace from establishment of the basic relationship, to wages, to working conditions and safety, a recognition of this list is a necessary first step towards any contemplated set of internationally mandated labor rights. Not all ILO Member states have yet ratified the conventions which establish these rights; nevertheless, they are among the most ratified.<sup>143</sup> The core list has grown from a recognition that there is a minimum level of labor standards. The freedoms to associate and to bargain collectively are seen as the necessary procedural rights for the labor force.<sup>144</sup> Without the right to meet and discuss common issues and concerns and gain leverage in establishing the terms of employment with management, workers will be without the ability to influence labor standards. The prohibition of forced labor is necessary to enshrine properly the worker's right to choose his work.<sup>145</sup> The prohibition of discrimination limits the ability of employers and governments to treat workers differently on the basis of some characteristic unrelated to

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Argentina, Brazil, Chile, Hong Kong, China and Slovakia, were invited to become observers in the Negotiating Group).

<sup>140</sup> See *supra* notes 7 and 11 concerning recent efforts by the ILO Governing Body regarding core labor rights.

<sup>141</sup> See Langille, *supra* note 7; OECD STUDY, *supra* note 44. However, there is no universal agreement. See generally Leary, *supra* note 26 (arguing for a shorter list); R. Michael Gadbaw & Michael T. Medwig, *Multinational Enterprises and International Labor Standards: Which Way for Development and Jobs*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 141, 153 (Lance A. Compa & Stephen F. Diamond eds., 1996) (arguing for a different set of rights altogether).

<sup>142</sup> See *supra* notes 69-78 and accompanying text.

<sup>143</sup> See OECD STUDY, *supra* note 44, at 33-36.

<sup>144</sup> Langille, *supra* note 7, at 32.

<sup>145</sup> See *supra* notes 69-78 and accompanying notes.



their abilities.<sup>146</sup> The prohibition of exploitative child labor is aimed at restricting, if not curtailing, child labor either by establishing minimum standards or by limiting any activity that resembles forced labor.<sup>147</sup>

### 2.2.2. *Second Consensus*

With regard to developing the second consensus, investment and labor differ significantly on how an issue relates to trade. There is a growing consensus on the economics of trade linkage for investment, as witnessed by studies and the numerous attempts to create trade-related investment rules.<sup>148</sup> Nevertheless, the international community has not yet been able to agree upon the need for, or the content of a truly international investment regime. The political reality of the GATT and its manifestation in the Uruguay Round produced limited or structurally-flawed trade related rules, such as the TRIMS Agreement and the GATS, respectively.<sup>149</sup> Despite these flawed attempts to create some type of trade-related investment regime, the WTO has not abandoned the field. During the Singapore Ministerial, the member states agreed to establish a Working Party on Trade and Investment. The WTO Secretariat also issued its report on Trade and Investment. Although the Working Party has begun its work, which focuses not only on trade-relatedness (i.e., the economics of investment and trade) but also noticeably on the relationship between trade and investment and development, its agenda suggests a lengthy process focusing on educating Member states about investment and its ramifications. Conspicuously absent from the current goals of the Working Party is any mission to modify TRIMS or the promulgate new trade-related investment rules.

Regionally, the OECD has moved ahead of the WTO by working towards the MAI. Given its membership, the OECD is sensitive about the relationship between the MAI and the WTO's trade-related investment rules. Consequently, the OECD Member states

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<sup>146</sup> *Id.*

<sup>147</sup> See generally Diller & Levy, *supra* note 78.

<sup>148</sup> See generally TRADE AND FDI, *supra* note 46, at 23-37.

<sup>149</sup> For a discussion of the limits of TRIMS, see *supra* notes 111-47 and accompanying text. For a discussion of the GATS limitations see generally Hoekman, *supra* note 9 at 177-83; Richard B. Self, *General Agreement on Trade in Services, in THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY*, *supra* note 14, at 523.

have acknowledged that the OECD must work with the WTO, and has formulated MAI obligations which are consistent with the WTO rules.<sup>150</sup>

By contrast, there is no consensus on how labor rights relate to trade. Those favoring linkage and those opposing it disagree regarding the economics of the linkage of labor rights to trade.<sup>151</sup> Moreover, these groups also disagree about the value and utility of international trade-related rule-making in this area.

### 2.2.3. *Third Consensus*

Investment and labor also differ regarding the third consensus. They differ on how international rule-making regarding each area should be realized and enforced. With regard to both areas, the WTO now has a limited or non-existent role despite suggestions that it should be the rule-making institution.<sup>152</sup> The WTO commands this attention because it is currently regarded as a competent and powerful institution. The Uruguay Round succeeded in replacing the GATT with a membership organization that required states to adopt an expansive set of legal commitments and to submit to what is perceived to be an effective dispute settlement system. Given its already extensive jurisdiction and mandate to promulgate additional rules, the WTO is competent to negotiate new trade-related rules.<sup>153</sup> Moreover, the WTO's Dispute Settlement Understanding is equipped with the most effective method for enforcing its obligations,<sup>154</sup> which is an adjudicative dispute settlement system<sup>155</sup> backed by the power to authorize trade sanctions.<sup>156</sup> Despite or because of these institutional attributes, however, the

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<sup>150</sup> See *infra* Section 3.1. for a discussion of the MAI design and core principles.

<sup>151</sup> See Srinivasan, *supra* note 44; Van Liemt, *supra* note 101.

<sup>152</sup> See *supra* note 11 and accompanying notes.

<sup>153</sup> See Nichols, *supra* note 104, at 727-28.

<sup>154</sup> See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multinational Trade Negotiations, Annex 2, app. 1, in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 404 (1994) [hereinafter Dispute Settlement Understanding].

<sup>155</sup> See Taylor, *supra* note 112, at 242-49, 296 & n.399 (listing all the major discussions of the adjudicative nature of the DSU System).

<sup>156</sup> See Dispute Settlement Understanding, *supra* note 154, at art. 22 (recognizing that the Dispute Settlement Understanding authorizes sanctions only if the offending party in a WTO dispute fails to withdraw the non-conforming measure pointed out by a WTO panel report). *Id.* art. 22.3.

WTO may never be the institution to promulgate comprehensive international rules on investment or labor rights. In the investment area, it is clear that the WTO has jurisdiction because it has investment and investment related agreements. The WTO, however, will not be the first institution to complete a set of international investment rules. Instead, it appears that the OECD, if it does finish the now delayed negotiations, will promulgate such an agreement.<sup>157</sup> Certain consequences flow from this institutional choice. The OECD, as an institution comprised of similarly situated countries, is developing a MAI that represents its members views rather than the compromise of competing visions that marks a WTO agreement. The OECD also has freedom regarding the form of the agreement (a free standing treaty) and how to enforce its obligations (through the state to state methods, as well as private investor versus state methods). This is not available to the WTO unless it adopts several alterations to its current structure<sup>158</sup> and focus.<sup>159</sup>

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<sup>157</sup> As noted earlier, the WTO Working Party on Trade and Investment lacks any mandate beyond reviewing the linkage issue. The WTO would move ahead of the OECD only if the MAI is never completed, which is a prospect that currently seems unlikely.

<sup>158</sup> In the current structure of the WTO, all Member states are subject to all major obligations. This in turn means that any violation of a WTO obligation, whether it is a GATT 1994, TRIPS, TRIMS or GATS obligation, is subject to the Dispute Settlement Understanding ("DSU"). Because the DSU was established for sovereign-sovereign complaints only, the WTO would have to alter the structure of the DSU to offer an additional type of dispute settlement for investment disputes if the investor-state disputes are to be kept directly under WTO supervision. See Edward M. Graham, *Direct Investment and the Future of the World Trade Organization*, in *THE WORLD TRADING SYSTEM: CHALLENGES AHEAD* 205, 212 (1996) (suggesting alternative ways to establish standing for investors).

Changing the structure of the DSU in such a fashion, however, raises the issue of why investment disputes should be treated differently than other trade and trade-related disputes. The answer that the rights of an individual investor are involved is not sufficient because the rights of individual holders of intellectual property rights are implicated by the TRIPS Agreement, as are those of service suppliers in the GATS, and yet they lack access to the DSU System. Private party-sovereign investment disputes can be characterized as contract disputes. Such a characterization would differentiate them from intellectual property rights which are benefits conferred by a state. Of course, the other option would be to allow such disputes to be handled through ICSID Arbitration or *ad hoc* arbitration and not give the WTO true jurisdiction. See *id.* (noting that a U.S. position on the efforts is needed by the WTO).

<sup>159</sup> The expansion of the WTO to allow for private parties to have access is a controversial idea, even if it is potentially meritorious. See Andrea K. Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, in Symposium, *Linkage as Phenomenon: An Interdisciplinary Ap-*

The completion of the MAI as a free standing treaty will, if it can gain membership outside the OECD itself, provide two international institutions with overlapping competence regarding investment rules. Whether and how the two institutions can coordinate their efforts to implement and enforce the rules will become major issues. Ultimately, this dual competence could lead to a WTO decision to adopt the MAI as a beginning, even if not as a basis for its own Trade-related Investment Agreement.

In the labor rights area it is fairly clear that the WTO has no role to play in the short term. The Singapore Ministerial Declaration effectively assigned jurisdiction over labor rights to the ILO. The ILO now has to grapple with having the issue of trade linkage returned to it. Initial moves towards expanding the ILO power further to monitor labor rights protection were stymied in the 1997 International Labor Conference. However, in November, the Governing Body of the ILO agreed to allow a director-general led effort to increase ILO powers regarding core labor rights to be put on the agenda for the 1998 International Labor Conference.<sup>160</sup> For the near future, labor rights advocates will have to see if the ILO can better protect fundamental labor rights. If that organization fails to address the issue in some way, it is likely that pressure to move labor rights onto the WTO agenda, at least from the United States, will not cease.<sup>161</sup>

### 3. TRANSFORMING EXISTING AND PROPOSED RULES INTO TRADE-RELATED RULES

#### 3.1. *Trade and Investment*

Different models for an investment regime exist, including the bilateral investment agreements, APEC guidelines,<sup>162</sup> the existing

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*proach*, 19 U. PENN. J. INT'L ECON. L. 201 (1998) (arguing that private access would bring a level of legitimacy to WTO dispute settlement).

<sup>160</sup> See *Singapore Minister Urges*, *supra* note 10.

<sup>161</sup> *Id.*

<sup>162</sup> The Asian Pacific Economic Cooperation forum issued Non-Binding Investment Principles in November 1994 that dealt with, among other things, transparency, national treatment, investment incentives, performance requirements, expropriation and compensation standards, repatriation of funds (and its convertibility) and dispute settlement. See TRADE AND FDI, *supra* note 46, at 29.

OECD codes,<sup>163</sup> NAFTA,<sup>164</sup> and the TRIMS<sup>165</sup> and GATS<sup>166</sup> Agreements. During the MAI drafting process, all of these models were reviewed and studied for common principles and design. The MAI is not completely based on any of these models. In most cases, there were limitations as to the scope of the agreement (either in the definitions or number of commitments) or with their enforcement mechanism.<sup>167</sup> Nevertheless, it is fairly clear that the MAI has been strongly influenced by its models. The most obvious models appear to be the GATT (and the GATS) for structure<sup>168</sup> and NAFTA, Chapter 11 for substance and enforcement mechanism.<sup>169</sup>

In many ways the MAI resembles the GATT and the GATS—the framework agreements of the WTO. A framework agreement for trade rules is one which sets out core general principles (subject to some general and other specific exceptions) and a process for achieving the ultimate goals of the agreement. The trade framework agreements contemplate progress over time with each new negotiating round reaching and fixing a new level of commitments. In the case of the GATT 1947, the core principles were the Most Favored Nation<sup>170</sup> and National Treatment Provisions<sup>171</sup> and the process was contained in the article on Tariff

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<sup>163</sup> OECD Code on the Liberalization of Capital Movements and the OECD Code of Liberalization of Current Invisible Operations. For a survey of these Codes, see OECD, INTRODUCTION TO THE CODES OF LIBERALIZATION (PARIS, 1987).

<sup>164</sup> See NAFTA, *supra* note 135.

<sup>165</sup> See TRIMS Agreement, *supra* note 4.

<sup>166</sup> See GATS, *supra* note 14.

<sup>167</sup> See the analysis of these models in TRADE AND FDI, *supra* note 46, at 25-28.

<sup>168</sup> The GATT and GATS are framework agreements. *See id.* at 35.

Like the GATT before it, the GATS is a framework designed to permit the progressive liberalization of trade in services through further negotiations. Indeed, the GATS contains a built-in commitment in Article XIX to continue to negotiate liberalization through successive rounds of negotiations with the first such negotiation scheduled to begin no later than the year 2000, and to continue periodically afterwards.

<sup>169</sup> The scope of the MAI, its provision on performance requirements, and its adoption of the two forms of dispute settlement appear to be heavily patterned after similar NAFTA provisions.

<sup>170</sup> GATT, *supra* note 2, at art. I.

<sup>171</sup> *Id.* art. III.

Binding.<sup>172</sup> The framework format has proven remarkably workable for eliminating tariffs and other barriers to trade. In fact, the success of the GATT in lowering tariff barriers ultimately revealed other barriers to trade and subsequently led countries to push for other agreements to deal with areas that the framework did not cover but which clearly impacted on trade, the non-tariff barriers.

During the Uruguay Round, the GATS was also designed, using the GATT model as a basis, as a framework agreement. The GATS has one general principle,<sup>173</sup> scheduled service sector commitments<sup>174</sup> and a commitment to progressive liberalization.<sup>175</sup> Designing an agreement for trade in services as a framework agreement, however, created several problems. The contracting parties were not able to adopt completely either MFN or National Treatment. In addition, the services schedules submitted by many countries were considered to be so inadequate by others that later, sector specific negotiations were required.<sup>176</sup> These departures from the GATT model have led many to view the GATS as structurally flawed. The struggle to fit services trade

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<sup>172</sup> Article II was conceived as a device for getting the contracting parties to liberalize trade by conducting an ongoing process of negotiations to lower worldwide tariffs. For this process to work the contracting parties had to negotiate over levels of tariff reduction, submit country-specific schedules which illustrated those commitments, and commit to bind (or keep in place) those tariffs or tariffs of comparable amount. Crucial to the concept of binding is that the countries agreed both to a standstill, not increasing tariffs (unless an exception applied), as well progressive liberalization of tariff commitments. See *id.* art. II.

<sup>173</sup> GATS, *supra* note 14, at art. II (Most-Favored-Nation). Although the GATS does have MFN as a core principle, it is subject to exemptions contained in an Annex to the agreement. Moreover, unlike the GATT, the Uruguay Round negotiators did not establish national treatment as a general principle. Instead, it falls under the section on specific commitments by Member states, which means that limitations might be placed on the principles for any service sector for which a committee is made. See *id.* art. XVII.

<sup>174</sup> *Id.* arts. XVI, XVII, XVIII.

<sup>175</sup> *Id.* art. XIX.

<sup>176</sup> See Self, *supra* note 149, at 546-50 (briefly discussing the extended negotiations required for financial services, and basic telecommunications). In addition, there was dissatisfaction with the "positive list" approach taken for scheduling commitments. Under this method, countries only scheduled the sectors they were willing to liberalize and, subsequently, limits were placed on those liberalization commitments. Any sector left off a schedule was not open to liberalization.

into such a model could raise some issues about the MAI attempt at a framework investment agreement.

The MAI legal rules and obligations<sup>177</sup> are contained in the following parts of the treaty: Section I is a lengthy preamble which sets out the goals of the treaty; Section II sets out the scope and application, which defines investor, investment and the geographical scope of application; Section III addresses the treatment of investors and investments, which lists the core principles of national treatment, MFN and transparency<sup>178</sup> and other investor rights<sup>179</sup>; Section IV discusses investor protection; Section V deals with dispute settlement; Section VI codifies exceptions and safeguards; Section VII is the financial services provision, which is a carve out chapter which creates special rules for this type of investment; Section VIII deals with taxation; and Section IX articulates country specific exceptions, which will ultimately be comprised of the schedules of each signatory when negotiations are finished.

The core concepts regarding the treatment of investors and investments are National Treatment and Most Favored Nation.<sup>180</sup> Aside from the use of the legal term of art, these two MAI provisions are worded exactly the same as one another. The general principles of the MAI are, therefore, the same as those of the GATT. Legal terms that focus on non-discrimination such as national treatment and Most Favored Nation, however, take on different meaning when aligned to the specific goals of a commercial agreement. In the trading regime, the crucial form of non-

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<sup>177</sup> Other portions of the MAI are devoted to the Relationship to other International Agreements (Section X), Implementation and Operation (Section XI), and Final Provisions (Section XII).

<sup>178</sup> The MAI, like newer trade agreements, has raised transparency to the level of core principles.

<sup>179</sup> Other investor rights specified by the MAI include temporary entry for investors, a prohibition of nationality restrictions for executives, managers, officers and board members, prohibitions on performance requirements. See *MAI Negotiating Text*, *supra* note 8, at Section III.

<sup>180</sup> The National Treatment provision is as follows:

Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords (in like circumstances) to its own investors and their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments.

*Id.*

discrimination is between trading partners. As a result, MFN is the cornerstone of the GATT. By contrast, in an investment agreement, the most common discrimination is against outside investors or investments. Consequently, the most important concept in the MAI is National Treatment. Using these concepts to explain how investment and investors must be treated, however, necessarily involves specifying some level of investment rights. In the MAI, the two general principles are linked to the broadest possible scope of investment rights.<sup>181</sup> Investors are given rights to establish, acquire, expand, operate, manage, maintain, use, enjoy, sell, or otherwise dispose of investments in a fashion no less favorable than that of a country's nationals or any other country's citizens.<sup>182</sup> Investors and investments are also to be entitled to the better national treatment or MFN.<sup>183</sup> This latter provision is important since any derogation from national treatment would still provide the investor with the same treatment offered to other outsiders.

Given the breadth of rights established by the national treatment and MFN provisions of the MAI, they cannot be viewed in isolation from the list of country-specific exceptions. The MAI employs the negative list approach for the exceptions schedules where any exceptions that a country plans to take must be scheduled.<sup>184</sup> In its current form, the MAI has opted for strong general principles and many exceptions.<sup>185</sup> The list of country-specific

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<sup>181</sup> The MAI text recognizes that true national treatment is not possible in some areas, such as financial services and taxation, and so it has taken a carve-out approach with respect to these concepts. See *MAI Negotiating Text*, *supra* note 8, at Sections VII-Financial Services and VIII-Taxation. See also OECD, *MAI Briefing for non-OECD Countries: Scope of the MAI* (Sept. 17, 1997) (presentation by Xavier Musca, Treasury Directorate, Ministry for the Economy and Finance, France) <<http://www.oecd.org/daf/cmism/mai/musca.htm>> ("Total and unconditional liberalism of international investment could lead to economic destabilization and would have been counterproductive. The MAI negotiators thus established limits to its scope of application.")

<sup>182</sup> *Id.* The scope of the MAI, therefore, gives investors and investments pre- and post-establishment rights.

<sup>183</sup> See *id.* Each Contracting Party shall accord to investors of another Party and to their investments the better of the treatment required by Articles 1.1 (National Treatment) and 1.2 (MFN), whichever is the more favorable to those investors or investments. See *id.*

<sup>184</sup> This is in contrast to the GATS positive list approach that had been heavily criticized. See Hoekman, *supra* note 9.

<sup>185</sup> See Sol Picciotto, Linkage in International Investment Regulation and the Multilateral Agreement on Investment, presented at the Linkage as Phe-



exceptions still being negotiated is several times the size of the treaty itself. Negotiations slowed over the need for OECD states to find acceptable levels of country-specific exceptions, as well as to determine what the other general exceptions<sup>186</sup> will be allowed, and their form. Even more controversial has been the fight over whether there will be exceptions for such things, such as ones for regional economic integration arrangements<sup>187</sup> and cultural industries.<sup>188</sup>

Extensive exception scheduling, as well as carve-outs, are also necessary given what unconditional national treatment would mean in the investment context. Investment measures tend to be internal. Some, but not all, of a country's rules that limit or restrict investment are designed to discriminate. Other measures are aimed at ensuring the proper functioning of the market, the economic security of the country, or efforts by governments to achieve certain industrial policy goals.<sup>189</sup> True national treatment would mean treating outside investors no less favorably than nationals, but for the purpose of some of such rules and regulations, differentiation in treatment is necessary.

The country-specific exceptions schedules also play a role beyond limiting the reach of the national treatment and MFN obligations. The schedules will serve as the framework for how future liberalization will take place. The MAI, as drafted, allows countries to grandfather-in existing non-conforming measures, or any amendments to them that do not increase the non-conformity

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nomenon: An Interdisciplinary Approach symposium sponsored by the American Society of International Law ("ASIL") (1997).

<sup>186</sup> The current proposal for General Exceptions in Section VI has only been proposed for discussion by the Chairman. *MAI Negotiating Text*, *supra* note 8.

<sup>187</sup> Two different proposals have been submitted on Regional Economic Integration Organizations. Neither is included in the draft text at this point. *See id.*

<sup>188</sup> *See id.* There is one proposal for an Exception Clause for Cultural Industries. It also has not been included in the draft text to date. *See also Investment Talks Continue at OECD; MAI Now on Course for 1999 Completion*, 15 INT'L TRADE REP. 525 [hereinafter *Investment Talks*] (describing this impasse over the cultural industries and regional integration exceptions).

<sup>189</sup> *See Graham, supra* note 158, at 210 & n.10 (noting that none of the countries of the OECD, which is certainly the group with the most liberal investment regimes, grant "full national treatment to all foreign controlled firms in all industries").

of the measure.<sup>190</sup> A decision has been unreached as to whether to keep this as a standstill measure<sup>191</sup> that does not allow new non-conforming measures to be issued by countries once the MAI goes into effect. If there is standstill, then the next issue would logically be rollback, an indicator of how the exceptions list would shrink over time as countries adjust to the new liberalized investment regime. The MAI currently has chosen a method for rollback which requires countries to list any commitment to future liberalization on the exceptions schedule itself.<sup>192</sup> Conducting rollback in this manner means that any commitments to reduce and eliminate non-conforming measures would be made at the time the MAI goes into force. In this respect, the current MAI draft does not have one element of a GATT/WTO framework agreement: the commitment to later rounds of negotiations concerning future liberalization. The MAI, as drafted, has no provisions for successive rounds of negotiations, or for monitoring of signatories' compliance.<sup>193</sup>

Beyond the breadth issue, the MAI differs from the existing WTO agreements on investment in two ways that are bound to affect its consideration as a potential model for a comprehensive WTO investment agreement. The MAI covers not only the liberalization of investment rules, but also investment protection. These provisions and the method used to ensure them in some ways appear to put the interests of investors in a privileged position. The content of the provision on expropriation and adequate

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<sup>190</sup> MAI *Negotiating Text*, *supra* note 8, at Section IX, A, which contains the following provision:

a. Articles X (National Treatment), Y (Most Favored Nation Treatment), [Article 2, . . . and Article . . . ] do not apply to:

(a) any existing non-conforming measure as set out by a contracting Party in its Schedule to Annex A of the Agreement, to the extent that the measure is maintained, continued or promptly reserved in its legal system.

<sup>191</sup> The draft text reveals that the negotiators are still considering whether to allow new non-conforming measures to be introduced after the MAI comes into force. *See id.*, at X, (B) and (C). According to an explanatory note for this, there are two views. "[O]ne view is that such a provision might undermine the MAI disciplines to which it applied. The other view is that Part B would make it easier to preserve high standards in the disciplines of the agreement by allowing flexibility to countries in lodging their exceptions." *Id.*

<sup>192</sup> *See id.* at X, Annex A, 1.

<sup>193</sup> These are the other methods that were discussed by the negotiating group. *See MAI Commentary* (on file with author).

compensation closely resembles the high standard set in NAFTA,<sup>194</sup> as does the provision on free transfer of funds.<sup>195</sup> Moreover, the MAI drafters have specified two methods for dispute resolution which are traditional state to state procedure, and the more controversial investor versus host state arbitration. While there is precedent for the investor/state dispute in bilateral investment agreements and NAFTA, including such a method in the WTO might require extensive readjustment of that institution's traditions regarding dispute settlement.

### 3.2. *Trade and Labor*

To date, there have been only proposals about how to create trade-related labor rules. This section of the article will therefore concentrate on explaining the three existing proposals, and offering one new one. This analysis is not offered as a prescription for what should be done or considered. Rather, attempting to set out what labor rights rules might look like seems necessary for revealing their amenability to trade-related rule-making. All of the proposals have limitations that arise either from the nature of labor rights themselves or from the institutional efforts that would be required to negotiate and enforce such rules. The proposals will be discussed in order of least complex (although not necessarily the least feasible) to most complex.

The first proposal, espoused by Steve Charnovitz, is to expand ILO competence to include the power to authorize trade controls. Charnovitz argues that the ILO organic act, the Treaty of Ver-

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<sup>194</sup> Compare NAFTA, *supra* note 135, at art. 1110, with MAI *Negotiating Text*, *supra* note 8, at IV.2. Both require that expropriation be direct or indirect or be by a measure having an equivalent effect. In addition, both give the same exceptions of public purpose and non-discriminating basis, in accordance with due process and accompanied by adequate compensation. The only major element of the expropriation and compensation section that does not match NAFTA's is that there is currently no valuation criteria specified for the MAI's fair market value ("FMV") provision. Most of the countries did not want the kind of explicit options set out in NAFTA. However, in order to avoid possible uncertainty about the definitions of FMV, the Negotiating Group chairman has suggested that an interpretive note could be added so that "in the case of undue delay in the payment of compensation on the part of a Contracting Party, any exchange rate loss arising from this delay should be borne by the host country." MAI *Negotiating Text*, *supra* note 8, at n.2.

<sup>195</sup> Compare NAFTA, *supra* note 133, at art. 1109, with MAI *Negotiating Text*, *supra* note 8, at IV.4.

sailles,<sup>196</sup> interpretations of it<sup>197</sup> and the history of several ILO conventions<sup>198</sup> suggest that such power could be available. Charnovitz goes on to suggest that if the ILO were to claim such competence, it could focus on drafting at least one new convention on forced labor that committed states not to trade in products made in violation of the convention.<sup>199</sup> Charnovitz argues that his suggestion is for trade controls on odious products, particularly if pre-approved by the ILO, rather than trade sanctions.<sup>200</sup>

Several limitations exist with regard to this proposal. First, the ILO membership would have to approve any such expansion of its powers. Given the ILO history on trade-related rights to date, this seems unlikely.<sup>201</sup> Second, even if politically feasible, a system of trade controls, such as a total ban on the odious products, would be a trade measure subject to WTO scrutiny.<sup>202</sup>

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<sup>196</sup> See Treaty of Versailles, *supra* note 1, at art. 405. The treaty contains no limits for the scope of ILO Conventions.

<sup>197</sup> See Charnovitz, *supra* note 26, at 160-61.

<sup>198</sup> See *id.* at 161-62.

<sup>199</sup> See *id.* at 162.

<sup>200</sup> See *id.*

<sup>201</sup> There have already been sharp objections to Director General-Hansenne's proposal that the ILO adopt a declaration of principle identifying core labor rights and a follow-up mechanism to review Member State compliance. See *supra* note 10.

<sup>202</sup> A trade ban would qualify as a quantitative restriction under Art. XI of the GATT. While it is true that a country could unilaterally deploy such a measure, there is always the possibility of a response by the target country. None of the GATT's general exemptions would provide a defense if the target country took its case to the WTO's Dispute Settlement Body. The only Article XX exception that deals with labor is (e), which allows a country to take measures relating to the products of prison labor. While an analogy can be drawn to prison labor from some core rights, for example, forced labor or exploitative child labor, that would not necessarily mean that the state using the ban would prevail. The GATT general exceptions have been construed strictly. See generally Jan Klabbers, *Jurisprudence of International Trade Law: Article XX of GATT*, 26 J. WORLD TRADE L. 63 (1992). It is, therefore, far from clear that any reasoning from analogy would be accepted when the wording of Article XX(e) itself is precise. A recent interpretation of Article XX by the first WTO Appellate Body panel report also gives another reason to avoid relying upon Art. XX as a defense. In the *Reformulated Gas* case, the panel found a measure that fit a XX exception to be unavailable because it failed the test of the article's chapeau which states that:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in goods, nothing in this Agreement shall be con-

Third, the argument assumes that the issue of trade-relatedness has been resolved in favor of those pushing labor rights. As established earlier, there is no consensus on whether labor rights are related to trade. Finally, this proposal would be of true value in protecting labor rights only if it covered all core labor rights. In that instance, the ILO would have to consider redrafting all of the conventions dealing with the core labor rights to equip them with this power. Moreover, this proposal would require either monitoring by the ILO<sup>203</sup> or an expansion of the ILO's system for reviewing complaints about Freedom of Association.<sup>204</sup>

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strued to prevent the adoption or enforcement by any number of measures.

United States—Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 603 (1996).

This suggests that even if an art. XX defense is available, a country must make efforts not to discriminate in how it applies a measure. For the purposes of Charnovitz's proposal, that would mean that there would have to be some method for verifying all trading countries that used forced labor so as to apply the ban appropriately.

<sup>203</sup> In this light, it is interesting to note the ILO's decision to consider at this year's International Labor Conference setting up a "follow-up" mechanism to check whether countries are providing the core labor rights. See *supra* note 10. It is not clear whether this would actually be monitoring by the ILO, it may be a complaint procedure. See *infra* note 204.

<sup>204</sup> There is reason to believe that the proposed follow-up supervision, currently being proposed by Director-General Hansenne, is based on his 1997 report suggestion that the Freedom of Association process be expanded. If a declaration of principles establishing core labor rights was adopted, which required that all ILO Member states had to adhere to the rights as a membership obligation, then review could be done as it is under the Freedom of Association process.

[U]nder this special procedure, governments or workers' and employers' organizations may submit complaints concerning violations of trade union rights by States, irrespective of whether or not they have ratified the Conventions on freedom of association. These complaints are examined by the Committee on Freedom of Association, a tripartite body of the Governing Body with an independent Chairperson. The Committee carries out a preliminary examination of the complaints taking into account the observations submitted by the governments. It may recommend to the Governing Body, as appropriate: that a case requires no further examination; that it should draw the attention of the government concerned to the problems that have been identified and invite it to resolve them; or attempt to obtain the agreement of the government concerned for the case to be referred to the Fact-Finding and Conciliation Commission, which would be a much more cumbersome procedure which is used sparingly.

1997 Director-General Report, *supra* note 7, at 9.

The second proposal, suggested by one country,<sup>205</sup> various scholars,<sup>206</sup> and international labor unions,<sup>207</sup> has been to establish a collaborative ILO/WTO process. Not all of the proposals are exactly the same. What follows is a summary of the major elements of the proposals. The first ILO/WTO collaboration proposal would involve the ILO and WTO acting together as the screening body for complaints about violations of core labor rights. If the complaint process used by the ILO/WTO Joint Advisory Committee leads to the conclusion that there were violations, the Joint Advisory Committee would ultimately<sup>208</sup> make recommendations to the WTO Council for consideration of possible trade measures. A second variation on this scheme, sug-

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Director-General Hansenne believes that such a procedure could be effective. In describing the Freedom of Association process, he notes the following:

Since it was set up in 1951, the Committee has examined more than 1,900 cases, which has enabled it to build up a very full body of principles on freedom of association and collective bargaining, based on the provisions of the ILO Constitution and the relevant Conventions, Recommendations and resolutions, and to take action which, even in the eyes of the outside world, is considered "reasonably effective."

*Id.*

Even if the Freedom of Association process were expanded to cover core rights by the ILO, it would not actually provide a way of verifying, for the purposes of applying a trade ban, which countries were not in compliance. This kind of process relies on parties submitting complaints rather than monitoring. See OECD STUDY, *supra* note 44, at 158-60, which contains the following criticisms of the ILO Freedom of Association process: (1) since the system is complaint driven, it does not reach countries where unions have no power to complain; (2) the Freedom of Association Committee does not properly distinguish between major and minor problems; and (3) even if the Committee makes findings, it does not publicize them widely.

<sup>205</sup> France suggested such a possibility in 1996. See Paul Waer, *Social Clauses in International Trade*, 30 J. WORLD TRADE 25, 33 (1996).

<sup>206</sup> See Daniel S. Ehrenberg, *From Intention to Action: An ILO-GATT/WTO Enforcement Regime in International Labor Rights*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 163 (Lance A. Compa & Stephen F. Diamond eds., 1996); Leary, *supra* note 7, at 192-97, 202.

<sup>207</sup> See Leary, *supra* note 7, at 202-03 (describing the proposal by the International Confederation of Free Trade Unions ("ICFTU"), the World Confederation of Labour ("WCL"), and the European Trade Union Conference ("ETUC")).

<sup>208</sup> The labor union proposal does not contemplate that trade sanctions would be the first response. Instead, if violations were found, the Joint Advisory Committee would be charged with recommending measures to be taken within a certain time frame. Only if the country failed to take action would trade sanctions be applied. *Id.* (quoting the ICFTU, WCL and ETUC proposal).

gested by a 1995 ILO Working Paper on "The Social Dimensions of World Trade,"<sup>209</sup> argues that adhering to core labor rights could be adopted as membership requirements for the WTO. If a WTO member then violated these rights it would be subject to dispute settlement under Art. XXIII of the GATT under the concept of nullification and impairment.<sup>210</sup> A third variation on the collaborative idea is based on using the WTO's Dispute Settlement Understanding ("DSU"). Under this proposal, the ILO would accept complaints (by an ILO or WTO member state or an employers' or workers' association from such a state) about "a pattern of gross and persistent practices of labor rights violations."<sup>211</sup> A joint ILO/WTO committee would then decide on the admissibility of complaints. If found admissible, a complaint would then be submitted to a joint ILO/WTO Dispute Panel which would issue a report. As a final step, an offending state would become subject to an ILO remediation committee established to determine what corrective measures should be taken, a timetable for the state's response and a timetable for possible sanctions if the state did not comply.<sup>212</sup>

Most, if not all, of these proposals are based on the assumptions that there is a clearly established universe of core labor rights, that there is a consensus on whether labor rights are related enough to trade to command WTO participation, and that ILO and WTO collaboration is politically achievable or practically feasible. As this article suggests, the first two assumptions are far from clear. With regard to ILO/WTO collaboration for such an effort to occur, there would have to be a major shift in the GATT/WTO tradition of standing alone. Although the Uruguay Round ended with suggestions that the WTO coordi-

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<sup>209</sup> See *supra* note 7.

<sup>210</sup> See GATT, *supra* note 2, at art. XXIII, 1(a); see also Leary, *supra* note 7, at 194-96. Actually, this is one of the three proposals suggested by the Social Dimensions Report. The other two proposals (1) making low labor standards a subsidy under GATT article XVI; or (2) extending GATT article XX on general exceptions to cover labor rights, were considered ill-founded. Both were objected to because either would allow a WTO Member to make a unilateral determination of when to take action against a trading partner. See Leary, *supra* note 7, at 202.

<sup>211</sup> *Id.* at 167.

<sup>212</sup> See Ehrenberg, *supra* note 206, at 167-75. Ehrenberg's proposal for ILO/WTO collaboration tracks all of the major aspects of the DSU System, including panel reports, negative consensus, and appeal (only this is to the ICJ instead of the Appellate Body).

nate with other international organizations, the WTO has not yet done much in this respect.

The two other proposals would give jurisdiction to the WTO rather than the ILO. One possibility would be for the WTO to adopt a list of core rights as general exceptions to GATT obligations. This would require amending Article XX so that products made in violation of core labor rights were treated like products made from prison labor. Another possibility would be the promulgation of a WTO Trade-Related Labor Rights ("TRLR") Agreement linked to trade in goods.<sup>213</sup> Assuming that any such agreement is *ever* politically possible, it would focus on establishing the minimum labor standards necessary for fair trade. There is a model for such a treaty in the TRIPS Agreement.<sup>214</sup> Any TRLR Agreement would have to have a section on minimum standards, which are based upon core labor rights around which a consensus appears to exist, as well as a section on domestic enforcement measures. A TRLR Agreement could be made subject to the existing DSU, as was the TRIPS Agreement. However, in this instance, there is a serious problem created by only states having access to dispute settlement. Workers in a state not providing such rights would have to rely upon other states to pursue their cause.

The WTO-based proposals suffer from many of the problems pointed out with regard to the other proposals. First, they assume that any negotiations would begin with a list of well-defined core labor rights as the minimum standards. The ILO does have conventions on all the core rights, but they would need to be re-drafted from a WTO perspective; at least with regard to the prohibition of exploitative child labor, some complete definition would first have to be developed. Second, such proposals would never be considered without some understanding of trade-relatedness which currently does not exist. Finally, it is not clear that such an agreement would really improve labor conditions in errant WTO Member states. A large measure of the TRIPS Agreement's value as a model for future trade-related rule-making remains unrealized. It is one thing to establish minimum interna-

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<sup>213</sup> Any such agreement would have to be linked to trade and goods in order to satisfy the basic requirement of trade-relatedness. Besides, the core labor standards are important precisely because they would establish a minimal level of acceptability for products produced by workers.

<sup>214</sup> See *supra* Sections 1.1.1. and note 21 (discussing the TRIPS Agreement).



tional standards, as arguably the TRIPS and any TRLR Agreement could do. It is yet another thing to ensure that the Member states enforce those minimum standards. Since the transition period for TRIPS has not yet run for the developing countries,<sup>215</sup> it is impossible to judge whether they can or will comply. Thorough compliance under TRIPS may not be achieved unless other states make frequent use of the WTO's dispute settlement system.<sup>216</sup>

#### 4. DISPUTED GOALS/GAINS/INSTITUTIONS

##### 4.1. *Whose Goals?*

The actors in the process of international rule-making are many: governments, inter-governmental organizations, regional organizations and economic integration arrangements, non-governmental organizations and interest groups, the affected constituencies, and scholars. States, behaving as unitary actors and acting strategically,<sup>217</sup> are not the only, or even necessarily, the driving force behind rule-making. The ongoing debate regarding linkages is symptomatic of a world having to come to grips with "globalization and its discontents."<sup>218</sup> While institutions provide a forum in which rule-making takes place, the cooperation and coordination within that institution and its traditions and/or process for rule-making change the nature of rules adopted. Moreover, as the process of rule-making proceeds, through the consensus levels suggested above, the goals of some if not all of the actors can change. Given the nature of the arguments for

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<sup>215</sup> See TRIPS Agreement, *supra* note 3, at arts. 65-66. The developing countries and countries in transition from a centrally planned economy were given five years from the time the WTO Agreement went into effect (1995) to meet TRIPS obligations. See *id.* art. 65.2. Least developed countries were given eleven years. See *id.* art. 66.

<sup>216</sup> In the earliest tests of developing country compliance, the United States brought cases under the DSU against both India and Pakistan for their failure to set up "mail boxes" during the TRIPS transition period. The mail boxes, to receive patent applications, were required because under TRIPS art. 65(4), developing countries were given an additional five year period to extend patent protection to areas of technology that had been previously unpatentable under their laws. India lost before the dispute settlement panel and appealed.

<sup>217</sup> These ideas, about states, represent structural realist assumptions about how the world works. See Anthony Clark Arend, *Do Legal Rules Matter? International Rules and International Politics*, 38 VA. J. INT'L L. 107, 112 (1998).

<sup>218</sup> See Langille, *supra* note 7, at 29.

linkage and the wide variety of linkages being argued for such as trade and environment, trade and labor rights, trade and investment, trade and competition law, trade and anti-corruption the goals of some groups will be altered by the linkages ultimately accepted<sup>219</sup> for trade-related rule-making and acted upon. It is simplistic to argue that developed countries alone are pushing certain agendas only for the strategic advantage of protectionism, although, both trade and labor rights and trade and investment do qualify, in some aspects, as developed-country issues in this respect. Characterizing the advocacy being done for linkage and trade-related rule-making in such a narrow fashion, however, requires one to ignore the human rights concerns many groups have

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<sup>219</sup> An illustration of this came from the OECD's process for negotiating the MAI. After a text on the core investment rights and protections was drafted, the OECD consulted with non-governmental organizations, particularly environmental groups. This interaction led the MAI Negotiating Groups to consider some of the issues they raised about linkage. The MAI draft text now contains two alternative proposals on "Not Lowering Standards" which read as follows:

#### Alternative 1

The Parties recognise that it is inappropriate to encourage investment by lowering [domestic] health, safety or environmental [standards] [measures] or relaxing [domestic] [core] labour standards. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such [standards] [measures] as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

#### Alternative 2

A Contracting Party [shall] [should] not waive or otherwise derogate from, or offer to waive or otherwise derogate from [domestic] health, safety or environmental [measures] [standards] or [domestic] [core] labour standards as an encouragement for the establishment, acquisition, expansion or retention of an investment of an investor.

*MAI Negotiating Text, supra* note 8, at 50.

The MAI draft, therefore, has apparently accepted a linkage, at some level, between investment and the environment, and between investment and labor. See *Investment Talks, supra* note 188. In addition, the delegations have been considering an "additional clause" on labor and environment. The form of that clause, if adopted, has not yet been determined. Among those forms officially proposed by delegations, one would involve a variation of GATT Art. XX language and another would be based on NAFTA Chapter 11's provision (Art. 1114(1)) on not lowering standards. See *id.*

regarding core labor rights<sup>220</sup> and the developmental interests expressed by non-governmental organizations concerning trade and investment.<sup>221</sup>

#### 4.2. *What Gains?*

What exactly would be the gains to the States and all the other actors of the international community from the creation of international trade-related rules for labor and investment rights? It is not possible to catalogue all of the suggested gains from the two linkages examined in this article. Nevertheless, it is possible to identify some gains from the protection of core labor rights: moral (from the promotion of human dignity by protecting core labor rights); the long term economic interests of the state involved;<sup>222</sup> and legitimacy (for the world trading system as it grapples with the growing arguments that economic gains are not the only value). For investment rights, examples of some gains would be facilitating investment, trade, and business by providing some measure of certainty/stability in the rules (rule coherence); and contributing at some level to the economic growth and potential development for all countries.

#### 4.3. *Which Institution?*

Given the process-oriented focus of this article, any profitable institutional discussion should be limited to analyzing the existing alternatives. Consequently, what follows will be a short summary of the advantages and disadvantages of the institutions currently in play. In the investment area, the two institutions are the OECD and the WTO. The OECD advantages would appear to be that it has been negotiated by a group of countries with similar interests and goals, which may be able to come up with a coherent set of

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<sup>220</sup> See *supra* nn.26, 119-20 and accompanying text.

<sup>221</sup> See *Investment Talks*, *supra* note 188 (describing how the MAI negotiating group adopted a provision on Not Lowering Standards (*see supra* n.219) in response to reactions from environmental groups and labor unions).

<sup>222</sup> See Langille, *supra* note 7, at 39.

There is really no interesting economic argument as to whether it is in a nation's long-term interest to pursue policies of utilizing child labour, forced labour, or discrimination in the labour market. It is not. The only economic issues here are difficult issues of transition from current conditions to a better world.

rules representing those views. Since the OECD will be a stand-alone treaty, other countries will have the freedom to accede if they believe, or later, obtain evidence that it would be in their best interests. During the drafting process itself, the OECD Secretariat has made efforts to educate non-OECD States about the MAI's goals and its scope. Since there are no plans to create an institutional structure around the MAI,<sup>223</sup> at least not as currently drafted, it can easily deal with the establishment of a two-track dispute settlement system built around international arbitration.<sup>224</sup>

The advantages of the WTO as the institution for international investment rule-making, is that it is a global organization. Any rules it adopts will represent a wider, if not deeper, consensus. The WTO has the authority to make any agreement part of the membership obligation of the organizations, if the Member states so choose. The GATT/WTO process of rule-making in negotiating rounds creates the possibility of other agenda items that can be traded off to gain an investment agreement or an investment agreement with a particular level of standards. Finally, WTO has had historical experience with drafting framework agreements that have proven successful over time.

The disadvantages of the two institutions involved are reverse images of the advantages of the other. For example, since the MAI is not being negotiated by a global group, any OECD set of rules will not reflect the consideration and potential accommodation of the views of developing countries. Given the limited OECD membership and the content of the MAI, it may have difficulty get-

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<sup>223</sup> This has been an issue during the negotiations.

The Parties Group will come into operation when the MAI comes into force. There is still some uncertainty about its character. Some see the MAI as simply a framework of rights and obligations together with a procedure for settlement of disputes. The Parties Group would therefore concentrate on the important task of handling new accessions. Others see the Parties Group as a new institution to act as a forum for debate and for carrying forward a wider policy agenda. In practice, it is probable that its character will evolve to suit the actual future needs of MAI members.

Statement of Nick Griffiths, U.K. Permanent Delegation to the OECD (on file with author).

<sup>224</sup> See *MAI Negotiating Text*, *supra* note 8 at Section V—Dispute Settlement, State-State Procedures and Investor-State Procedures. The dispute settlement section is still undergoing further elaboration. According to explanatory notes “different options remain in the field of multilateral consultations and scope of dispute settlement.” *Id.* at n.1.

ting other nations to accede. In the case of the WTO, one perceived disadvantage, but not a necessarily a universally held one, could be that the global membership will adopt a less ambitious set of investment rules. Consequently, liberalization will take longer. The WTO would also have to grapple with what to do with the issue of dispute resolution.<sup>225</sup>

In the case of trade-labor rights, the two institutions are the ILO and the WTO. It is important to note here that none of the discussions about international competence regarding trade-related labor rights have imagined the ILO going on as it has in the past.<sup>226</sup> As a result, the discussions about the ILO's advantages relate to its inherent strengths. The ILO advantages are that it is an institution devoted to labor issues and the promotion of labor rights. Moreover, the ILO's tripartite membership structure actually means that labor, through representation by the unions and management, through representation of that group, each has a voice in the negotiations and deliberations of the organization. Both of these aspects together make the institution sensitive to the human rights and commercial aspects of trade-related labor rights.

The WTO may or may not have any advantages acting as the sole competent institution in this area over the ILO. Most of the proposals made for trade-related labor rights involve the WTO and ILO working in some collaborative form.<sup>227</sup> The WTO, however, has taken over jurisdiction from another function specific organization, WIPO, for the purposes of developing trade-related rules. As a result, there is precedent for such a step.

The disadvantage of sole ILO jurisdiction appears to be limited powers of ensuring compliance. The ILO tradition of voluntarism has, in the views of many, left core labor rights at substantial risk. Nevertheless, there are equally serious concerns about turning to the WTO, whether it stands alone or acts in some collaborative effort, solely to obtain the rules compliance power that would come from WTO authorized trade sanctions since labor has two aspects (involving human rights and its role as a factor of production). In

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<sup>225</sup> See *supra* notes 154-55 and accompanying text.

<sup>226</sup> Currently, the constituencies pushing such a view are the most outspoken of the developing countries. See *supra* note 10. Director-General Hansenne has been signaling his strong belief that some alteration and expansion of the ILO role regarding core labor rights is needed. See *id.*; see also *supra* note 204 (discussing the limitations of the most active ILO process).

<sup>227</sup> The only exceptions are the Charnovitz proposal, which does raise trade issues, and the TRLR proposal which was made largely to reveal its limits.

the near term it is the ILO which must struggle with linkage. Whatever happens in the next phase of ILO negotiations and discussions the issue of linkage is unlikely to disappear.

# TEACHING LINKAGES

SPENCER WEBER WALLER\*

## 1. INTRODUCTION

This symposium represents a historic opportunity to study the phenomenon of linkages. The subject of linkages is the next logical step in the growing movement to address the impact of international trade rules on other areas of the law formerly conceived of as either autonomous to international trade concerns or as purely domestic concerns. Conceiving of this set of issues as a coherent body of rules and theories is different from the traditional conception of the “trade and . . .” problem which seeks to incorporate or privilege one or more traditionally non-trade issues within the multilateral or regional trading rules. The international economic law community has moved beyond the consideration of the individual relationships between trade and the environment, trade and competition, trade and intellectual property, trade and human rights as isolated phenomena vying for the attention of the trade community. Thinking about linkages requires the construction of new theories and teaching methods to show how the various “trade and . . .” problems compare and contrast to each other and how linkages more generally challenge the trading system beyond the needs of any particular “trade and . . .” constituency.

## 2. THE FRUSTRATIONS

Teaching American law students about either the many “trade and . . .” issues or the broader subject of linkages is particularly frustrating for several related reasons. First, at many schools international trade and international business transactions are com-

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bined into a single survey course which all but rules-out coverage of any of the advanced topics a teacher may wish to pursue. Even when international trade is a separate course, the need to cover the development of the GATT/WTO system, regional trading blocs, the role of national implementing statutes, and the sheer weight of the material leaves exploration of linkages for the end of the course when the teacher is rushed and students are crabby. In addition, studying linkages requires at least a nodding familiarity with such diverse topics as antitrust, intellectual property, environmental, labor, and human rights law, which the student (or teacher) would not necessarily have seen before in either the trade course or any other class at the law school.

Finally, legal scholarship on linkages is still in its embryonic form<sup>1</sup> and published materials geared toward the teaching of linkages are basically non-existent. The nature of the currently available teaching materials requires the teacher to craft her own materials on linkages or force the students to wade through literally hundreds of pages surveying the various linkages in the existing published course materials.

In this Article, I describe and evaluate my most recent experiment to introduce linkage issues in a three credit international trade course.<sup>2</sup> Previously, I had only explored the linkages between trade and competition in a small seminar devoted to that subject where students having completed the basic trade course wrote advanced research papers. I had sought for some time to teach linkages more comprehensively in the basic trade course to introduce the topic to the broadest student audience possible at the earliest possible stage. In the past eight years, I have taught international trade law using just about every different international

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<sup>1</sup> The proceedings of this conference, and the other writings of Steve Charnovitz and Jeffrey Dunoff, form a significant body of the legal scholarship on the question of linkages in international trade, as opposed to the vast amount written on specific "trade and . . ." issues. See Steve Charnovitz, *The World Trade Organization and Social Issues*, J. WORLD TRADE L., Oct. 1994, at 5; Jeffrey L. Dunoff, "Trade and": *Recent Developments in Trade Policy and Scholarship—and their Surprising Political Implications*, 17 NW. J. INT'L L. & BUS. 759 (1996-97).

<sup>2</sup> At Brooklyn Law School, there is a separate International Business Transactions class for three credits which Professor Lan Cao and I each teach using a problem method and the most recent edition of the RALPH H. FOLSOM, MICHAEL WALLACE GORDON & JOHN A. SPANOGLE, JR., INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED COURSE BOOK (3d ed. 1995).



trade casebook on the market without any systematic effort to teach linkages.<sup>3</sup> In past years, I had simply assigned one or two chapters on specific linkage issues as time permitted. Based on a combination of student interest and my ongoing research, most often these materials consisted of some combination of competition and/or environmental law issues.

### 3. THE EXPERIMENT

In the spring of 1997, I taught seventy international trade students using the third edition of Jackson, Davey & Sykes's casebook on *International Economic Relations*.<sup>4</sup> I followed the basic outline of the casebook beginning with the constitutional structure of the United States regulation of international trade, the history and development of the GATT and the world trading system, the structure of the WTO and its dispute mechanism and then an in-depth analysis of the various import relief mechanisms under international and United States law.<sup>5</sup> The class sessions consisted of a mixture of Socratic dialogue, lecture, class discussion, problems, and the occasional role playing exercise.

On the syllabus, I designated two sessions about seventy percent of the way into the course to discuss "trade and . . ." issues broadly construed. About halfway through the course, I asked the students to indicate their top three preferences for linkage topics. I asked the students to choose from the chapters toward the end of the book on environmental, competition, intellectual property, trade and services, lesser developed countries, non-market economies, and other linkages (labor, human rights, and national security). Once I received the preferences, I divided the

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<sup>3</sup> These have included JOHN H. BARTON & BART S. FISHER, *INTERNATIONAL TRADE AND INVESTMENT* (1989), JOHN H. JACKSON & WILLIAM J. DAVEY, *INTERNATIONAL ECONOMIC RELATIONS* (2d ed. 1986); ALAN C. SWANN & JOHN F. MURPHY, *CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS* (1991) and for the coming year, RAJ BHALA, *INTERNATIONAL TRADE LAW* (1996).

<sup>4</sup> JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT* (3d ed. 1995).

<sup>5</sup> I do not discuss or assign Chapter two, reviewing the private law aspects of international business transactions, other than make this a purely optional matter for students who have not taken the separate International Business Transactions class offered at the law school. I do at most one session on customs law often with a practitioner guest lecturer because of a separate, two-credit Customs Law class offered at the law school.

students into seven groups based on the topics chosen and assigned each group to read the chapter in Jackson, Davey on their particular topic. I made it first-come, first-served to encourage prompt submission of preferences and gave everyone their first choice until groups had nine students. Only then did I move onto the second and third choices. In a big class, choices distributed fairly randomly both across subject interest and I had enough late filers that could be used to round out the less popular groups. In only a few cases did I have to drop down to students' third choices.

I provided each group with a nearly identical outline of questions to guide their discussion.<sup>6</sup> The questions asked students to think about how linkages and non-traditional economies have been treated under the GATT and WTO, how they can or should be incorporated into the future work and dispute resolution system of the WTO and whether other institutional arrangements would be more successful in grappling with these issues.

At the same time, I also assigned a student to act as group leader to initiate the discussion based on my observations in class as to the sensible talkers who would initiate, but not dominate, the discussion and not lead the small group astray into a discussion of peripheral issues. On the appointed day, the students met in different corners of the classroom and two additional rooms near by. I floated from group to group to monitor progress, answer questions, and guide discussion back onto track if necessary. I made one visit to each group over the seventy five minute class session. Most of the groups had vigorous discussions, at least while I was present. Most of the groups used my all too brief presence to ask me factual questions about developments in their field or test preliminary hypotheses about approaches they were considering.

The class regrouped as a whole for the next session two days later. The team leaders briefly reported on each small group discussions and the class as a whole discussed the linkages between the various linkage phenomena. Finally, each student was required to prepare a four page think piece without any additional research to discuss their particular "trade and . . ." topic in light of the larger group discussion. The paper was graded as part of the classroom component of the course, which effectively meant that

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<sup>6</sup> The questions handed to the students are attached as Appendix 1.

it was an additional piece of information I used in making borderline determinations when the exam grade was at the edge between two grading tiers.

The exercise had three complementary purposes. First, it was both an attempt to improve the content of the course and to avoid the frustration of both teacher and student that after all the hard (and often dry) work, the course would not end before we got to "good stuff." Second, it sought to allow the students to study in-depth topics of interest without having to force the whole class into that area. Finally, it was also a conscious attempt to nudge the students into more active learning, an increased sense of perspective, and a higher degree of self-reflection, all of which are established techniques suggested by cognitive science as effective learning and problem solving methods.<sup>7</sup>

The experiment was more than satisfactory. The discussions in the small group were on average wonderfully stimulating for both me and the students. The students generated many intriguing ideas, almost always on track and often quite innovative. My personal favorite came from the trade and environment group which not only proposed the bare outline of a multilateral environmental agreement for inclusion in the WTO system, but also created its own acronym, the General Agreement on Trade and the Environment, or the GATE.

The subsequent session when the class met as a whole helped complete the picture. The group leaders briefly presented their findings and proposals which took about half of the class. For the remainder of the period, I sought to maintain a conversation between members of different groups (other than the group leaders) as to how the themes developed in one linkage applied to other linkages. In particular, I focused on whether particular linkages depended on whether the current trade regime under-valued non-market considerations (environment, labor, human rights) or failed to properly value market considerations (competition, intellectual property). I focused to a lesser extent on whether there were universalist values underlying creating global regimes for these issues and whether there were any legitimate boundaries remaining between international trade and domains of domestic law. In addition, I tried to put the conversation into the context of North-South issues and to get students to discuss which link-

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<sup>7</sup> See Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 358-60 (1995).

ages promoted the interests of non-market economies and less developed countries, which issues favored the wealthier market economies, and how gains in one area were paid for in another. This session became the basis for reference in the remaining classes to linkage issues as they arose in other frontier areas of the WTO, NAFTA, and a consideration of the Helms-Burton controversy.

#### 4. THE PROGNOSIS

This modest attempt at interdisciplinary teaching of linkages could be improved in a number of ways. First, I learned that I needed to be more careful in selecting group members and team leaders. In honoring student preferences, the groups on lesser developed countries and non-market economies ended up being dominated by students from countries falling into one or both of these categories. Many of these students were more reticent to express their views and the conversations lagged in places, even when I was present to encourage the group and throw out new ideas.

The other issue I noticed was that I obviously was spread too thin. For me, the seventy five minute class session sped by as I rushed from group to group buoyed on by the enthusiasm and ideas that I heard. However, the students would have benefited from more direction, information, and suggestions if I had been able to stay longer with each group. Upon reflection, I would suggest turning necessity into virtue by involving other faculty colleagues in the exercise. Had I thought of it in time, I could have asked colleagues teaching in related fields to assist the small group discussions. At my school, I could draw upon people with considerable expertise in issues relating to environmental, financial services, human rights, economic development, intellectual property, labor, and national security law. Adding their expertise would have enriched the small group discussions, provided expertise beyond anything I could do, and freed me up to concentrate on one or two of the groups. Perhaps more importantly, I missed a golden opportunity to involve my colleagues in the international curriculum and to promote the internationalization of their own important slices of the law school curriculum.

The papers submitted on the last day of the course spread out surprisingly well along the basic curve for grading purposes. The best papers showed a real sense of excitement with the subject

matter and some innovative thoughts about the type of issues under discussion today at the WTO and the OECD. The weaker papers tended to summarize the information from the reading assignments or discussed several topics without advancing a real thesis.

Overall, the students seemed to enjoy the experience. The students who took the time to comment on the whole process on their evaluations were quite positive about the linkage classes and requested more such exercises throughout the semester.

## 5. CONCLUSION

The more that linkages can be integrated into a traditional international trade course the better. The students will receive a more accurate picture of contemporary international trade law and policy as well as a better appreciation for the contentious issues being debated and resolved in the World Trade Organization, the European Union, NAFTA, and the many other international organization dealing with portions of the trade agenda. In short, this is where the action is, and any course which fails to even attempt to cover these issues presents an old-fashioned and dangerously incomplete picture of the current legal landscape.

The challenge to cover the richness of the linkages debate is formidable. It requires careful budgeting of time and pushing the existing teaching materials to introduce such issues into the introductory international trade course.

The method I tried was borne more out of desperation than anything. The modest success of this approach is only an amateurish beginning. My model can easily be improved and supplemented. Other kind of group discussions and problems can be designed. New materials or modules can be developed either through commercial publishers, electronic media, or more informal shared materials among academics. There are advanced research seminars which can deepen the knowledge of both faculty and students on linkage issues. There are interdisciplinary and practice oriented simulation classes which force students naturally into linkage discussion and analysis in order to solve problems. Discrete class sessions in traditional classes can be devoted to particular linkages. E-mail and internet home pages can be used to access primary documents from the front lines and provide a forum for ongoing discussion of linkage issues throughout the semester. Coming to grips with the many forms of emerging link-

ages in trade policy ends up forcing the teacher out of old habits and to start fresh in designing a trade course and determining the core knowledge a student needs and how best that knowledge can be taught and learned. I found the whole process invigorating as a teacher and look forward to reporting in future years on my improved attempts to teach linkages.

## APPENDIX 1

ISSUES FOR DISCUSSION AND OUTLINE FOR SERVICES,  
ENVIRONMENTAL, COMPETITION, INTELLECTUAL PROPERTY  
AND OTHER LINKAGES SMALL GROUPS

• The purpose of the small group discussions is to focus intensively on some of the frontier issues that the WTO is just beginning to address. In the small group the focus should be on the relationship between your topic and the more traditional tariff and non-tariff barriers that are the subject of the GATT/WTO system. Are these frontier issues really barriers to trade which must be reduced in the name of further trade liberalization or are they issues with a radically different set of values not amenable to a trade solution? Are these really issues that governments can deal with, or are they more cultural issues geared toward private behavior? Please use this framework in addressing the specific questions below in your small group discussion, in the large group continuation the next class, and your four page detailed outlines which are due on the last day of class.

• How did the GATT deal with your issue before the Uruguay Round?

• How did the Uruguay Round incorporate these new values in the WTO and the world trading system?

• Does the GATT/WTO system fairly incorporate these principles and values or does it over or underprivilege your particular area?

• What further work should be done in terms of crafting new codes or other mechanisms to address your particular "trade and . . ." problem?

• Can the new WTO dispute resolution mechanism adequately address any disputes that arise in this area? Does the WTO have the technical expertise to do so? Will the WTO mechanism inevitably emphasize the "trade" aspect of the issue to the exclusion of other values? Is this a bad thing if it does?

• Is the WTO the best place for this work to take place? Are there existing international organizations which are better fora for the resolution of these issues? Are there other mechanisms available to better harmonize the law of the different member countries with regard to your particular topic?

- How does your particular “trade and . . .” problem affect lesser developed countries and non-market economies? Does the existing WTO structure on your issue adequately affect their needs?
- What does your particular issue tell us about how the WTO should address the many other “trade and . . .” issues it is confronting?



## APPENDIX 2

ISSUES FOR DISCUSSION AND OUTLINE FOR LESSER DEVELOPED  
COUNTRIES AND NON-MARKET ECONOMIES SMALL GROUP  
DISCUSSIONS

Your small group discussions are a little different from the rest of the groups which deal with various aspects of the "trade and . . ." problem. Instead, your focus is on one of two groups which have largely outsiders to full participation to the GATT/WTO world trading system. The fall of the Soviet Union and the decline of support for protectionism as the appropriate path to economic development has led to an increased interest in LDCs and NMEs wanting to be members and full players in the WTO. The focus of your small group discussions, the large group discussion in the next class, and the four page detailed outlines due on the last day of class should be how your particular group has been treated under the GATT/WTO system and whether the likely agenda of the WTO will make matters better or worse.

- How did the GATT deal with your group before the Uruguay Round?
- How did the Uruguay Round incorporate these values in the WTO and the world trading system?
- Do the WTO rules and codes make adequate provisions for your interest group?
- Can your particular interest group meaningfully participate in the world trading system as currently constituted?
- Does a lesser developed or transitional country have to adopt a traditional market economy in order to join or participate fully in the WTO?
- How, if at all, should accession to the WTO be different for your interest group? What interim rules or grace periods should be allowed to make the transition to full WTO membership and compliance with all rules? On what basis should your group be entitled to special treatment? Has your group actually benefited from the special treatment it may have received in the past?
- How does the current WTO "trade and . . ." agenda affect your particular group?
- Is the WTO fundamentally a club to protect the interests of rich Western market economies or a true general international

organization working toward a viable trading system for all nations? Are there other international organizations which better protect your interests?