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Problems of WTO Harmonization and the Virtues of Shields over Swords

Daniel Kalderimis

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INTRODUCTION

This Article examines the impact of the WTO on non-trade values: a question at the heart of the debate on trade in genetically modified food products. In examining the impact, this Article takes a fresh perspective. Identifying the main tension as WTO harmonization agreements, it argues that harmonization agreements can be divided into two types: progressive harmonization agreements, which seek to attain some non-trade value—thus expanding the reach of the WTO system; and defensive harmonization agreements, which seek to further restrain non-trade values from interfering with free trade.

Both types of harmonization agreements therefore intersect with non-trade values. Progressive harmonization agreements use non-trade values as swords—in the sense that breach of a relevant non-trade value becomes a breach of the WTO. Defensive harmonization agreements, on the other hand, work to prevent non-trade values from being invoked as shields against WTO discipline. This Article presents concerns with both species of harmonization, but finds defensive harmonization to be particularly problematic. It is argued that defensive harmonization in the WTO arbitrarily increases the reach of free trade into non-trade values and thereby disturbs the "contractual balance" enshrined in the scheme of the GATT. The Article concludes with two proposals. First, defensive harmonization agreements should only come into play following a proven

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breach of the GATT; second, defensive harmonization agreements should be tied explicitly to the relevant limbs of GATT Article XX. Adopting these proposals will protect the GATT contractual balance and allow non-trade values to operate, where appropriate, as shields to free trade.

I. QUESTION: DOES THE WTO HAVE CONSTITUTIONAL STATUS? ANSWER: DOES IT MATTER?

A. WTO CONSTITUTIONALIZATION AND LINKAGES: THE BROAD DEBATES

The end of World War II prompted a period of unprecedented international cooperation.[1] The direct experience of devastating war led nation states to explore new solutions to prevent the conditions of 1930s Europe from happening again.[2] Some solutions, such as the Marshall Plan, involved unilateral intervention.[3] Others, such as the General Agreement on Tariffs and Trade (GATT),[4] created an environment of multilateral cooperation. Still others, such as the United Nations Charter, led to the creation of new international institutions.

Fifty years later, the institutional model has generally proved the most durable.[5] International institutions relating to

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1. *See* CLIVE ARCHER, INTERNATIONAL ORGANIZATIONS (2d ed. 1992); *see also* THOMAS RISSE-KAPPEN, COOPERATION AMONG DEMOCRACIES, THE EUROPEAN INFLUENCE ON U.S. FOREIGN POLICY (1995).

2. *See* STEPHEN AMBROSE, RISE TO GLOBALISM (7th ed. 1993); ERROL MENDES & OZAY MEHMET, GLOBAL GOVERNANCE, ECONOMY AND LAW: WAITING FOR JUSTICE 2 (2003).

3. MICHAEL J. HOGAN, THE MARSHALL PLAN: AMERICA, BRITAIN, AND THE RECONSTRUCTION OF WESTERN EUROPE: 1947-1952 (1987).

4. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

5. There are, however, recent signals that in the post-Cold War world the United States is beginning again to favor unilateral intervention. The refusal of the United States to sign the Kyoto Protocol to the United Nations Framework on Global Climate Change and the Rome Statute of the International Criminal Court, and its circumvention of the United Nations in the recent conflicts in Afghanistan and Iraq, may indicate a relative weakening of the power of international institutions. *See generally* David E. Sanger, *Bush Will Continue to Oppose Kyoto Pact on Global Warming*, N.Y. TIMES, June 12, 2001, at A1; Thomas M. Frank, *The United States and the International Criminal Court: Unilateralism Run Rampant*, 35 N.Y.U. J. INT'L L. & POL. 519 (2003); Tom J. Farer, *The Prospect for International Law and Order in the Wake of Iraq*, 97 AM. J. INT'L L. 621 (2003); José E. Alvarez, *International Hegemonic Law Revisited*, 97 AM. J. INT'L L. 873 (2003).

areas as diverse as global health,[6] security and disarmament,[7] environment,[8] agriculture,[9] education[10] and even postal services[11] have become an accepted (even inevitable) part of global governance.[12] As they age, they have evolved. Institutions with modest aims, such as the 1951 European Community for Coal and Steel, have developed into institutions with constitutional aspirations.[13] Indeed, the European Union (EU) is presently in the process of debating and drafting a Constitutional Treaty to usher in an even closer era of cooperation.[14]

This Article is concerned with the "constitution" of the World Trade Organization (WTO), the international institution which grew out of the 1947 GATT.[15] As Joseph Weiler has

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6. *See, e.g.*, The World Health Organization, *at* http://www.who.int/en/ (last visited Jan. 28, 2004).

7. *See, e.g.*, The International Atomic Energy Agency, *at* http://www.iaea.org/worldatom (last visited Jan. 28, 2004).

8. *See, e.g.*, The United Nations Environment Programme, *at* http://www.unep.ch (last visited Jan. 28, 2004); *see also* The International Oceanographic Commission, *at* http://ioc.unesco.org/iocweb (last visited Jan. 28, 2004).

9. *See, e.g.*, The Food and Agriculture Organization of the United Nations, *at* http://www.fao.org (last visited Jan. 28, 2004).

10. *See, e.g.*, The United Nations Educational, Scientific and Cultural Organization, *at* http://www.unesco.org (last visited Jan. 28, 2004); The International Bureau of Education, *at* http://www.ibe.unesco.org (last visited Jan. 28, 2004).

11. *See* The Universal Postal Union, *at* http://www.upu.int (last visited Jan. 28, 2004).

12. And, further, a nascent region of international law. *See, e.g.*, JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW (2002). *See also* The 2003 YEARBOOK ON INTERNATIONAL ORGANIZATIONS, *at* http://www.uia.org/organizations/home.php (last visited Jan. 28, 2004) (indexing some 44,000 international organizations of which 5,900 are inter-governmental).

13. TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 224) 1 (1992), 31 I.L.M. 247 (Member States of the European Communities [European Community for Coal and Steel, European Economic Community, European Atomic Community] established the European Union with the aim of creating an ever closer union between the peoples of Europe.). *Id.* art. A.

14. *See* Draft Treaty Establishing a Constitution for Europe, July 18, 2003, *available at* http://european-convention.eu.int/DraftTreaty.asp?lang=EN (last visited Jan. 28, 2004). *See also Report from the Presidency of the Convention to the President of the European Council*, July 18, 2003, CONV 851/03, *available at* http://european-convention.eu.int/docs/Treaty/cv00851.en03.pdf (last visited Jan. 28, 2004).

15. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1125 (1994) [hereinafter Final Act]. All of the documents comprising the WTO system are attached to the Final Act, including the Marrakesh Agreement Establishing the WTO which serves as an umbrella agreement for specific WTO agreements. *See* Marrakesh Agreement Establishing the World Trade Organization, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994).

pointed out, "constitution" is a rich term and can include both the makeup or composition of an entity (as in, how is the WTO comprised?), as well as the system of fundamental principles which govern the entity (as in, does the WTO have constitutional status?).[16]

Many esteemed minds have already turned their attention to the second of these constitutional questions. Despite the WTO's relative youth, serious comparison is already being made to the political institutions of the EU.[17] In some ways this comparison is valid and useful. The core principles of the EU–freedom of movement of goods, people, services and capital[18]–are similar to the core principles of the WTO (although the WTO does not, yet, apply to people or capital movement). Both organizations are powerful, expanding and engaged in balancing trade and non-trade values.

In other respects, the comparison is less apt. Hidden in the WTO constitutionalism debate is a tension between the "ought" and the "is". Some commentators seem to be arguing descriptively that the WTO shows incipient signs of EU-style constitutionalization;[19] others seem to be arguing normatively that, whatever the present position, the WTO should embrace a more constitutional vision.[20] When the two arguments are separated,

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16. J. H. H. WEILER, THE CONSTITUTION OF EUROPE viii (1999); *see* John H. Jackson, *The WTO 'Constitution' and Proposed Reforms: Seven 'Mantras' Revisited*, 4 J. INT'L ECON. L. 67 (2001) (providing a lucid discussion of the first sense of constitution).

17. Markus Krajewski, *Democratic Legitimacy and Constitutional Perspectives of WTO Law*, 35 J. WORLD TRADE 167 (2001); Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 J. INT'L ECON. L. 19 (2000); Ernst-Ulrich Petersmann, *How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?*, 20 MICH J. INT'L L. 1 (1998); Neil Walker, *The EU and the WTO: Constitutionalism in a New Key*, *in* THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ASPECTS (Grainne De Burca & Joanne Scott eds., 2001).

18. *See* TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3 (1997) [hereinafter EC TREATY]. The treaty provides the right to free movement of goods, *id.* art. 23, the right to free movement of people, *id.* arts. 39, 43, the right to trade in services without restrictions, *id.* art. 49, and the right to transfer capital without restrictions, *id.* art. 56.

19. *See, e.g.*, Walker, *supra* note 17; Petersmann, *The WTO Constitution and Human Rights*, *supra* note 17; Meinhard Hilf, *Power, Rules and Principles – Which Orientation for WTO/GATT Law?*, 4 J. INT'L ECON. L. 111 (2001).

20. *See, e.g.*, Thomas Cottier, *Limits to International Trade: The Constitutional Challenge*, 94 AM. SOC'Y INT'L L. PROC. 220 (2000); Krajewski, *supra* note 17; Marco C. E. J. Bronkers, *More Power to the WTO?*, 4 J. INT'L ECON. L. 41 (2001); Ernst-Ulrich Petersmann, *Human Rights and International Economic Law*, 4 J. INT'L ECON. L. 3 (2001); Ernst-Ulrich Petersmann, *The WTO Constitution and the Millennium Round*, *in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN

the better view is that the WTO is not yet a constitutional system because it has no clear polity, direct effect, individual access, defined scope or intrinsic/higher-order authority.[21] The real locus of the constitutional debate is whether the WTO should *become* such a system. Those who think it should urge the WTO to actively involve itself in other issue areas such as the environment, labor and human rights.[22] Given its wider scope and explicit focus on constitutionalism, the EU is an obvious template for such a process.[23] A possible endgame is the evolution of the WTO into a type of "World Government."[24] A less radical way to approach the same issue is to consider how the WTO might involve itself in other issue areas, without necessarily seeking to control or exclusively regulate them. The leading article in this field is David Leebron's *Linkages*,[25] which sets out a taxonomy of *how* different international regimes can be linked, and criteria for evaluating the question of *whether* they should be linked.

B. KEEPING ONE FOOT ON THE GROUND: AN OUTLINE OF A DIFFERENT ARGUMENT

This Article places itself in the context of these broad debates over whether the WTO should seek to become a more constitutional system and whether it should link explicitly to other regimes. However, this Article argues that both debates start in the wrong place. That is, they target the second meaning of "constitution" at the expense of the first.[26] The debates over whether the WTO should become a constitutional system, or

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HONOUR OF JOHN H. JACKSON 111 (Marco Bronkers & Reinhard Quick eds., 2000).

21. *See* Robert Howse & Kalypso Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far*, *in* EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM (R. B. Porter et al. eds., 2001); Krajewski, *supra* note 17.

22. Petersmann, *supra* note 17; *see, e.g.*, *supra* note 20 and accompanying text.

23. *See generally* Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628 (1999).

24. *See* Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity*, *in* DELIBERATELY DEMOCRATIZING MULTILATERAL ORGANIZATIONS (Marco Verweij & Tim Josling eds., 2003); Howse & Nicolaidis, *supra* note 21. Both articles point out the dangers of this endgame (and how it is linked to constitutional discourse in the second sense).

25. David W. Leebron, *Linkages*, 96 AM. J. INT'L L. 5, 17-24 (2002); *see also* José E. Alvarez, *How* Not *to Link: Institutional Conundrums of an Expanded Trade Regime*, 7 WIDENER L. SYMP. J. 1 (2001).

26. For the two meanings see *supra*, notes 16, 24 and accompanying text.

over how it might link to other regimes, ignore the more pressing fact that the WTO already *does* control non-trade values and *is* linked to other regimes. The control exists because the WTO's wide membership, sophisticated dispute resolution system, and effective sanctions ensure that in practice (and notwithstanding other international agreements) WTO values trump non-WTO values. The linkages follow because many issues of international concern–such as health and environmental protection–intersect with the goal of free trade. In sum, the WTO makes powerful rules governing non-WTO policies by omission. This case is made in Part II.

Part III sets out the nature of the WTO linkages in some detail. To begin with, it argues that the "contractual balance" of the GATT created several valves for non-trade values to co-exist with GATT discipline. Today, the main challenges to the GATT contractual balance are WTO harmonization agreements. Part III examines the WTO harmonization agreements and then categorizes them into two groups: *progressive* and *defensive.* Progressive harmonization agreements seek to attain some non-trade value—thus expanding the values of the WTO system; defensive harmonization agreements seek only to further restrain non-trade values from interfering with free-trade.

Part IV argues that the WTO harmonization agreements, both progressive and defensive, threaten to upset the contractual balance as they add new and independent obligations. They are, however, problematic for different reasons. The problem with progressive agreements is simply that they are premature. Although the WTO has the raw power to conclude progressive measures, it does not yet have the polity or authority to do so legitimately. This Article recommends a standstill on such agreements. Perhaps greater legitimacy will come in time, but it should not be preempted. In particular, progressive agreements and linkages that would back non-WTO values with WTO discipline are premature, as is talk of constitutionalization. All such movement should wait until there is broader agreement on the legitimacy of the WTO to make policy in non-trade areas.

As to defensive agreements, Part IV argues that these are conceptually empty and represent a blindside threat to non-trade values. This is because they seek to regulate a non-trade value with the sole object of preventing that value from interfering with free trade. Given the WTO's unchallenged power, this leads to dangerously myopic rules. Defensive agreements are especially objectionable when not properly tied into the GATT

agreement and its derogation provisions. Accordingly, this Article recommends first that existing defensive agreements should be expressly subject to the GATT derogation provisions and secondly that the GATT should be amended to recognize additional grounds of derogation (for instance labor rights) and to include carve-outs for important international agreements concerning non-trade values.

The overall argument can be summarized in an aphorism: non-trade values should be used as shields to WTO claims, rather than swords backed by WTO power.

II. WHY THE PERTINENT QUESTION IS 'WHAT ARE WTO LINKAGES TODAY'?

Keohane and Nye's well-known analysis of post-World War II international institutions depicts them as clubs of negotiators bargaining with one another within specified issue areas.[27] Referred to as "decomposable hierarchies",[28] the international regimes which emerged had narrow constituencies, usually composed of specialized technocrats, and little contact with other regimes. Keohane and Nye argue that the international club model has been undercut by its own success–leading to greater interdependence between different issue areas and a need for greater cooperation between different regimes.[29] This is the tricky question of linkages referred to above and is the source of much tension over globalization.

But any discussion of the WTO as an example of the club model of international relations needs to appreciate its preeminent position. Excepting the EU, which does not conform to the international club model,[30] the WTO has achieved a level of institutionalization and power which sets it apart from the other international clubs.[31] There are three main reasons for this. First, the core areas of the WTO, trade in goods and services,

27. Robert O. Keohane & Joseph S. Nye Jr., Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy, (2000) (unpublished paper prepared for the American Political Science Convention, Washington D.C.) (on file with author).

28. HERBERT A. SIMON, THE SCIENCES OF THE ARTIFICIAL 197-207 (3d ed. 1996) (developing this terminology).

29. Keohane & Nye, *supra* note 27.

30. The EU is better viewed as an expansive regional integration agreement rather than an international club with a specified issue area. *See generally supra* notes 13-14, 18, 27.

31. *See generally* Alvarez, *supra* note 25.

have many natural intersections with other areas. This is the lesson that the finance minister of any government knows well, and is demonstrated by the importance of the Interstate Commerce Clause in the U.S. Constitution.[32] Second, WTO Member states usually take their WTO obligations seriously, as trade sanctions can have immediate and politically explosive economic impacts. This can contrast with attitudes towards environmental or labor violations, for instance, where the consequences may be more latent. Third, and most importantly, the WTO has a mandatory, legalistic and binding dispute settlement system, a rarity for international institutions.[33] The Dispute Settlement Understanding (DSU) of the WTO has rightly been called an important success.[34] Although the WTO does not have an enforcement system, the rigorous dispute settlement procedure promotes early settlement.[35] The "shadow of the law" cast by the WTO system is significant.[36]

The net result is not only that WTO rules have a broad reach, but that they effectively trump other regime rules. Why is this? Because, while there are multiple legal regimes all pulling in different directions, there is only one world and the most

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32. U.S. CONST. art. I, § 8, cl. 3.

33. The WTO is, however, not the only international institution with such a dispute resolution procedure. The International Tribunal for the Law of the Sea also has compulsory jurisdiction to issue final and binding rulings. *See* The United Nations Convention on the Law of the Sea, Oct. 7, 1982, U.N. Doc. A/CONF.62/122, 1833 U.N.T.S. 397, 21 I.L.M. 1261, 1322-24.

34. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, *available at* http://www.wto.org [hereinafter DSU]. *See generally* ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS, AND DISPUTE SETTLEMENT (1997); Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1 (1999); Press Release 180, World Trade Organization, WTO's Unique System of Settling Disputes Nears 200 Cases in 2000 (June 5, 2000), *available at* http://www.wto.org/english/news_e/pres00_e/pr180_e.htm.

35. Eric Reinhardt reports that the probability of settlement increases on average twenty-seven percent after a panel is established (but drops eighteen percent if the panel rules for the complainant). Eric Reinhardt, *Adjudication Without Enforcement in GATT Disputes*, 45 J. CONFLICT RESOL. 174, 178 (2001). The net effect of seeking a panel is to significantly increase the level of liberalization of disputed measures by approximately ten percent. *Id.*

36. *See* Mark L. Busch & Eric Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement*, *in* THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC 457, 460 (Daniel L. M. Kennedy & James D. Southwick eds., 2002); Mark L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT'L L.J. 158 (2000).

powerful regime calls the shots. One might consider the issue this way—divide all the possible domestic measures of country X into (a) those which potentially affect trade in goods or services; and (b) those which do not. Looking only at group (a), imagine the possible underlying purposes for these measures. Unless the underlying purpose is to facilitate international trade, any group (a) measure will potentially conflict with WTO discipline. This reflects the simple point that there is a potential conflict between the WTO values of free and non-discriminatory trade on the one hand, and all other conceivable values—be they labor, human rights, national security, environmental, social justice, or public health.[37] These possible intersections are depicted in Figure 1 below.

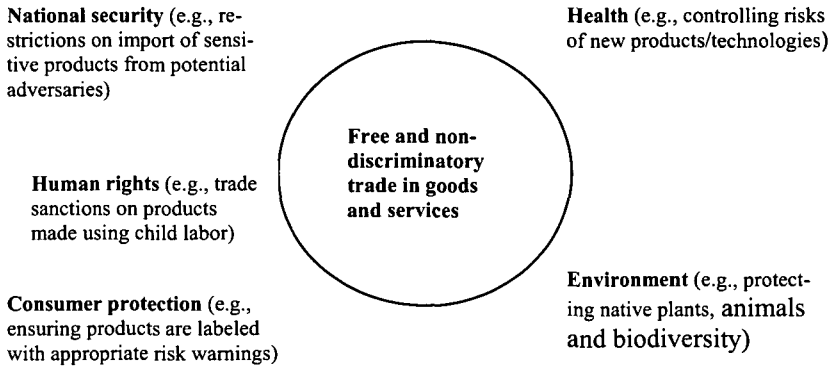

Figure 1: Intersections of trade and non-trade values

If country Y is sufficiently concerned that a proposed measure of country X will detrimentally affect its trading interests, this potential conflict between values becomes actual. The question then becomes, how is this conflict resolved? Because of the unusual sophistication of the WTO DSU, it is likely that country Y will invoke this body rather than any other forum.[38] In the DSU, the question asked is not which values should prevail but whether the non-WTO measure is consistent with the WTO rule.[39] If not, the WTO rule will prevail. This creates a practi-

37. This point, and some possible solutions, was carefully explained before the WTO was created. John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227 (1992).

38. DSU, *supra* note 34, art. 23.1.

39. DSU, *supra* note 34, art. 3.4 (specifying that all rulings and recommenda-

cal hierarchy with WTO rules at the top. Although Member states have international labor, environmental and human rights obligations, these must always submit to WTO discipline. In contrast, WTO rules are not judged according to these other standards.

This analysis reveals two things. The first is that the WTO is a precocious organization—one that has accumulated significant influence in a short space of time, and fast outstripped the development of other international clubs. It is also a focused institution concerned with free trade issues. The WTO, then, combines effective power with a narrow agenda. A crude analogy is a single issue domestic government. In one sense it may be true that such a government has only one set of policies, but in fact the government has policies on a wide range of matters—it is just that most are made by omission. The combination of the WTO's single-mindedness and power indicates that the initial question is not what linkages should the WTO make in the future to take account of non-WTO values, but what is the state of those linkages right now?.

III. THE NATURE OF WTO LINKAGES TODAY, AND THE THORNY ISSUE OF WTO HARMONIZATION

The WTO's effective but focused power challenges the notion of "embedded liberalism" which has given legitimacy and support to much of the economic liberalization of the last half-century.[40] Embedded liberalism is the concept that there was an implicit bargain behind the expansion of international economic liberalization after World War II: that the new international agreements[41] would not undo domestic social protections created variously in the New Deal/Keynesian/Social Democratic eras of the 1930s.[42] On this view, the GATT represents a bar-

tions made by the WTO Dispute Settlement Body must be "in accordance with the rights and obligations under this Understanding and under the covered agreements" and Article 3(5) which requires that all solutions to matters formally raised in the WTO system "shall be consistent with [the covered] agreements").

40. John Gerard Ruggie, *International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379 (1982).

41. *See* GATT, *supra* note 4; The Articles of the International Monetary Fund, T.I.A.S. No. 1501, 2 U.N.T.S. 39, art. VIII, § 2(a) (July 22, 1944), as amended, 20 UST 2775, 29 U.S.T. 2203, T.I.A.S. No. 11898 (prohibiting the imposition of "restrictions on the making of payments and transfers for current international transactions").

42. Ruggie, *supra* note 40, at 392-93.

gain, a compromise, in which all sectors of society agreed to open markets, but also to contain and share the social adjustment costs that open markets inevitably produce.[43] It is partly a sense that the WTO is unsetting this bargain which led to the massive but unfocused globalization protests over the 1999 Third Ministerial Conference in Seattle, and to the recent failure of the 2003 Fifth Ministerial Conference in Cancun.[44]

Anti-globalization activists are correct in assuming that much of the actual balancing between different values is done in the WTO according to WTO rules. This does not necessarily mean that the actual balance struck is off-kilter. It does, however, necessitate an inquiry into what the WTO rules provide and how they are applied.

A. OBLIGATIONS AND DEROGATIONS: THE WTO'S CONTRACTUAL BALANCE

Academics often speak of the "institutional balance" of the WTO, meaning the divisions of power between the different WTO entities: the Secretariat, the Member States, the Appellate Body (AB) and Panels.[45] There is general agreement that this balance is a factor lending stability and legitimacy to the WTO.[46] The same is true, however—and perhaps even more so—for the very elements of the GATT contract, which is also the model for the General Agreement on Trade in Services

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43. John Gerard Ruggie, *Taking Embedded Liberalism Global: The Corporate Connection, in* TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE 93 (David Held & Mathias Koenig-Archibugi eds., 2003).

44. As to Seattle see JANET THOMAS, THE BATTLE IN SEATTLE: THE STORY BEHIND AND BEYOND THE WTO DEMONSTRATIONS (2000). As to Cancun see Elizabeth Becker, *Poorer Countries Pull Out of Talks Over World Trade*, N.Y. TIMES, Sept. 15, 2003, at A1. The failure in Cancun was largely a result of the disinclination of developing countries to agree to expand the WTO to address the so-called "Singapore Issues": competition, investment, transparency in trade facilitation and government procurement. *See* Luke Eric Petersen, *Singapore Issues Break Cancun's Back*, INV. LAW AND POL. WKLY. NEWS BULL., Sept. 14, 2003, *available at* http://www.investmentwatch.org/articles/investsd15sep.html (last visited Jan. 28, 2004). *See generally* STARHAWK, WEBS OF POWER: NOTES FROM THE GLOBAL UPRISING (2002); JERRY MANDER & EDWARD GOLDSMITH, THE CASE AGAINST THE GLOBAL ECONOMY (2001).

45. *See, e.g.*, Frieder Roessler, *The Institutional Balance Between the Judicial and the Political Organs of the WTO, in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON 325 (Marco Bronkers & Reinhard Quick eds., 2000); Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489 (2001).

46. *See supra* note 45 and accompanying text.

(GATS).[47] The essence of this contract is that Members have core trade obligations which can be derogated from where such derogation is necessary to protect non-trade values.[48] This concept, which is central to the argument below, will be referred to as the "contractual balance" of the WTO.

This contractual balance reflects Ruggie's bargain of embedded liberalism.[49] Some might object that the GATT (and the GATS) is now merely a part of the WTO structure and that the bargain it represents has therefore diminished in importance. But this view allows the form of the WTO to obscure its substance. In reality, the GATT remains the cornerstone of the WTO. Most of the other WTO Agreements, such as the Subsidies Agreement,[50] the Anti-Dumping Agreement[51] and the Safeguards Agreement,[52] merely elaborate GATT obligations. Moreover, it would not be an overstatement to suggest that GATT obligations represent possibly the only core of deep agreement amongst WTO Members.[53] Whatever additions are made to the WTO Agreement, members should be careful to preserve the bargain that made the GATT successful for fifty years.

To be clear, the contractual balance has two elements. The

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47. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, *available at* http://www.wto.org [hereinafter GATS]. Although there are some important structural differences between the GATT and the GATS (the GATS' positive and negative list approach to obligations being the most striking), the two are properly viewed as different sides of the same coin. They each strive for the same goals of trade liberalization but in the different fields of goods and services. Because of this deep similarity, this article does not generally attempt to distinguish between the two. Indeed this article will refer solely or primarily to the GATT when making points also applicable to the GATS.

48. *See* GATT, *supra* note 4, arts. I-III, XI, XX; GATS, *supra* note 47, arts. II, XIV, XVI, XVII.

49. *See* Ruggie, *supra* notes 40, 43.

50. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, *available at* http://www.wto.org [hereinafter Agreement on Subsidies].

51. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, *available at* http://www.wto.org [hereinafter Anti-bargaining Agreement].

52. Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, *available at* http://www.wto.org [hereinafter Agreement on Safeguards].

53. This precept was underscored by the September 2003 WTO Ministerial in Cancun, at which WTO member countries failed to progress potential extensions to the WTO mooted in the Doha Ministerial Declaration. *See World Trade Organization Ministerial Declaration at Doha*, WT/MIN(01)DEC/1 (Nov. 14, 2001), *available at* http://www.wto.org. *See also supra* note 44 and accompanying text.

first is the need to establish breach—most likely of GATT Articles I, III or XI.[54] Each of these articles is worded so as to permit some interplay with other values. The most striking example of this balancing process is *Asbestos*[55] in which an EC marketing and import ban on asbestos-containing construction materials was held not to breach the national treatment obligation of Article III.4. The reason was that construction materials containing asbestos are not "like products" to construction materials not containing asbestos.[56] This case therefore explicitly balanced trade and non-trade values in the breach phase.

The second element is the ability to derogate. The GATT derogation provisions include Article XIX, relating to safeguards; Article XXIV, relating to free-trade agreements; and Article XXI, relating to national security exceptions.[57] But the primary provision is of course Article XX, which specifies the general exceptions to GATT discipline.[58] The GATS equivalent is Article XIV.[59] Below, this Article refers to GATT Article XX and GATS Article XIV as the "general derogation provisions."

The general derogation provisions function like defenses in a criminal trial and excuse a breach of WTO discipline where the otherwise offending measure is justified by reference to a listed non-WTO value. The values covered by the general derogation provisions are wide and include health, public morality, plant and animal life and natural resources.[60] There are, however, some glaring omissions; namely labor and other human rights. WTO-inconsistent measures undertaken for such purposes are not explicitly excused.

As the club model has broken down, case law under GATT Article XX has developed with the growing awareness of the importance of the GATT contractual balance. Pre-WTO GATT cases, such as *Thai Cigarettes* [61] and the two *Tuna/Dolphin*

54. GATT, *supra* note 4, arts. I, III, XI.

55. WTO Appellate Body Report, *EC – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/R, (Mar. 12, 2001), 40 I.L.M. 1193 (2001), *available at* http://www.wto.org [hereinafter *Asbestos*].

56. *Id.* paras. 87-88.

57. GATT, *supra* note 4, arts. XIX, XXIV, XXI.

58. GATT, *supra* note 4, art. XX.

59. *See* GATS, *supra* note 47, art. XIV, 33 I.L.M. at 57. The GATS also contains an equivalent to the national security exceptions contained in GATT Article XXI. *See id.* art. XIV, 33 I.L.M. at 59.

60. *See* GATT, *supra* note 4, art. XX; GATS, *supra* note 47, art. XIV.

61. GATT Dispute Settlement Panel Report on Thailand – Restriction on Importation and Internal Taxes on Cigarettes, DS10/R, GATT B.I.S.D. (37th Supp.) at 200 (Nov. 7, 1990) [hereinafter *Thai Cigarettes*].

cases[62] had sought to restrictively interpret the scope of Article XX. In *Thai Cigarettes*, the Panel held that a measure granting the Thai Tobacco Monopoly the sole right to import foreign cigarettes[63] was inconsistent with GATT Article XI and was not saved by GATT Article XX(b).[64] With regard to GATT Article XX(b), Thailand had argued that its import policy was justified by its anti-smoking health policies.[65] Allowing open competition on the cigarette market, it was submitted, would likely lead to increased rates of smoking in the Thai population.[66] Thailand also argued that U.S. cigarettes were more harmful than Thai cigarettes.[67] The Panel held that alternative, GATT-consistent measures, including a total ban of cigarette advertising, governmental anti-smoking campaigns, and strict labeling requirements, could address Thailand's concerns about both quantity and quality of cigarettes.[68] Critics asserted that these alternatives were more in the nature of inexpert hypotheses than realistic health regulation.[69]

In the first *Tuna/Dolphin* case (which was not adopted), the Panel held that a Member had no right under GATT Article XX to unilaterally adopt environmental policies with "extraterritorial" application.[70] To permit such policies would jeopardize the GATT as a multilateral framework. The Panel in the second *Tuna/Dolphin* case (which was also not adopted) echoed similar reasoning and emphasized that GATT Article XX was intended as a narrow derogation from GATT discipline.[71] As a result of this ruling, and the introduction in *Tuna/Dolphin I* of the now-

62. GATT Dispute Settlement Panel Report on U.S. – Restrictions on Imports of Tuna, DS21/R, *submitted to parties* Aug. 16, 1991, *not adopted*, 30 I.L.M. 1594 (1991) [hereinafter *Tuna/Dolphin I*]; GATT Dispute Panel Report on U.S. – Restrictions on Imports of Tuna, DS29/R, circulated June 16, 1994, *not adopted*, 33 I.L.M. 839 (1994) [hereinafter *Tuna/Dolphin II*].

63. Incidentally, the Thai Monopoly only exercised this right on three occasions between 1966 and 1990.

64. *Thai Cigarettes*, *supra* note 61, para. 87, at 228.

65. *Id.* para. 27, at 208.

66. *Id.* para. 23.

67. *Id.* para. 28.

68. *Id.* paras. 76-81, at 226-81.

69. *See, e.g.*, Robert Howse, *Managing the Interface Between International Trade Law and the Regulatory State: What Lessons Should (and Should Not) Be Drawn from the Jurisprudence of the United States Dormant Commerce Clause*, *in* REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 139, 140 (Thomas Cottier & Petros C. Mavroidis eds., 2000).

70. *Tuna/Dolphin I*, *supra* note 62, 30 I.L.M., para. 5.32.

71. *Tuna/Dolphin II*, supra note 62, 33 I.L.M., para. 5.38.

infamous "product/process" doctrine,[72] many saw the *Tuna/Dolphin* decisions as restricting Members' ability to pursue broad environmental agendas.[73]

Following the activation of the WTO Agreement, WTO panels and particularly the AB have been more careful to respect Member autonomy under GATT Article XX. The watershed case was *Shrimp/Turtles* in which the AB held that a U.S. import ban on shrimp caught without "turtle excluder devices" was provisionally justified under GATT Article XX(g), relating to the conservation of exhaustible natural resources.[74] Thus, turtles qualify as an exhaustible natural resource, and unilateral measures are not prima facie illegitimate. Although the AB held that the U.S. measure was inconsistent with the chapeau to GATT Article XX, it did so through a relatively subtle argument that, without transparent and consistent treatment of offending countries, the U.S. measure constituted "unjustifiable discrimination."[75]

Since *Shrimp/Turtles*, the AB has confirmed a relatively broad approach to the scope of GATT Article XX–for instance, clean air also qualifies as an exhaustible natural resource.[76] Present jurisprudence confirms that Members can choose their own level of environmental or health protection, but must ensure that the regulatory mechanism for securing this level is the least trade-restrictive means reasonably available.[77] This test is

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72. The Panel held that members could only properly discriminate against products on the basis of their nature and content, but not due to their production method. *Id.* para. 5.11-5.12. This is relevant not to establishing a defense under GATT Article XX, but in establishing breach under GATT Articles I, III or XI.

73. *See* Don Mayer & David Hoch, *International Environmental Protection and the GATT: The Tuna/Dolphin Controversy*, 31 AM. BUS. L.J. 187 (1993); R. Kenton Musgrave & Garland Stephens, *The GATT - Tuna Dolphin Dispute: An Update*, 33 NAT. RESOURCES J. 957 (1993).

74. WTO Appellate Body Report, *U.S. - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, *circulated* Oct. 12, 1998, *available at* http://www.wto.org [hereinafter *Shrimp/Turtles*].

75. *Id.* para. 176.

76. WTO Appellate Body Report, *U.S. - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, *adopted* May 20, 1996, 35 I.L.M. 603 (1996), *available at* http://www.wto.org. The initial Dispute Panel concluded that the U.S. preference for domestic gasoline could not be justified by Article XX(g)'s provisions relating to protection of exhaustible natural resources.

77. The AB has also determined a relatively certain legal inquiry. The first question is whether the relevant GATT Article XX exception is satisfied—whether the measure at issue is "necessary" or "related to" the relevant objective. "Necessary" need not mean inevitable. Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled or Frozen Beef*, WT/DS163,169/AB/R, *circulated* Dec. 11, 2000, *adopted* Jan. 10, 2001, 26 BERNAN'S ANNOTATED REP. 1, *available at*

not neutral because it places trade values at a premium over non-trade values, but it is generally sensitive to the link between WTO discipline and other values. While not perfect, the general derogation system provides a workable valve for other values to compete against WTO values.

B. WTO HARMONIZATION AGREEMENTS IN DETAIL

To complicate matters, the WTO contains four mandatory "positive integration," or "harmonization" agreements in addition to the core agreements on trade in goods and services. The GATT and the GATS are often referred to as "negative integration" agreements in that they prohibit certain types of conduct but do not prescribe positive policies for Member states.[78] The four mandatory WTO harmonization agreements are:

(1) the Agreement on Sanitary and Phyto-Sanitary Measures (SPS);[79]

(2) the Agreement on Technical Barriers to Trade (TBT);[80]

(3) the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS);[81] and

(4) the Agreement on Trade-Related Investment Measures (TRIMS).[82]

This Article takes issue with these agreements. The premise advanced is that WTO harmonization measures upset the GATT contractual balance, and that this undermines the legitimacy of the WTO.

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http://www.wto.org. "Related to" requires some direct connection. *Shrimp/Turtles*, *supra* note 74. In determining these questions, regard is to be had to whether an alternative GATT-consistent measure is reasonably available to achieve the Members' objectives. No proportionality test appears to be imposed. It is only after the relevant exception is satisfied that the additional conditions of the GATT Article XX chapeau are applied. *See Shrimp/Turtles*, *supra* note 74, paras. 147-76.

78. Petersmann, *supra* note 34, at 179.

79. Agreement on Sanitary and Phyto-Sanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, *available at* http://www.wto.org [hereinafter SPS Agreement].

80. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, *available at* http://www.wto.org [hereinafter TBT Agreement].

81. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 81, *available at* http://www.wto.org [hereinafter TRIPS Agreement].

82. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, *available at* http://www.wto.org [hereinafter TRIMS Agreement].

1. *Health, Environmental and Technical Regulations in the WTO*

a. The SPS Agreement

The SPS Agreement applies to all "sanitary and phytosanitary measures which may, directly or indirectly, affect international trade."[83] Sanitary and phytosanitary (SPS) measures are defined in Annex A as measures applied to protect human, animal or plant life or health from risks arising from the entry of pests, diseases or contaminants.[84] The SPS Agreement does not require that Members adopt any SPS measures; it merely provides that all SPS measures applied by a Member must be consistent with the SPS Agreement.[85] The SPS Agreement requires that SPS measures:

> (1) be applied only to the extent necessary to protect human, animal or plant life or health, be based on scientific principles, and not be maintained without sufficient scientific evidence;[86]
>
> (2) not arbitrarily or unjustifiably discriminate between Members, and not constitute a disguised restriction on international trade;[87]
>
> (3) either be:
>
> > (i) based on international standards, guidelines or recommendations where they exist;[88] or
> >
> > (ii) based on a scientific risk assessment taking account of a wide range of factors, including economic factors[89]—unless relevant scientific evidence is insufficient, in which case the Member may provisionally adopt SPS measures and seek to perform a scientific risk assessment within a reasonable period of time;[90] and
>
> (4) not be more trade-restrictive than required to achieve the Member's appropriate level of SPS protection.[91]

At face value these provisions appear reasonable to prevent disingenuous invocation of health concerns from restricting in-

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83. SPS Agreement, *supra* note 79, art. 1.1.
84. This definition is a simplified paraphrase of four relatively prolix limbs of the SPS Annex A, Article 1 definitions. SPS Agreement, *supra* note 79, art. 1.
85. SPS Agreement, *supra* note 79, art. 2.1.
86. *Id.* art. 2.2.
87. *Id.* arts. 2.3, 5.5.
88. *Id.* art. 3.1.
89. *Id.* arts. 3.2, 5.1, 5.2.
90. *Id.* art. 5.7.
91. SPS Agreement, *supra* note 79, art. 5.6.

ternational trade; however, issues of science are rarely so simple. As a current example in a related regime, the U.S. sugar industry, in association with other U.S. food industry groups, is lobbying the U.S. Congress to cut funding to the World Health Organization (WHO) on the basis that a particular WHO report is "scientifically flawed."[92] This WHO report recommends that sugar should account for no more than ten percent of a healthy diet.[93] The sugar industry insists that the correct figure is twenty-five percent.[94] This is precisely the sort of challenge the SPS invites.[95]

There have now been three cases clarifying SPS obligations: *Australia – Salmon*,[96] *EU – Hormones*[97] and *Japan – Varietals*.[98] In each of them, the defending government was found to have breached the SPS, but there was no finding (and sometimes no allegation) that the government breached the GATT. Each case is briefly outlined below.

The measure at issue in *Salmon* was a regulation which required imported salmon to be heat-treated to kill possible disease agents.[99] Thus, "fresh, chilled or frozen" salmon was prohibited.[100] On appeal, the AB agreed with the Panel (though for slightly different reasons) that the measure was inconsistent with the SPS because it was not based on a proper "risk assessment."[101] The 1996 Report purporting to justify the measure contained "general and vague statements of mere possibility of adverse events occurring."[102] This was insufficient to establish

92. Sarah Boseley, *Sugar Industry Threatens to Scupper WHO*, GUARDIAN, Apr. 21, 2003, *available at* http://www.guardian.co.uk/international/story/0,3604,940287,00.html (last visited Jan. 28, 2004).

93. *Id.*

94. *Id.*

95. *See generally supra* notes 84-91 (for an overview of the SPS Agreement).

96. WTO Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R (Oct. 20, 1998), 8 BERNAN'S ANNOTATED REP. 359, *available at* http://www.wto.org [hereinafter *Salmon*].

97. WTO Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products*, WT/DS26,48/AB/R (Jan. 16, 1998), 4 BERNAN'S ANNOTATED REP. 275, *available at* http://www.wto.org [hereinafter *Hormones*].

98. WTO Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R (Feb. 22, 1999), 9 BERNAN'S ANNOTATED REP. 351, *available at* http://www.wto.org [hereinafter *Varietals*].

99. *Salmon*, *supra* note 96, paras. 1-2, 8 BERNAN'S ANNOTATED REP. at 359.

100. *Salmon*, *supra* note 96, paras. 1-2, 8 BERNAN'S ANNOTATED REP. at 359.

101. *Salmon*, *supra* note 96, paras. 127-31, 8 BERNAN'S ANNOTATED REP. at 392-93.

102. *Salmon*, *supra* note 96, paras. 127-31, 8 BERNAN'S ANNOTATED REP. at 392-93.

the probability, as opposed to the possibility, of adverse events. Moreover, the 1996 Report did not properly link the measure taken to the risks identified.[103] The AB went even further, and held that Australia was in breach of SPS Article 5.5 in that, by reversing the recommendations of an earlier 1995 Draft Report, by selectively targeting salmon but not other seafood species, and by applying the ban externally but not internally, the measure constituted a "disguised restriction on international trade."[104] This bold ruling has raised some eyebrows.[105]

In *Hormones*, the EU sought to defend a series of directives which prohibited the importation of beef treated with any of six growth hormones, on the basis of a possible link to cancer.[106] Use of these hormones was also banned within the EU itself.[107] The AB held that the EU had not based its directives on a scientific risk assessment.[108] The EU had itself conducted no formal assessment and the scientific evidence before the AB did not rationally support the import prohibition.[109] The AB held that a merely "theoretical" risk was insufficient to justify protective measures.[110] The EU did not seek to justify the measures using Article 5.7, which incorporates a version of the precautionary principle, but instead argued that the precautionary principle was a rule of customary international law and thus directly applicable to the dispute.[111] The AB expressed doubt that the principle is sufficiently well established outside the specific field of international environmental law and determined that, even if it were, it could not override positive SPS obligations such as those in Articles 5.1 and 5.2.[112]

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103. *Salmon, supra* note 96, paras. 132-34, 8 BERNAN'S ANNOTATED REP. at 393-94.

104. *Salmon, supra* note 96, paras. 177-78, 8 BERNAN'S ANNOTATED REP. at 402.

105. *See, e.g.*, Steve Charnovitz, *The Supervision of Health and Biosafety Regulation World Trade Rules*, 13 TUL. ENVTL. L.J. 271 (2000); Robert Howse & Petros C. Mavroidis, *Europe's Evolving Regulatory Strategy for GMOs – The Issue of Consistency with WTO Law: Of Kine and Brine*, 24 FORDHAM INT'L L.J. 317 (2000).

106. For a full factual background see WTO Panel Report, *EC – Measures Concerning Meat and Meat Products, Complaint by the U.S.*, WT/DS26/R/USA, *circulated* Aug. 18, 1997, paras. 2.1-2.3, *available at* http://www.wto.org; *EC – Measures Concerning Meat and Meat Products, Complaint by Canada*, WT/DS48/R/CAN, *circulated* Aug. 18, 1997, paras. 2.1-2.33, *available at* http://www.wto.org.

107. *Hormones, supra* note 97, para. 3, 4 BERNAN'S ANNOTATED REP. at 275.

108. *Hormones, supra* note 97, paras. 208-09, 4 BERNAN'S ANNOTATED REP. at 340.

109. *Hormones, supra* note 97, paras. 193, 208-09.

110. *Id.* para. 193.

111. *Id.* paras. 122-25.

112. *Id.*

In *Varietals*, Japan sought to defend a measure banning import of certain plants (including peaches, nectarines, and apricots) on the basis that they could be infested with the codling moth, a pest not found in Japan.[113] An exemption regime existed, which required the importer to fumigate the plants in accordance with a "varietal testing requirement" (VTR).[114] The AB agreed with the Panel that the VTR was maintained without sufficient scientific evidence, in breach of SPS Article 2.2. Japan submitted that its measure was nevertheless justified under the Article 5.7 precautionary principle. The AB disagreed, holding that—given the long history of the exemption regime—Japan had not sought to obtain additional information necessary for a more objective assessment within a reasonable period of time.[115]

Future SPS cases are likely to get harder and further distance SPS jurisprudence from GATT jurisprudence. Disputes involving pesticide-treated food products are likely to arise presently. Even more controversially, Genetically Modified Organisms (GMOs) will likely be the next battlefield. On May 13, 2003, the United States lodged a complaint against the EC's 2002 GMO directive which stipulates a firm labeling, tracing and assessment policy.[116] Japan, Australia and New Zealand

113. For a full background, see WTO Panel Reports, *Japan – Measures Affecting Agricultural Products*, WT/DS76/R, *circulated* Mar. 19, 1999, paras. 2.1-2.28, *available at* http://www.wto.org.

114. *Id.* paras. 2.1-2.28.

115. *Varietals*, *supra* note 98, para. 97.

116. *See U.S. Contests Europe's Ban on Some Food*, N.Y. TIMES, May 14, 2003, at C1. The challenged directive is European Commission Directive 2001/18, which the United States contends implements a *de facto* moratorium on GMOs. *See also The EU Moratorium on Agricultural Biotech Products: Claims and Facts*, *available at* http://www.ustr.gov/new/biotech-claimsandfacts.htm (last visited Jan. 28, 2004). Directive 2001/18 repealed an earlier law on the release of GMOs and is facially intended to improve transparency through labeling, create a more efficient authorization process and provide principles governing risk assessment. In addition, there is presently a debate about the terms of European Parliament and Council Regulations which would further refine the rules for GMO labeling, traceability and use. *See* Commission Proposal for a Regulation of the European Parliament and of the Council Concerning Traceability and Labeling of Genetically Modified Organisms and Traceability of Food and Feed Products from Genetically Modified Organisms and Amending Directive 2001/18/EC, COM(01)182 final, *available at* http://europa.eu.int/comm/food/food/biotechnology/gmfood/biotech09_en.pdf (last visited Jan. 28, 2004); Commission Proposal for a Regulation of the European Parliament and of the Council on Genetically Modified Food and Feed, COM(01)425 final, *available at* http://europa.eu.int/comm/food/fs/gmo/biotech08_en.pdf (last visited Jan. 28, 2004).

are moving in a similar direction.[117]

The GMO debate is interesting not only because it illustrates the tension between the SPS and the GATT, but also because it illustrates the tension between the SPS and other international agreements. Some international bodies have supported restrictive GMO measures. For instance, a 2001 United Nations Development Programme Study tentatively supported GMO use, but urged countries to require transparent labeling of GMO products.[118] More importantly, the Convention on Biological Diversity[119] recently adopted the Biosafety Protocol, which is a multilateral treaty designed to protect biodiversity.[120] The Protocol aims to establish rules for the transboundary movements of GMOs (which it terms "Living Modified Organisms," or LMOs).[121] Like the SPS, the Protocol purports to balance the competing values of free trade, modern technology, sound science, and environmental and health protection. It does so, however, from a different perspective since it aims primarily to protect biodiversity, and secondarily to protect human health.[122] Its core obligations are safety-oriented and require minimum safety standards in the handling, packaging and transport of LMOs;[123] comprehensive prior notification of transborder movements,[124] information sharing and informed consent;[125] mandatory labeling for LMOs intended for use as food or

117. On April 1, 2001, Japan introduced a rigorous labeling and detection policy for GMOs. *See* Takeshi Matsuoka, *GMO Labeling and Detection Methods in Japan* (unpublished paper), *available at* http://apec.biotec.or.th/pdf/MrTakeshiMatsuoka.pdf (last visited Jan. 28, 2004). Moves are being made in both Australia and New Zealand to do the same. *See* Kym Anderson & Chantal Pohl Neilsen, *How Will The GMO Debate Affect the WTO and Farm Trade Reform?* (unpublished paper), *available at* http://econ.massey.ac.nz/CAPS/s3pub17.pdf (last visited Jan. 28, 2004).

118. *United Nations Human Development Report*, Making New Technologies Work for Human Development, U.N. Development Programme, *available at* http://hdr.undp.org/reports/global/2001/en/ (last visited Jan. 28, 2004).

119. United Nations Convention on Environment and Development, Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818, *available at* http://www.biodiv.org/convention/articles.asp (last visited Jan. 28, 2004) [hereinafter Convention].

120. The Biodiversity Protocol's full name is the Final Draft of Biosafety Protocol Approved at Montreal Meeting on Biological Diversity Convention (or Cartagena Protocol). Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, vol. 23, 39 I.L.M. 1027 (200), *available at* http://www.biodiv.org/biosafety/protocol.asp (last visited Jan. 28, 2004) [hereinafter Protocol]. Significantly, the United States is not a party.

121. Protocol, *supra* note 120, pmbl., arts. 1, 3.

122. *Id.* art. 1.

123. *Id.* art. 18.1.

124. *Id.* arts. 7, 8, 13.

125. *Id.* art. 19. The Protocol envisages the institution of a Biosafety Clearing-

feed;[126] and minimum standards for risk assessment and management.[127]

Like many international agreements, however, the Protocol's compliance mechanisms are very weak. The dispute settlement procedures of the Convention apply, which require only negotiation, then non-binding mediation.[128] Alternatively, parties are encouraged to seek the compulsory jurisdiction of the International Court of Justice.[129]

This familiar situation highlights that the SPS Agreement is able to use the WTO's preeminence to effectively trump the Protocol. Notwithstanding potential justification under the Protocol, restrictive GMO measures (whether labeling and rigorous assessment, or full moratorium) are vulnerable in the WTO. If the SPS applies,[130] it could be argued that science does not support any non-theoretical risks of GMOs; that trade or labeling measures applied are not rationally related to the relevant risk assessment; or that measures taken are not the least restrictive means of addressing the risks identified.[131] The interpretation of Article 5.7 in *Japan – Varietals* is also concerning.[132] It seems unlikely that Article 5.7 could support a lengthy moratorium on new food technology on the simple basis that the risks are yet unknown. Whatever the outcome, WTO compatibility—rather than consistency with the Biosafety Protocol—will likely define the GMO health policies of a number of countries.[133]

b. The TBT Agreement

The TBT Agreement applies to "technical regulations" adopted by a Member.[134] These are widely defined in Annex 1 to include any "[d]ocument which lays down product characteris-

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House to facilitate the exchange of "scientific, technical, environmental and legal information on, and experience with, living modified organisms." *Id.* art. 19.1.

126. Protocol, *supra* note 120, art. 18.2.

127. *Id.* arts. 15, 16.

128. *See id.* art. 34; Convention, *supra* note 119, arts. 27.1, 27.2.

129. *See* Convention, *supra* note 119, art. 27.3.

130. It is not quite clear that GMO regulation is an SPS matter due to the absence of bioengineering issues from the explicit definition of SPS measures in Annex 1. *See supra* notes 79, 83 *et seq.*

131. *See supra* notes 79, 83 (discussing SPS requirements).

132. *See supra* notes 98, 113 (discussing *Varietals*).

133. *See generally supra* Part II; *supra* notes 31-37. The WTO is the preeminent international legal system with a robust dispute resolution and enforcement system. *Cf. supra* notes 120, 128 (discussing the weak dispute resolution and enforcement system of the Protocol).

134. *See* TBT Agreement, *supra* note 80.

tics or their related processes and production methods . . . with which compliance is mandatory."[135] Technical regulations also include labeling, packaging or other terminology issues.[136] The TBT Agreement does not apply to SPS measures, and does not actually require a country to adopt any technical regulations.[137] If Members do adopt technical regulations, however, the TBT sets out certain rules.[138] Members are required to apply technical regulations on a national treatment and on an MFN basis.[139] When preparing technical regulations, Members have two additional obligations: (1) to ensure that their regulations are not "prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade." That is, technical regulations must be directed at "legitimate objectives" and must not be more trade-restrictive than necessary to fulfill those objectives;[140] and (2) to base technical regulations on relevant international standards, where they exist, unless these standards would be ineffective or inappropriate to fulfill the legitimate objectives pursued.[141]

Like the SPS, the TBT has emerged as a non-GATT mechanism for balancing non-trade values in the WTO.[142] And, like the SPS, the TBT balance is more trade-oriented than the GATT balance.[143] The TBT Agreement has been raised in only two cases, *EC –Asbestos*[144] and *EC – Sardines*.[145] In the former, the AB held that the regulation at issue was a technical regulation but declined, due to the state of the record, to determine whether the regulation violated the TBT.[146] The AB was clear, however, that the TBT constituted an independent set of obligations from those of the GATT, stating " . . . the *TBT Agreement* imposes obligations on Members that seem to be different from,

135. *Id.* Annex 1.
136. *Id.* Annex 1, cl. 1.
137. *Compare* SPS Agreement, *supra* note 79, *with* TBT Agreement, *supra* note 80.
138. *See* TBT Agreement, *supra* note 80, art. 2.
139. *Id.* art. 2.1.
140. *Id.* arts. 2.2-2.4, 4.1, Annex 3.
141. *Id.* arts. 2.4, 4.1, Annex 3.
142. *See generally* TBT Agreement, *supra* note 80.
143. *Compare* GATT, *supra* note 4, *with* SPS, *supra* note 79, *and* TBT Agreement, *supra* note 80.
144. *See Asbestos*, *supra* note 55, at 2.
145. *EC – Trade Description of Sardines*, WT/DS231/AB/R 44, World Trade Organization Dispute Settlement Decisions 71 (adopted October 23, 2002) [hereinafter *Sardines*].
146. *Asbestos*, *supra* note 55, paras. 82-83.

and additional to, the obligations imposed on Members under the GATT 1994."[147]

The *Sardines* case did go on to complete the analysis under the TBT.[148] The measure in issue was an EC regulation establishing common marketing standards for preserved sardines.[149] The regulation provided that only sardines from the species *Sardina pilchardus*, commonly found in the Northern Atlantic, could be labeled and marketed in the EC as "sardines." Peru took issue with this regulation as it excluded the species *Sardinops sagax*, commonly found in the Eastern Pacific. A relevant international standard (Codex Stan 94), jointly adopted by the United Nations Codex Alimentarius Commission and the WHO, addressed the term sardines, which it defined as comprising twenty-one different species, including both *pilchardus* and *sagax*.[150] The AB held that Codex Stan 94 was a relevant international standard (even though it had not been adopted by consensus) and that the EC had not used Codex Stan 94 as a basis for its regulation.[151] The AB further held that Codex Stan 94 was neither inappropriate nor ineffective to achieve the EC's stated objectives of "market transparency, consumer protection and fair competition."[152] The EC was therefore in breach of TBT Article 2.4.[153]

The *Sardines* case was probably not an inappropriate decision on the facts; there is a genuine case that, for labeling purposes, the two sardine species should be treated the same. *Sardines* illustrates, however, that one can succeed under the TBT where one might have failed under the GATT.[154] The TBT imports a free-standing requirement to base technical regulations in any field—national security, public health, or environmental protection—on international standards unless none exist or those which do can be shown to be inappropriate or ineffective to achieve the objectives pursued.[155] In this sense the TBT Agreement is a powerful vehicle of harmonization.[156] Unlike the SPS Agreement, there is no option to disregard a relevant standard

147. *Id.* para. 80.
148. *Sardines*, *supra* note 145, paras. 197, 233, 258, 290.
149. *Id.* paras. 2-3.
150. *Id.* para. 6.
151. *Id.* paras. 233, 258.
152. *Id.* para. 291.
153. *Id.* para. 315.
154. *Compare* GATT, *supra* note 4, *with* TBT Agreement, *supra* note 80.
155. TBT Agreement, *supra* note 80, art. 2.
156. *See generally id.*

by conducting independent tests.[157]

In sum, it might be said that the SPS applies the discipline of science to those measures it covers, and the TBT applies the discipline of international standards.[158] To return to the GMO debate, if measures restricting market access to GMO-containing products fall under the SPS, these will require scientific justification;[159] if such measures fall under the TBT, they will have to be based on international standards.[160]

2. *Intellectual Property and Investment in the WTO*

a. The TRIPS Agreement

The TRIPS Agreement provides an interesting contrast to the SPS and TBT Agreements.[161] The SPS and TBT Agreements are designed solely to protect international trade.[162] Conversely, the TRIPS Agreement is not designed to protect international trade at all.[163] Rather, its purpose is to promote intellectual property (IP) rights and, if anything, to restrict international trade (although not more than necessary) where such trade would infringe IP rights.[164]

In other words, TRIPS is a WTO recognition of the intersection between free-trade values and other values.[165] The TRIPS Agreement resolves this intersection by placing the protection of certain intellectual property standards above the goal of unrestricted trade.[166] Although trade in pirated computer software or generic pharmaceuticals may encourage competition and produce profits for some sectors of the world community, it may disincentivize invention and reduce profits in others.

It can be argued that secure intellectual property rights are important for international trade.[167] Companies may be unwill-

157. *Cf.* SPS Agreement, *supra* note 79, art. 3.3.
158. *Compare* SPS Agreement, *supra* note 79, *with* TBT Agreement, *supra* note 80.
159. SPS Agreement, *supra* note 79, art. 3.3.
160. TBT Agreement, *supra* note 80, art. 2.
161. TRIPS Agreement, *supra* note 81.
162. SPS Agreement, *supra* note 79; TBT Agreement, *supra* note 80.
163. *See generally* TRIPS Agreement, *supra* note 81.
164. TRIPS Agreement, *supra* note 81, art. 7.
165. *See generally id.*
166. *See id.*
167. *See generally* DUNCAN MATTHEWS, GLOBALISING INTELLECTUAL PROPERTY RIGHTS: THE TRIPS AGREEMENT (2002).

ing to supply IP products to countries which do not protect these from piracy. Even if correct, this argument simply uses trade effects instrumentally, to additionally support a value considered intrinsically important—that is, a high standard of property protection. In reality, the normative basis for TRIPS is exogenous to the free flow of international trade.

This can be seen in the different structure of the TRIPS Agreement from that of the SPS and the TBT.[168] The latter two agreements could be described as *defensive* because their sole aim is reducing interference with the trade rules in GATT and GATS.[169] This means that—although they are concerned with health measures and technical standards respectively—they do not promote any particular values, or provide any minimum standards.[170] This is somewhat peculiar as the very purpose of adopting SPS measures or technical regulations is to *promote* non-trade values, such as health protection, environmental standards, consumer safety or national security.[171] Rather ironically, the purpose of the SPS and TBT Agreements is to curtail these non-trade values.[172] It would be entirely SPS and TBT consistent for a Member to dispense with all health, environmental, safety regulations whatsoever.[173] But it would be inconsistent for that Member to base SPS measures on poor science, or TBT measures on standards which conflict with international consensus.[174] As defensive agreements, the SPS and the TBT exist simply to straightjacket non-trade measures.[175]

The TRIPS Agreement, on the other hand, could be described as *progressive* because it exists to increase the scope and internal values of the WTO.[176] Its very purpose is to set new minimum standards for IP protection.[177] Indeed, it goes fur-

168. *Compare* SPS Agreement, *supra* note 79, *with* TBT Agreement, *supra* note 80, *and* TRIPS Agreement, *supra* note 81.

169. *See* SPS Agreement, *supra* note 79; TBT Agreement, *supra* note 80.

170. *See* SPS Agreement, *supra* note 79; TBT Agreement, *supra* note 80.

171. *See generally* SPS Agreement, *supra* note 79.

172. *See generally* SPS Agreement, *supra* note 79; TBT Agreement, *supra* note 80.

173. *See* SPS Agreement, *supra* note 79; TBT Agreement, *supra* note 80 (failing to prescribe any minimum standard or floor for regulation in non-trade areas, setting only a maximum standard or ceiling).

174. *Compare* SPS Agreement, *supra* note 79, arts. 2.2, 3.3, *with* TBT Agreement, *supra* note 80, art. 2.4.

175. *See generally* SPS Agreement, *supra* note 79; TBT Agreement, *supra* note 80.

176. *See generally* TRIPS Agreement, *supra* note 81.

177. TRIPS Agreement, *supra* note 81, pmbl. ("*Recognizing* . . . the need for new rules and disciplines concerning . . . (b) the provision of adequate standards and

ther—no level of protection is too high to violate the TRIPS. The Agreement even encourages Members to provide more rigorous IP protection.[178]

Specifically, TRIPS contains the predictable relative obligations, such as national and MFN treatment for application of IP protection.[179] It also contains a host of substantive obligations, some incorporated from the Paris, Berne and Rome Conventions.[180] Chief among these are:

> (1) to extend copyright protection to computer programs, as well as more traditional forms of literary or artistic creation;[181]
>
> (2) to provide a minimum level of copyright protection of 50 years from the date of authorized publication (or, if no authorized publication, making);[182]
>
> (3) to provide trademark protection for no less than seven years;[183]
>
> (4) to provide protection for industrial designs either through industrial design or patent law for no less than 10 years;[184]
>
> (5) to provide patent protection for any invention, whether products or processes, for no less than 20 years.[185] Developing countries were given a five year grace period,[186] but still had to provide a means to file applications and interim marketing rights;[187] and
>
> (6) to provide effective enforcement mechanisms, including criminal

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principles concerning the availability, scope and use of trade-related intellectual property rights.").

178. *See* TRIPS Agreement, *supra* note 81, art. 1.1 ("Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement.").

179. *See id.* arts. 3-4.

180. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *available at* http://www.wipo.org/clea/docs/en/wo/wo020en.htm (last visited Jan. 28, 2004); Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, *as amended on* Sept. 28, 1979, *available at* http://www.wipo.int/clea/docs/en/wo/wo001en.htm (last visited Jan. 28, 2004); Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, *available at*http://www.wipo.int/clea/docs/en/wo/wo024en.htm (last visited Jan. 28, 2004).

181. TRIPS Agreement, *supra* note 81, arts. 9-10.

182. *Id.* art. 12.

183. *Id.* art. 18.

184. *Id.* arts. 26-27.

185. *Id.* arts. 27, 33.

186. *Id.* art. 65.

187. TRIPS Agreement, *supra* note 81, art. 70.

prosecution, for infringement of certain TRIPS obligations.[188]

The TRIPS Agreement contains a number of derogation provisions.[189] The most general provision is also probably the least effective because it permits public health, nutrition and otherwise public interest measures, but only provided such measures are already consistent with the TRIPS Agreement.[190] There are, however, a number of other provisions which permit states to control abuse of IP rights and to limit IP rights where there would be no prejudice.[191] Certain activities are also excluded from TRIPS' scope.[192]

TRIPS has proven effective in drawing awareness to intellectual property issues. To date, six decided cases have involved significant contested issues under TRIPS.[193] The most controversial dispute covered by TRIPS—the supply of HIV/AIDS medicines to South Africa—was resolved through informal negotiations rather than formal procedures.[194] In each of the six cases determined under the DSU, the defendant has lost on at least one substantive ground. These cases illustrate that the TRIPS obligations are wide-ranging and not easily avoided.

To quickly sketch the issues and results, Canada lost a dispute initiated by the United States on the basis that its Patent Act provided only seventeen, and not twenty, years of protection to applications filed before 1989.[195] In a related case, Canada's

188. *Id.* arts. 41-67.

189. *See id.* arts. 8.1, 13, 26.2, 27.3, 30, 40.1.

190. *Id.*

191. For instance, there is flexibility to control abuse of intellectual property rights which may adversely affect international trade or international technology transfer. *Id.* art. 8.2. There is also some scope to control, through competition law, certain IP practices. *Id.* art. 40.1. Limited exceptions are permitted for both copyright and patent issues, where these cause no prejudice or interference with the IP holder's rights. TRIPS Agreement, *supra* note 81, arts. 13, 30.

192. Some inventions with public interest implications may be excluded from patentability. *Id.* arts. 27.2, 27.3. There is also a significant carve-out for national security. *Id.* art. 73.

193. *See EC—Regime for Importation, Sale and Distribution of Bananas*, WT/DS27/ARB/ECU (Mar. 24, 2002), *available at* http://www.wto.org/english/tratop_e/dispu_e/1555d.pdf; *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS 54,55,59,64/R (Dec. 7, 1998), *available at* http://www.wto.org/english/tratop_e/invest_e/ds54-15.doc (two other cases tangentially raising TRIPS issues).

194. *See* Charlotte Denny & James Meek, *Drug Giants Made to Swallow Bitter Pill: Global Opinion Won in South Africa, But Will it Triumph When the US Fights Brazil's Cheap Aids Medicine?*, GUARDIAN, Apr. 19, 2001, *available at* http://www.guardian.co.uk/Print/0,3858,4172158,00.html (last visited Jan. 28, 2004).

195. *Canada – Term of Patent Protection*, WT/DS170/AB/R (Oct. 12, 2000), *available at* http://www.wto.org.

Patent Act was also found to violate TRIPS by permitting the use of a patented product during the patent term to "stockpile" derived articles intended for sale after expiration of that term. This was held not to be a "limited exception" within the meaning of Article 30.[196] India lost two separate cases because it did not have a "mailbox" filing system for receiving patent applications and did not provide interim exclusive marketing rights.[197] The United States unsuccessfully defended regulations which permitted small businesses from playing broadcasted performances to customers on the basis that this was not a limited exception to the copyright-holders' exclusive right to broadcast.[198] Finally, in *Havana Club*, the AB held that a U.S. measure denying the right of Cuban nationals to apply for and hold trademarks partially violated the TRIPS' national treatment and MFN clauses.[199]

TRIPS is a carefully crafted agreement with a number of derogation provisions seeking to provide flexibility.[200] It should, however, be appreciated that the results reached will often be different than those which would have been reached under the GATT. Canada's stockpiling case is an example of strong IP rights restraining an otherwise legitimate trade practice.

b. The TRIMS Agreement

The TRIMS Agreement is slightly harder to classify.[201] On one hand, it sets out positive rules prohibiting certain trade policies often tied to investment incentives, such as trade balancing, export performance and local-content requirements.[202] On the other, TRIMS purports merely to reflect the obligations inherent in GATT, Articles III (national treatment) and XI

196. *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/R (Apr. 7, 2000), *available at* http://www.wto.org.

197. *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (EC Complaint)*, WT/DS79/R (Sept. 22, 1998), *available at* http://www.wto.org; *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (U.S. Complaint)*, WT/DS50/AB/R (Jan. 16, 1998), *available at* http://www.wto.org; *see generally* TRIPS Agreement, *supra* note 81, art. 70.

198. *US – Section 110(5) of the U.S. Copyright Act*, WT/DS160/R (July 27, 2000), *available at* http://www.wto.org. Note that the relevant provisions were Articles 9-13 of the Berne Convention. *Supra* note 180. These provisions were incorporated through TRIPS. TRIPS Agreement, *supra* note 81, art. 9.1.

199. *US – Section 211 of the Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (Feb. 1, 2002), *available at* http://www.wto.org.

200. TRIPS Agreement, *supra* note 81.

201. TRIMS Agreement, *supra* note 82.

202. *Id.*

(quantitative restrictions).[203] Accordingly, TRIMS' positive rules are in the form of illustrative examples of these GATT provisions.[204] Technically, the illustrative examples in Part I of the Annex probably exceed the rules which can be formally derived from GATT Article III.[205] For instance, a Member deciding to impose export performance requirements on all domestic companies as well as foreign companies would violate TRIMS, but not GATT Article III.[206] For the most part, however, it would be accurate to describe TRIMS as a *declaratory* agreement which only modestly extends the reach of the GATT.[207] For this reason, the analysis below will focus on the SPS, TBT and TRIPS Agreements.

IV. A BALANCE ALTERED: WHY THE WTO IS NOT READY FOR HARMONIZATION

What does the above survey of WTO harmonization agreements reveal about the "constitution" of the WTO? There are two important points. First, all WTO harmonization agreements—whether defensive or progressive—alter the contractual balance created by the core trade agreements, GATT and GATS, because they create additional and independent obligations for Members. Proving that a measure does not breach any GATT or GATS obligation, or that it is saved by the general derogation provisions, is therefore insufficient to ensure WTO compliance. This point may seem self-evident, but it is important. If one takes the GATT and GATS as striking a fundamental bargain between trade and non-trade interests, then every free-standing addition to the WTO risks altering this bargain.

Second, there is a key conceptual difference between progressive and defensive harmonization agreements. This has not been clearly recognized in the literature. David Leebron has attempted to distinguish between several broad types of harmonization.[208] The main distinctions Leebron identifies are: (a) spe-

203. *Id.* art. 2.2 (providing that the Annex is merely "[a]n illustrative list of TRIMS which are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994").

204. *See id.*

205. *See supra* note 4, art. III.

206. *Compare* TRIMS Agreement, *supra* note 82, Annex 2(c), *with* GATT, *supra* note 4, art. III, cl. (1), (4).

207. *Compare* GATT, *supra* note 4, *with* TRIMS Agreement, *supra* note 82.

208. David W. Leebron, *Lying Down with Procrustes: An Analysis of Harmoniza-*

cific rules which regulate characteristics or performance; (b) general policy objectives which set broad standards; (c) agreed principles which influence or constrain factors taken into account in making specific rules; and (d) harmonization of institutional structures and procedures.[209] Using only this taxonomy, one might conclude that progressive harmonization is often of types (a) or (b)—in that positive rules or policies are specified; whereas defensive harmonization is often of types (c) or (d)—in that certain factors or decision-making processes are prohibited.

Leebron's taxonomy does not, however, provide the full picture. Leebron's distinctions focus closely on the *external form* of harmonization measures but not on their *underlying purpose.* Leebron loosely defines harmonization as "making the regulatory requirements or government policies of similar jurisdictions identical, or at least more similar."[210] The unanswered question, though, is "why is this convergence sought"? To answer it, one needs to recognize the important difference between harmonization sought in an area to *promote common values in respect of that area,* and harmonization sought in an area to *protect common values in a different area* from regulatory encroachment.

In the first situation, the area affected is directly regulated on the basis of explicit decisions about that area. In the second, the areas affected are indirectly regulated due to explicit decisions about another area entirely. Thus, trade policy comes to make health policy by omission. For the WTO, this difference can be explained in terms of institutional power loci. Progressive harmonization agreements shift the institutional locus of the WTO from a uni-polar concentration on trade values to a multi-polar balancing of multiple values. The mark of a progressive harmonization agreement is the stipulation of minimum standards with respect to the non-trade value in issue. Figure 2 depicts the way in which TRIPS has expanded the substantive scope of the WTO.

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tion Claims, in FAIR TRADE AND HARMONIZATION 44 (Jagdish Bhagwati & Robert E. Hudec eds., 1996).

209. *Id.* at 43-46.

210. *Id.* at 43.

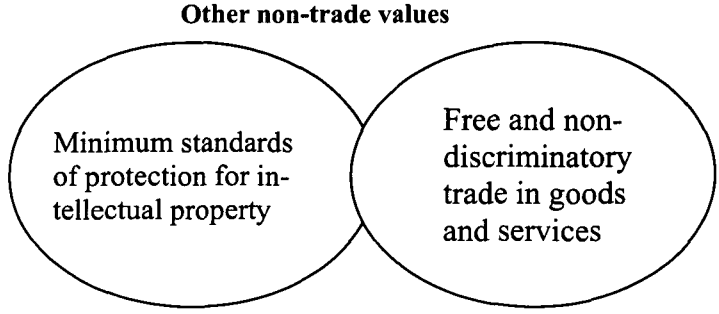

Figure 2: TRIPS in the WTO

Defensive harmonization, on the other hand, does not seek to promote new values in the WTO. Rather, its function is to better protect the trade values at the core of GATT and GATS. The mark of a defensive harmonization agreement is the intent to restrict, rather than promote, the non-trade value in issue. With the SPS, the focus is on requiring scientific evidence supporting SPS measures; with the TBT, the focus is on requiring technical regulations to be based on international standards. Conceptually, defensive harmonization agreements expand the reach of trade values into other areas through procedural restrictions and conditions on measures promoting non-trade values. Figure 3 illustrates.

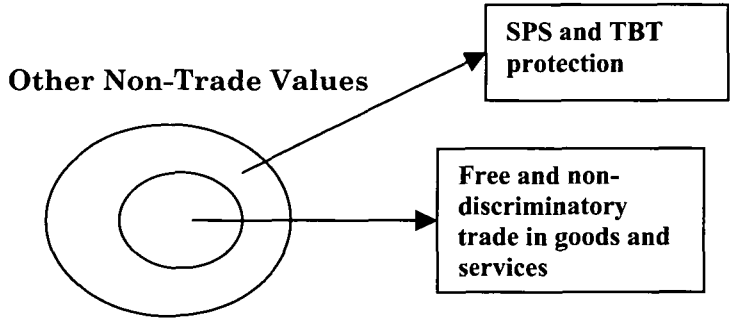

Figure 3: The SPS and TBT in the WTO

This Article argues that the WTO is not yet ready for either progressive or defensive harmonization—though for different

reasons. In explaining those reasons, it is convenient to address defensive harmonization first.

A. DEFENSIVE HARMONIZATION MEASURES: ADDING OBLIGATIONS BUT NO GOALS

The flaw of the WTO defensive harmonization agreements is that they do not seek to achieve anything that the GATT and the GATS do not already seek to achieve. They simply seek the same goals in a more rigorous manner. Their "additive" structure, however, upsets the careful balance between GATT obligations and GATT Article XX in two ways. First, although the SPS and TBT merely seek to promote compliance with the GATT, it is not necessary to establish a breach of the GATT for them to apply.[211] The SPS applies to all measures which "affect trade;"[212] the TBT applies to all technical regulations relating to products.[213] Thus, the reach of the TBT and SPS Agreements is wider than the GATT.[214] On the other hand, it is no defense to a charge of violating the SPS or TBT to demonstrate compliance with GATT Article XX.[215] So the exceptions to SPS and TBT discipline are narrower than the GATT.[216] The margin of appreciation contained in the GATT is therefore squeezed from both ends because the SPS and the TBT are leaner, more aggressive and entirely independent regimes.[217]

The notion that GATT compliance is not a defense has obvious potential to alter results. A good example is the Australian *Salmon* case.[218] Under the GATT, Australia might have argued that a requirement of heat treatment for foreign salmon, but not of domestic salmon, was not in breach of GATT Article III as—due to foreign risks of disease—the two were not like products.[219] This is essentially the argument which prevailed in *EC*

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211. *See* SPS Agreement, *supra* note 79; TBT Agreement, *supra* note 80.

212. *See* SPS Agreement, *supra* note 79, art. 1.1. The SPS applies to all measures affecting trade either directly or indirectly. *Id.*

213. *See* TBT Agreement, *supra* note 80, Annex 1 (defining "technical regulation").

214. *Compare* GATT, *supra* note 4, *with* SPS Agreement, *supra* note 79, *and* TBT Agreement, *supra* note 80.

215. *See* SPS Agreement, *supra* note 79; TBT Agreement, *supra* note 80.

216. *See* SPS Agreement, *supra* note 79; TBT Agreement, *supra* note 80.

217. SPS Agreement, *supra* note 79; TBT Agreement, *supra* note 80.

218. *Salmon*, *supra* note 96.

219. *Id.* This case can be analyzed in different ways. If the Australian measure is not conceptualized as a requirement of heat treatment but as an import ban of fresh, frozen or chilled salmon, the measure would violate GATT Article XI. But

– *Asbestos*.[220] Note that the *Asbestos* case, which was a success for the EU, avoided TBT scrutiny even though the TBT applied.[221] The result for the measure might well have been different if the AB had chosen to complete the panel's analysis.

Another example is the *Hormones* case.[222] Absent the SPS, one might have expected the EU to make a more convincing case from GATT Article XX(b); however, the EU failed not because the measure was more trade-restrictive than necessary, but because it was not properly supported by science.[223] If the issue of GMOs is resolved through the SPS, then it will not even be possible to mount a defense to any particular GMO product based on public morality under GATT Article XX(a).[224] The SPS and the GATT are entirely independent regimes.[225]

Some have argued that this disconnect is not problematic. In particular, Robert Howse has argued that the SPS requirement of scientific evidence should be understood as simply part of the democratic process of shaping a nation's values and choices.[226] Instead of usurping democratic choice, the SPS sharpens the rationality of that choice. This is undoubtedly true to some extent. But, while rational decision-making in a democracy is laudable, Howse's argument does not engage the troubling double-standard at the heart of defensive harmonization. While health and environmental agendas must be carefully justified and drafted with an eye to non-binding international standards, trade and economic agendas are not subject to the same discipline. There are sanctions for making "faulty" health or environmental regulations, but there are no sanctions for deciding not to regulate at all. Although cases so far are limited, the very threat of a protracted dispute challenging the procedure, science, rationality or international basis of measures, has real potential to chill intersecting regulation.

Lori Wallach has written of defensive harmonization:

> NAFTA and the WTO "non-tariff" provisions are based on certain underlying premises, among them: domestic health, safety, and environmental policies must be designed in the "least trade restrictive" man-

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even such a breach is not necessary to invoke the SPS.

220. *Asbestos*, *supra* note 55.

221. *Id.*

222. *Hormones*, *supra* note 97.

223. *Id.*

224. This is a possible avenue for a defense of trade-restrictive GMO measures.

225. *See* GATT, *supra* note 4; SPS Agreement, *supra* note 79.

226. Robert Howse, *Democracy, Science and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98 MICH. L. REV. 2329 (2000).

> ner and national laws and standards should be standardized internationally so as to maximize economic efficiency in cross-border trade. This process of global standardization has been dubbed "harmonization" by the corporations that favor it.[227]

This summary is not strictly accurate, as the SPS does not require standardization so much as scientific justification.[228] But the concept that, through defensive harmonization, trade values influence, and thus chill, non-trade regulation is important. Of course it is prudent to prevent non-tariff barriers from undermining the WTO system, and what looks like regulatory diversity can in fact be a disguised restriction on international trade.[229] But this is not a new problem and was anticipated and addressed through the GATT contractual balance.[230] If a non-tariff barrier does not breach GATT Articles I, III or XI, or can be saved by Article XX (which denies protection to "disguised restriction[s] on international trade"), should that non-tariff barrier—which clearly seeks to promote some non-trade goal—be fairly subject to further scrutiny?

The best response to Howse is this: that the effect of the SPS and TBT is to make technocratic advances in the protection of trade values only by threatening the substantive protection of non-trade values.[231] Consider the future cases of pesticides, disease control measures, unsafe building or manufacturing materials, child equipment safety standards or cosmetics labeling regimes. What may have succeeded under the GATT may fail under the SPS or TBT.[232]

Increasing the rationality of democratic decision-making is fine, but not if a rationality criterion is applied to all values *except* for free trade. If applied selectively, the many policies subject to the criterion will be outflanked by the few policies free from it, which creates imbalance. More importantly, such selective application is a result of value encroachment. Consensus on the importance of trade values at the WTO, but not on health or environmental values, has led the WTO to try to regulate health and environmental policies from a purely trade-oriented

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227. Lori M. Wallach, *Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards*, 40 U. KAN. L. REV. 807, 829 (2002).

228. SPS Agreement, *supra* note 79.

229. *See* Howse, *supra* note 226, at 2331.

230. *See* GATT, *supra* note 4, art. III.A (regarding the contractual balance).

231. *See* SPS Agreement, *supra* note 79; TBT Agreement, *supra* note 80.

232. *Compare* GATT, *supra* note 4, *with* SPS Agreement, *supra* note 79, *and* TBT Agreement, *supra* note 80.

perspective. In an interdependent, post-club model world, this is dangerous and illegitimate. This is so because defensive harmonization measures are conceptually empty. Because they do not proceed from a position of shared values in the areas they regulate, they risk doing damage to those areas in order to further ulterior motives.[233]

Returning to the Biosafety Protocol,[234] which is an example of *progressive SPS harmonization*, underlines this point. The Protocol seeks to harmonize certain regulatory measures so as to protect biodiversity and health.[235] That is, the measures it affects, namely environmental and health regulation, pursue the same goals the Protocol seeks to advance. Accordingly, the Protocol requires comprehensive notification, assessment and management procedures designed to reduce risks in the transboundary movement of GMOs.[236] The point is that the Protocol regulates health and environmental measures from inside the same epistemic community, using the same values.[237] In contrast, the SPS regulates from outside, using different values.

For these reasons, Joanne Scott's suggestion that the WTO should learn from the "new approach" to harmonization in the EU is simply misplaced.[238] This new approach lays down essential requirements for particular areas by directives, but then

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233. Indeed, for this reason defensive harmonization does not appear to meet the "goals" of harmonization suggested by Leebron. *See Procrustes*, *supra* note 208, at 49 (providing a concrete example of harmonization: "[f]or example, harmonization of food safety rules creates a single policy space for food safety"); Jagdish Bhagwati, *The Demands to Reduce Domestic Diversity among Trading Nations*, *in* FAIR TRADE AND HARMONIZATION 42 (Jagdish Bhagwati & Robert E. Hudec eds., 1996). Both Leebron and Bhagwati suggest that an important goal of harmonization is "fairness." *Id.* at 42; *Procrustes*, *supra* note 208, at 18. This is not what the SPS does. Rather than a policy space, it creates a policy "straitjacket."

234. Protocol, *supra* note 120.

235. *Id.*

236. *Id.* arts. 15-19, 33.

237. *See id.* art. 2, cl (4). This article contains the mark of progressive harmonization, a no-maximum standards clause very similar to Article 1(1) of TRIPS:

> Nothing in this Protocol shall be interpreted as restricting the right of a Party to take action that is more protective of the conservation and sustainable use of biological diversity than that called for in this Protocol, provided that such action is consistent with the objective and the provisions of this Protocol and is in accordance with that Party's other obligations under international law.

Id.

238. Joanne Scott, International Trade and Environmental Governance: What the WTO Could (But Probably Won't) Learn From the EU (Apr. 17, 2003) (unpublished paper, presented to the Columbia Law Faculty) (on file with the Minnesota Journal of Global Trade).

permits flexibility as to the actual means of compliance with those requirements.[239] Members may use certain approved standards (and are incentivized to do so by a presumption of compliance) but are also free to achieve the essential requirements by other means. This is a good system; however, it requires *progressive* integration agreements which actively seek to promote non-trade values. That is the nature of most EU directives. The essential requirements are actually minimum standards in *non-trade* areas: such as health, consumer protection or safety standards.[240] The directives are intended to balance the non-trade objective with the free movement principle.

This regime is not applicable to the SPS and TBT Agreements which do not prescribe any essential requirements because they do not promote any non-trade values. The WTO does not provide minimum standards of health protection, or specify minimum levels of technical regulations relating to, say, child car restraints. This difference in harmonization underlines the gulf between the WTO and the EU. The EU is moving closer to being a polity and already has a range of shared values which go

239. *See id.*; *see also* New Approach, Directives and Standards, at http://www.newapproach.org/Directives/DirectiveList.asp (last visited Jan. 28, 2004); European Commission, The New Approach to Technical Harmonisation and Standardisation – Harmonised Standards, at http://europa.eu.int/comm/enterprise/newapproach/standardization/harmstds/reflist.html (last visited Jan. 28, 2004) (giving a list of explanation of such directives).

240. *See* Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on General Product Safety, art. 3(1), 2001 O.J. (L 11/4) (requiring that "Producers shall be obliged to place only safe products on the market" and sets minimum standards, including labeling and routine checks, for determining product safety); Council Directive 88/378/EEC of 3 May 1988 on the Approximation of the Laws of the Member States Concerning the Safety of Toys, art. 2, cl. 1, 1988 O.J. (L 187) (providing that: "[t]oys may be placed on the market only if they do not jeopardize the safety and/or health of users or third parties when they are used as intended or in a foreseeable way, bearing in mind the normal behaviour of children"); European Parliament and Council Directive 94/62/EC of 20 December 1994 on Packaging and Packaging Waste, art. 1, cl. 1, 1994 O.J. (L 365) (attempting, by a combination of essential requirements and guaranteed market access for firms which meet these essential requirements, to balance the twin goals of environmental and trade protection). Article 1(1) provides:

> This Directive aims to harmonize national measures concerning the management of packaging and packaging waste in order, on the one hand, to prevent any impact thereof on the environment of all Member States as well as of third countries or to reduce such impact, thus providing a high level of environmental protection, and, on the other hand, to ensure the functioning of the internal market and to avoid obstacles to trade and distortion and restriction of competition within the Community.

Id. art. 1, cl. 1. Article 6 sets minimum targets of recovery and recycling of waste. *Id.* art. 6.

beyond trade.[241] At present, WTO Members agree on little other than free trade principles.[242]

B. POSITIVE HARMONIZATION MEASURES: BACK TO CONSTITUTUTIONALISM (IN THE SECOND SENSE)

Professor Scott's recommendation,[243] then, is posited on the WTO developing sophisticated *progressive* integration agreements which do promote non-trade values. But this suggestion opens a whole new can of worms.[244] True, substantive agreements are one way for the WTO to move from the club model to an organization which actively recognizes and promotes non-trade values. Opponents of TRIPS might consider it the very model that "social cause" WTO agreements, promoting labor, health and environmental rights, might follow. It prescribes minimum standards for a non-trade value and seeks to reconcile tensions this might create with core trade values of the WTO.

But is the WTO really the right forum for the positive international regulation of non-trade values? At present, it practically does the job by default, so one argument would be to turn the *de facto* into the *de jure*. However, this requires not only the exercise of power, but the exercise of power cloaked in authority—and the WTO is still some distance away from acquiring the necessary authority.[245]

The preliminary difficulty is that values which are positively incorporated in the WTO assume a great priority over values which are not so incorporated. This can be seen in the showdown over TRIPS and the provision of AIDS medicine. Without TRIPS, it would have been very difficult even to argue that intellectual property rights in universal twenty-year patents trumped a continent's right to address the most serious health epidemic of modern times.[246] This will arise each time

241. *See* Michael Trebilcock, Trade Liberalization and Regulatory Diversity 4 (Nov. 8, 2002) (unpublished paper, delivered to the Third EnviReform Conference) (on file with the Minnesota Journal of Global Trade).

242. *See generally supra* note 44. Since its inception in 1994, the WTO has faced a deadlock in expanding its agenda.

243. Scott, *supra* note 238.

244. That is, it involves substantively expanding the scope of the WTO—something about which there is massive disagreement and which brought down the Ministerial Conferences in Seattle and Cancun. *See supra* note 44.

245. *See* Howse & Nicholaidis, *supra* note 21; Howse & Nicholaidis, *supra* note 24; *supra* note 44 and accompanying text (describing the results of Seattle and Cancun).

246. Although, as stated, this case was settled and not resolved under the DSU.

new values are selectively incorporated into the WTO. For instance, if environmental rights are added and labor rights are not, then we can expect to see ecological protection gain ground against rights to work and unionize.

The only solution to the disparity is for the WTO to assume control over a broad range of non-trade values, and this, of course, leads straight back to the second of the constitutionalism questions[247]—should the WTO evolve into a type of world economic organization[248] or even world government?

Most would agree that this shift is neither politically feasible nor desirable. Joseph Weiler has pointed out that there are two types of legitimacy: formal and social.[249] Even if the WTO formally assumed jurisdiction over a range of other matters, this would not provide it with a polity or *demos* to govern legitimately.[250] It is hard to imagine that WTO Members—or, more importantly, their citizens—would accept the WTO as the sole and proper authority in difficult balancing cases; especially when these cases uphold free trade over environmental, health or human rights values.[251] This is not to mention the threat of institutional bias.

More pragmatically, it is doubtful whether the fundamental WTO discipline of trade sanctions is an appropriate or useful means of addressing complex problems in developing countries. As Bhagwati has pointed out, a WTO labor code prohibiting child labor is not likely to actually end the practice.[252] To really change social conditions requires painstaking grassroots work coupled with opportunities for new social ordering. The WTO is, unfortunately, too blunt an instrument to effect such changes. If a poor country which does not prohibit child labor is then subject to trade sanctions, it will become even poorer. It is therefore doubtful that this approach will ultimately improve the conditions on the ground.

Finally, a positive integration/constitutional approach does not seem a very efficient solution to the problem of balancing

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See supra notes 34, 182.

247. That is, should the WTO seek to become an overarching constitutional system? *See supra* Part I.

248. Bronkers, *supra* note 20, at 55.

249. WEILER, *supra* note 16, at 80.

250. *See generally* Howse & Nicolaidis, *supra* note 21; Howse & Nicholaidis, *supra* note 24; Lindseth, *supra* note 23; Cottier, *supra* note 20.

251. *See generally* Howse & Nicolaidis, *supra* note 21; Howse & Nicholaidis, *supra* note 24; Lindseth, *supra* note 23; Cottier, *supra* note 20.

252. JAGDISH BHAGWATI, FREE TRADE TODAY 79 (2002).

values because it would marginalize many existing institutions. The International Labor Organization (ILO), for instance, would become somewhat redundant.[253] Even if the WTO ultimately acquired the social legitimacy to enforce further non-trade values, the best vehicle for this would surely be through linkages to the rules and machinery of other regimes.

But no mistake should be made. If non-trade values—such as labor standards—are incorporated into the WTO by reference, then the result is the same as if they were directly included in a WTO agreement: such standards become directly enforceable in the WTO. In either case, breaching labor rights is breaching the WTO. In other words, linkages which transform non-WTO values into enforceable WTO obligations use non-trade values as a *sword backed by WTO discipline*. These linkages do not solve the problem of WTO legitimacy; quite the contrary. They increase the power of the WTO, but in a non-transparent manner.

V. SOME THOUGHTS: SHIELDS, STANDSTILLS, TIE-INS AND CARVE-OUTS

A. NON-TRADE VALUES AS SHIELDS AGAINST WTO DISCIPLINE

Does this mean that, until it acquires a broader polity, the WTO should refrain from making linkages with other regimes? No. There is a middle ground; linkage-based negative integration. Non-trade values in the WTO should be developed for use as a *shield against WTO discipline*; but they should not be incorporated as a *sword backed by WTO discipline.*

The concept of non-trade values as a shield helps protect the contractual balance of the WTO, which in turn preserves John Ruggie's compact of embedded liberalism.[254] It may ultimately preserve the future of the WTO. By the use of "non-trade values as a shield," this Article means that attention should be given to ensure that, where appropriate, non-trade values can be invoked as defenses against the trade-liberalizing aims of the GATT. The main shield mechanism is of course the general derogation provisions of GATT Article XX and GATS

253. *See generally* International Labour Organization, Official Website, at http://www.ilo.org/public/english/ (last visited Jan. 28, 2004) (containing information on the organization's objectives and activities).

254. *See supra* notes 40, 43.

Article XIV.[255]

Discussion of linkages has led to a number of different proposals for better balancing of the WTO with non-trade values. Aside from constitutionalization, there have been calls for the WTO to foster a democratic image through increased transparency and accountability and to cooperate better with other regimes.[256]

These suggestions are sensible. The WTO should consult widely with other regimes. The WTO should also become more transparent[257] and amicus curiae briefs should be routinely accepted.[258] The more voice given to disparate opinions and constituencies, the greater the WTO's legitimacy to address the range of issues which intersect with trade.[259] A more tangible way to approach issues lacking consensus is non-mandatory plurilateral agreements between like-minded Members. The Agreement on Government Procurement is a good example.[260] Plurilateral agreements help to disaggregate the different constituencies in the WTO and encourage gradual change. Such agreements should, however, not be excepted from the MFN principle with respect to non-signatories. Plurilateral agreements should be a means of encouraging reciprocal concessions in mutually advantageous areas, not a means of forcing compli-

255. This analysis is slightly simplified of course. One could also point to jurisprudence regarding "like products" under GATT Article III. GATT, *supra* note 4, art. III. As discussed earlier, the *Asbestos* case is a good example of balancing conducted at the breach phase. *Supra* note 55.

256. *See generally* Krajewski, *supra* note 17; Christophe Bellmann & Richard Gerster, *Accountability in the World Trade Organization*, 30 J. WORLD TRADE 6 (1996); Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (Rights and Democracy, 2000), http://www.ichrdd.ca/frame2.iphtml?langue=0&menu=m07&urlpage=store/ (last visited Apr. 1, 2004).

257. It should be noted, however, that the WTO was recently ranked well for transparency and accountability by the Global Accountability Report. *See* World Trade Organization, *WTO Gets High Marks for Accountability, Transparency* (Feb. 11, 2003), *available at* http://www.wto.org/english/news_e/news03_e/global_account_report_11feb03_e.htm (last visited Jan. 28, 2004).

258. *See Shrimp/Turtles*, *supra* note 74, paras. 107-08 (discussing the current status of amicus curiae briefs before Panels or the AB). *See generally* DAVID PALMETER & PETROS MAVROIDIS, DISPUTE SETTLEMENT IN THE WTO: PRACTICE AND PROCEDURE, chs. 4-6 (1999).

259. This argument has been made many times. For an example, see Krajewski, *supra* note 17 (especially note 11 therein).

260. Agreement on Government Procurement, Jan. 1, 1981, WTO Agreement, Annex 4, *available at* http://www.wto.org/english/docs_e/legal_e/tokyo_gpr_e.pdf (last visited Jan. 28, 2004).

ance with new values in the WTO arena.[261] Another laudable harmonization tool is voluntary Mutual Recognition Agreements (MRAs).[262] Such agreements are to be encouraged, but the shared value-balancing they entail should be a decision for Member countries, and not forced by WTO discipline.

While these measures are admirable, they are relatively soft proposals. Other proposals are needed to more immediately restore the GATT contractual balance, and such proposals do exist. In particular, the concept of WTO subsidiarity to other regimes points in a more promising direction.[263] Based on EU jurisprudence, this concept seeks to ensure that other values and procedures will prevail over the WTO apparatus where appropriate.[264] This concept dovetails well with the concept of non-trade values being used as a shield to WTO discipline.

B. HOW TO CREATE EFFECTIVE SHIELDS: SUBSIDIARITY IN THE WTO CONTEXT

Below are some practical proposals for change, based on three key mechanisms: "standstills," "tie-ins" and "carve-outs." A standstill is where integration efforts cease completely. A tie-in is where different agreements or regimes are explicitly linked to each other to create an organic framework of legal obligations. A carve-out is where some agreements or regimes are explicitly excepted from each other to create a clear hierarchy of legal obligations. The WTO Agreement could be improved by more extensive use of each of these mechanisms.

An initial suggestion is that the WTO should declare a total standstill on both progressive and defensive harmonization measures. Such a standstill is necessary until, if ever, the WTO acquires sufficient legitimacy to move its locus of balance from trade issues to a comprehensive economic (or even global) agenda. Cooperation, transparency, plurilateral agreements and MRAs are ways for the WTO to build towards such legiti-

261. For an extension of this argument, see Steve Charnowitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792 (2001).

262. *See generally* George Bermann, *Regulatory Cooperation Between the European Commission and U.S. Administrative Agencies*, 9 ADMIN. L.J. AM. U. 933 (1996); James M. Cooper, *Spirits in the Material World: A Post-Modern Approach to U.S. Trade Policy*, 14 AM. U. INT'L L. REV. 957 (1999).

263. *See* Howse & Nicolaidis, *supra* note 24 (discussing WTO subsidiarity); Jacques H. J. Bourgeois, *"Subsidiarity" in the WTO Context From a Legal Perspective, in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON (Marco Bronkers & Reinhard Quick eds., 2000).

264. Howse & Nicolaidis, *supra* note 24; Bourgeois, *supra* note 263.

macy.

With regard to defensive harmonization, the key problem is that the existing agreements, SPS and TBT, are not properly linked to the GATT Agreement whose aims they purport to further. As matters stand, the SPS and TBT destabilize the institutional balance of GATT and GATS by permitting successful WTO actions against potentially trade-restrictive measures to succeed without proof of GATT or GATS breach, and without opportunity to invoke the general derogation provisions.

The solution is to properly tie the SPS and the TBT to the GATT and GATS Agreements. The SPS Preamble flirts with this idea, recording the Members' intentions as, *inter alia*:

> . . . desiring therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).[265]

However, the SPS has not been interpreted consistently with this intention.[266] Instead, it and the TBT are regarded (and, one must acknowledge, generally drafted) as a series of additional and independent obligations. At the very least, both the SPS and the TBT should be amended to make it clear that they *do* merely elaborate rules for the application of GATT Article XX, and GATS Article XIV. This would mean that their provisions cannot be invoked absent a proven breach of a primary GATT or GATS obligation.

Even if this is done, there is still the problem that their requirements effectively restrict the scope of the general derogation provisions, and therefore upset the contractual balance. One option to consider is complete repeal. Less radically, a possible solution would be to tie the SPS to the only obviously relevant limb of the derogation provision: GATT Article XX(b).[267] This would allow Members to defend an SPS measure on other grounds using GATT Article XX and would only make the SPS Agreement relevant if the chosen defense was GATT Article XX(b). The SPS would then be a shield, and not a sword.

This refinement is more difficult in the case of the TBT because, unlike SPS measures, TBT regulations can have any number of conceivable purposes. Instead, thought could be

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265. SPS Agreement, *supra* note 79, pmbl.

266. *See Salmon*, *supra* note 96; *Hormones*, *supra* note 97; *Varietals*, *supra* note 98. Each of these AB decisions treated the SPS as if it were an entirely free-standing obligation. *See id.*

267. GATT, *supra* note 4, art. XX.

given to relaxing the requirement to use international standards as a basis for regulation.[268] Although this requirement can be avoided if the international standards are "ineffective or inappropriate," the *Sardines* case has shown that this is a high hurdle.[269] A better solution would be to use the SPS language in relation to standards and simply create a *rebuttable presumption* that measures based on international standards are consistent with the GATT (and GATS)—or, more formally, saved by GATT Article XX or GATS Article XIV.[270] This is really a micro instance of the EU "new approach."[271] The fundamental test for compliance would be the "not more trade-restrictive than necessary" test from the general derogation provisions.[272] If this can be met without reliance on international standards, that should be acceptable. International standards could then be simply a shield to ease the process and the burden of proof.

These suggestions will more effectively tie the SPS and the TBT to the fundamental bargain of the GATT and the GATS. But what of this bargain? Should it be reconsidered? Yes. The general derogation provisions, while workable, are not adequate to meet the challenge of the linkages created (by omission) through the WTO's preeminence. For one thing, consideration should be given to the substantive matters listed in the derogation provisions. The absence of labor and human rights provisions generally should be reassessed. These should, in a modern world, be proper reasons for derogating from WTO discipline. The EU generalized system of preferences is presently raising such issues, with India challenging the system before a WTO Panel.[273] It is not satisfactory that the EU should have to argue that its sensitivities to labor and human rights fall within the exceptions for "public morals" or "human animal or plant life or health."[274]

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268. TBT Agreement, *supra* note 80, art. 2.4.

269. *See supra* note 143.

270. *See* GATT, *supra* note 4, art. XX; GATS, *supra* note 47, art. XIV.

271. *See supra* notes 226-227.

272. *See generally supra* Part III.A; *see also supra* note 77.

273. At the time of writing, the Panel decision had been provided to the parties but not published. Informal reports claim that the Panel upheld India's claim. *See* Chakravarthi Raghavan, *India Wins Dispute on GSP Against EU*, HINDU, Sept. 9, 2003, *available at* http://www.hindu.com/2003/09/10/stories/ 2003091002371600.htm (last visited Jan. 28, 2004). *See* European Union, Generalized System of Preferences, at http://www.eurunion.org/legislat/gsp/gsp.htm (last visited Jan. 28, 2004) (containing information regarding the EU GSP system).

274. GATT, *supra* note 4, art. XX(a), (b) respectively. *See generally supra* Part III.A.

The question then becomes, how to create a carve-out for labor and human rights that is not excessively broad? One answer is to directly refer to relevant international agreements, such as ILO Standard 182,[275] The United Nations Declaration on the Rights of the Child[276] and the United Nations Declaration on the Elimination of All Forms of Racial Discrimination.[277] The exact agreements that should be chosen is a topic for another article. What can be said now is that these, and/or other like agreements considered sufficiently important, should be excepted from WTO discipline through a provision which states that nothing in the GATT or GATS is intended to prevent Members from performing positive obligations under those specified agreements. The obligations in such agreements can then be used as shields to proceedings claiming breach of the WTO.

This approach could also be extended into the environmental arena. Indeed, this is one area in which a rethink is sorely needed. The WTO's Committee on Trade and Environment has suggested that disputes under a Multilateral Environmental Agreement (MEA) will be excepted from WTO discipline in the case that all parties to the dispute are signatories to that MEA.[278] But this conclusion is doubtful because it seems to be inconsistent with Article 23.1 of the DSU which stipulates the DSB as the exclusive forum for WTO violations. In reality, the Committee's proposal will only be workable if actions taken under the MEA at issue are specifically excepted from WTO discipline. If they are, then a defendant can raise the MEA as a conclusive defense or shield against a WTO proceeding. The legality of the action can then be determined under the MEA.

A system of specific carve-outs for other international agreements would adversely affect the strength of the WTO. To the extent that the WTO presently and specifically overrides certain human, labor or environmental rights, its power would be restrained. This Article has argued that such a redistribu-

275. *ILO Convention Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour*, International Labor Organization, 38 I.L.M. 1207 (June 17, 1999). *See generally*, Matthew T. Mitro, *Outlawing the Trade in Child Labor Products; Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions*, 51 AM. U. L. REV. 1223 (2002).

276. G.A. Res. 1386, U.N. GAOR, 44th Sess., U.N. Doc. A/RES/44/25, 28 I.L.M. 1448 (1989).

277. G.A. Res. 2106, U.N. GAOR, 20th Sess., Agenda Item 58, U.N. Doc. A/6181, 5 I.L.M. 350 (1966).

278. *See* Electronic Commerce, *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey4_e.htm (last visited Jan. 28, 2004) (giving the official summary of the Committee's position).

tion of power is a good thing, but the implications should not be exaggerated. To the extent that a Member's justification for its action is not founded on a specifically excepted international obligation, the WTO would still prevail. Simply noting by way of defense that the measure in question related to, say, labor standards would not be sufficient—the carve-out should only except actions positively required by the specified agreement. In addition, the AB would have to be alert to spurious defenses, but there is no reason why this approach would not improve the balance struck at present. Indeed, this is precisely how Article 104 of the North American Free Trade Agreement (NAFTA) is drafted,[279] and few complaints have yet been raised about it.

CONCLUSION

In a vast field of international institutions, the WTO is preeminent. It has—particularly through careful AB decisions—generally wielded its significant power with restraint and responsibility. But, judicial finesse cannot cover indefinitely for institutional shortcomings. The WTO has a number of shortcomings which must be addressed because, although the club model theory of international regimes is still current, the reality is that international institutions and regimes today are linked. In practical terms, the linkage is hierarchical and the WTO is on top.

This Article has argued that the WTO's basic bargain—carefully drafted positive trade obligations balanced by broad

279. North American Free Trade Agreement, Sept. 14, 1993, art. 104, 107 Stat. 2057, 32 I.L.M. 289. Article 104, entitled "Relation to Environmental and Conservation Agreements," provides:

> 1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:
>
> a) the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended June 22, 1979,
>
> b) the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as amended June 29, 1990,
>
> c) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States, or
>
> d) the agreements set out in Annex 104.1,
>
> such obligations shall prevail to the extent of the inconsistency . . . .

Id.

derogation provisions—is the bedrock of its legitimacy, earned through embedded liberalism. The WTO's use of harmonization agreements threatens to undermine this bargain.

Aside from a standstill, this Article proposes two solutions for retaining the WTO bargain: updating the derogation provisions to modern conditions with greater carve-outs, some focused on specific international agreements; and tying existing defensive harmonization measures explicitly to the derogation provisions.

The immediate future for the WTO is not as a world government, but as a trade institution aware of its powerful effect on the promotion and attainment of non-trade values. To this end, non-trade values in the WTO should be wielded as a shield, not sharpened as a sword.