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NO ROSES WITHOUT THORNS: GLOBAL CONSUMERS OF CUT FLOWERS AS POLITICAL ACTORS

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As the colloquial name for cut flowers as “blood flowers” implies, the outsourced production of “blood flowers” is plagued by negative externalities, including child labor, health risks, soil and water pollution, sexual exploitation of women, and unfair distribution of water resources that shortchanges the tribal populations in Asian, African, and Latin American countries. Today consumers in developed countries increasingly view consumer choice as expressing their values and identities. Moreover, trade scholars believe trade restrictions could efficiently protect public morals, intellectual property, animal, human, and plant life, and ensure the proper sanitary and phytosanitary measures. A ban on cut flowers, a measure mandated by the GATT 1994 Article XX General Exceptions, will counteract some of the negative externalities of the cut flower trade. However, this article however argues that, within the context of a free market, it is the informed and compassionate consumers’ choice as political actors, and not the prohibitive provisions within trade law, that can most effectively eliminate the negative externalities of the cut flower trade. Besides, the cut flower trade yields positive externalities by providing jobs to men and women in Asia, Africa, and several Latin American countries. And, although a purely process-focused distinction may support a ban on the “blood flowers”, such a ban would result in job loss, subsequent destitution, starvation, and civilian deaths in developing countries, doing more harm than good.

I. INTRODUCTION

Roses do not grow without thorns, and the production of cut flowers is no exception to this rule.¹ The World Trade Organization’s

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¹ See *Hearing on The Pending Free Trade Agreement with Colombia Before the H. Ways & Means Comm., Trade Subcomm.* (2011) [hereinafter *Hearing on The Pending Free Trade Agreement*]

(“WTO”) *Agreement on Agriculture* governs the cut flower trade because the flowers fall within its “products of agriculture” definition.² Still, as the disagreement among North American courts demonstrates, legally defining and classifying cut flowers is an arduous, confusing task.³

Today, the cut flower trade is a fast growing global industry. According to the *Australian Agency for International Development*, global consumption of cut flowers has sky rocketed in recent years, with growth rates even predicted to top 30% by 2014.⁴ Demand for these highly perishable luxury goods is particularly strong in the European Union, Japan, and North America.⁵ In fact, the *Dutch Ministry of Foreign Affairs* reports that the European Union consumes nearly 50% of the world’s flowers.⁶ The United States remains the largest national market for foreign, primarily South American, growers.⁷ At present, global trade in cut flowers stands at roughly \$5.5 billion (U.S.), nearly 70% of which is within the European Union.⁸ Japan is the world’s second-largest national market.⁹

Regions with relatively warmer climates as well as cheap labor forces are comparatively suitable for flower cultivation, packaging, and

(statement of Kasey Cronquist, CEO/Ambassador, California Cut Flower Comm’n), available at http://waysandmeans.house.gov/uploadedfiles/california_cut_flower_commission.pdf (“[C]ut flower imports from Colombia have affected and will continue to affect domestic cut flower farms, specifically California’s flower farmers, which now make up almost 80% of U.S. cut flower production.”); see also Catherine Ziegler, *Fair Flowers: Environmental and Social Labeling in the Global Cut Flower Trade*, in FAIR TRADE AND SOCIAL JUSTICE: GLOBAL ETHNOGRAPHIES 73, 81 (Sarah M. Lyon & Mark Moberg eds., 2010).

² See *Agreement on Agriculture*, 1867 U.N.T.S. 410 [hereinafter AOA]; see also Bettina Rudloff & Johannes Simons, *Comparing EU Free Trade Agreements: Agriculture*, IN BRIEF, July 2004, at 3, 5, 6, available at http://www.swp-berlin.org/fileadmin/contents/products/fachpublikationen/InBrief_6A_e_BRudloff_JSImonsks.pdf.

³ See *Anheuser-Busch, Inc. v. Florists Ass’n of Greater Cleveland, Inc.*, 603 F. Supp. 35, 37 (N.D. Ohio 1984) (allowing a defendant florist to use the slogan “This Bud’s For You” and to not use “fresh-cut flowers”); see also *Bradshaw v. Minister of Customs and Excise*, [1928] S.C.R. 54 (Can.) (“[I]t seem[ed] perfectly clear ... that cut flowers cannot be brought within the term “nursery stock.”).

⁴ TRADE AND INDUSTRIAL POLICY STRATEGIES ET AL., TRADE INFORMATION BRIEF: CUT FLOWERS & FOLIAGE 11 [hereinafter SADC REP.], available at http://www.sadctrade.org/files/TIB1CutFlowersLong_0.pdf

⁵ See generally V. L. SHEELA, HORTICULTURE SCIENCE SERIES NO. 10: FLOWERS FOR TRADE 1 (K.V. Peter ed., 2008); COMMONWEALTH SECRETARIAT, GUIDELINES FOR EXPORTERS OF CUT FLOWERS TO THE EUROPEAN MARKET 6 (2001); E. FLEMING ET AL., ICT AND THE BLOOMING BLOOM TRADE 767-68 (2009), available at <http://www.efita.net/apps/accesbase/bindocload.asp?d=6572&t=0&identobj=JTEG5Rtj&uid=57305290&sid=57&idk=1>.

⁶ See John Henry Steitz II, *The Peril of Unilateral Action: The Netherlands National Environmental Policy Plan*, 3 GEO. INT’L ENVTL. L. REV. 311, 314 n.15 (1990) (as of 1990, The Netherlands was worlds’ largest cut flower exporter); see also *The European Union (EU) Consumes Over 50% of the World’s Flowers*, CBI MINISTRY OF FOREIGN AFF. (Jan. 29, 2008), <http://www.cbi.eu/news/The-European-Union-EU-consumes-over-50-of-the-world-s-flowers/126153>.

⁷ See, e.g., JOANNA BONARRIVA, INDUSTRY & TRADE SUMMARY: CUT FLOWERS 3 (2003) [hereinafter USITC PUB. 3580], available at <http://www.usitc.gov/publications/332/pub3580.pdf> (addressing trade and industry conditions for fresh and preserved cut flowers for the period 1997-2001).

⁸ SADC REP., *supra* note 4, at 10.

⁹ *Id.* at 14.

exportation.¹⁰ Consequently, Colombia, Ecuador, India, Israel, Kenya, the Philippines, Tanzania, and Uganda are some of the biggest cut flower producers and exporters.¹¹

The first issue in the sociology of cut flower debate is the product's production history. As Douglas Kysar explains, within today's globalized liberal market, consumers regularly "encounter goods with a production history that bears the imprint of countless economic actors from across the globe, actors whose lives and working conditions are enmeshed in an intricate web of economic and political interdependence."¹² The cut flower industry is just one example of this. Within the WTO, however, the argument for "legalization is strong for intellectual property rights, moderate for public health and environmental matters and weak for labour issues."¹³ There is great tension between the free market trade norms that the WTO promotes and the social norms in many developing countries.¹⁴ Moreover, while higher legalization of intellectual property rights may benefit multinational corporations in developed countries, moderate health and weak labor rights exacerbate the negative externalities, such as sweatshops in poor, developing countries.¹⁵

Another key issue in the cut flower debate is the trade's impact on societies at the cultivation and production levels, which the extensive social problems on flower farms evidence.¹⁶ Ezra Rosser's concept of "poverty offsetting" provides useful insight on one way to address this particular issue¹⁷ because it "offers the possibility of raising general awareness of the

¹⁰ RUTH HAUG ET AL., TRADE, ENVIRONMENT AND DEVELOPMENT: IMPORT OF FLOWERS FROM AFRICA TO NORWAY 15 (2008) [hereinafter NORAGRIC REP. NO. 43], available at http://www.umb.no/statisk/noragric/publications/reports/2008_nor_rep_43.pdf.

¹¹ See USITC PUB. 3580, *supra* note 7, at 29-33.

¹² Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 526, 536 (2004).

¹³ See Sieglinde Gstohl, *Blurring Regime Boundaries: Uneven Legalization of Non-Trade Concerns in the WTO*, 9 J. INT'L TRADE L. & POL'Y 275, 275 (2010).

¹⁴ See Cephas Lumina, *Free Trade or Just Trade? The World Trade Organisation, Human Rights and Development (Part 1)*, 12 L. DEMOCRACY & DEV. 20 (2008).

¹⁵ Chimni argues for a class approach to international law. He discredits the "death of class" thesis claiming that a transnational capitalist class – for our project the investors and companies involved in cut-flower trade – is shaping international laws and institutions. An emerging transnational oppressed class, the women, children; tribes and those men and women exposed to hazardous chemicals in the cut flower industry are yet another area in which Chimni's class approach can prove illuminating. See B.S. Chimni, *Prolegomena to a Class Approach to International Law*, 21 EUR. J. INT'L L. 57-82 (2010). The Indian Supreme Court in *Novartis AG v. Union of India*, MANU/SC/0281/2013 ¶ 65 (India) seems to have performed the class analysis that Chimni speaks of noting that the "Doha Declaration effectively reflected and addressed the deep disquiet of the developing and the least-developed countries regarding their obligation under TRIPS to grant patent protection for pharmaceutical and agricultural chemical products and the likelihood of its highly adverse consequence on public-health."

¹⁶ See, e.g., Bruno Leipold & Francesca Morgante, *The Impact of the Flower Industry on Kenya's Sustainable Development*, INT'L PUB. POL'Y REV., June 2013, at 1, 4-6, available at <http://www.ucl.ac.uk/ippr/journal/downloads/vol7no2/flowerindustry>.

¹⁷ Ezra Rosser, *Poverty Offsetting*, 6 HARV. L. & POL'Y REV. 179 (2012).

relationship between consumption and poverty.”¹⁸ Moreover, Kysar argues that awareness is key because “environmental, health, and safety standards continue to be determined by the willingness of citizens to vote rather than the willingness of consumers to pay.”¹⁹ But, the distinction between citizens and consumers as political actors in a market will have little practical significance if “voting itself becomes simply another self-conscious manifestation of market preferences.”²⁰

According to Kysar, consumers acting on process preferences “seem to regard consumption at least partially as an act of public significance.”²¹ However, the purpose of this Article is not to repeat sociologists’ findings on flower farms in developing countries. Instead, it maintains that consumer preference is an achievable means to extinguish the negative externalities running rampant in the cut flower trade.²²

Baradaran and Barclay have asserted that “[f]air trade is one of the fastest growing markets in the world.”²³ To be sure, fair trade is a viable option because it does not involve “coercion of either government or private industry.”²⁴ But, the political involvement of consumers as political actors is also necessary to completely eradicate the negative externalities within cut flower trade:

[F]air trade may also have a role in mitigating worldwide child labor problems ... It allows a market-based approach that helps producers in developing countries obtain special trading conditions and increased profits in exchange for meeting various human rights and labor standards that benefit workers. However, the use of fair trade labeling to combat child labor is an approach that has received little attention in the legal community, particularly in the United States.²⁵

After detailing the United States and European Union’s regulation of the cut flower trade, this Article will focus on the biggest producers and

¹⁸ *Id.* at 179.

¹⁹ Kysar, *supra* note 12, at 528.

²⁰ *Id.*

²¹ *Id.* at 533.

²² See Tayyab Mahmud, *Debt and Discipline: Neoliberal Political Economy and the Working Classes*, 101 KY. L.J. 1 (2012) (offering a critique of the new legal regimes and strategic use of monetary policy that, *inter alia*, displaced Keynesian welfare, facilitated financialization of the economy, broke the power of organized labor, and expanded debt to sustain aggregate demand); cf. ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM: RE-IMAGINING THE GLOBAL ECONOMIC ORDER* 3-7 (2012).

²³ Shima Baradaran & Stephanie Barclay, *Fair Trade and Child Labor*, 43 COLUM. HUM. RTS. L. REV. 1, 5 (2011).

²⁴ *Id.*

²⁵ *Id.*

exporters of cut flowers—Kenya, Ethiopia, Ecuador and Colombia—because they are also the countries where the negative impact of cut flower production is the strongest. By exploring this under-researched area, it is the authors' goal to provide useful suggestions and constructive critiques on various aspects of the global cut flower trade.

II. THE CONCEPT OF POVERTY OFFSETTING AND CONSUMERS AS POLITICAL ACTORS

Undoubtedly, there are labor, health, and environmental issues within the global cut flower trade. These issues are particularly difficult to resolve because proposed resolutions are often premised on completely different views. All too often, proposed solutions do not align with the interests of developing countries engaged in the cut flower trade.²⁶ For instance, many argue investors are attracted to cut flower farms in developing countries due to the abundance of affordable labor.²⁷ Yet, others believe political stabilization combined with infrastructure improvements has spurred growth in the cut flower industry, particularly in African countries.²⁸ What is lost in the disagreement, however, is the fact that labor cost and land price, combined with significant government support and subsidies, makes it exceedingly difficult for growers in developed countries to compete.²⁹

The location of these cut flower farms creates job opportunities, particularly for women in African, Asian, and Latin American countries.³⁰ However, limited support for workers' rights and the abundance of workplace related exploitation in flower farms have attracted the attention of human rights activists in more developed areas of the world, causing an outcry against environmental, social, health, and safety conditions on the farms.³¹ Rosser's idea of poverty offsetting provides "a way for consumers

²⁶ See generally Leipold & Morgante, *supra* note 16 (discussing the various pressures on Kenya's cut flower industry and their impact).

²⁷ See XINSHEN DIAO ET AL., INT'L FOOD POL'Y RESEARCH INST., THE ROLE OF AGRICULTURE IN DEVELOPMENT: IMPLICATIONS FOR SUB-SAHARAN AFRICA 153 (2007).

²⁸ See JACOB CHEGE, VALUE ADDITION IN COFFEE INDUSTRY IN KENYA: LESSONS FROM CUT FLOWER SECTOR 15 (2012), available at http://www.trustafrica.info/documents/research_findings/%5BTA-10-089%5D-%20Chege%20Final%20research%20report.pdf.

²⁹ See, e.g., *Hearing on The Pending Free Trade Agreement*, *supra* note 1. In the year 2006, France, for example, aided Euro 4 million over four years to support investment in horticultural holdings producing cut flowers, enabling them to diversify flower production and adapt supply to the new demands of consumers; see Authorisation of State aid pursuant to Articles 87 and 88 of the EC Treaty—Cases where the Commission raises no objections, Official Journal C 87, 11/04/2006, at 7.

³⁰ See Cheryl Doss et al., *The Role of Women in Agriculture* (Food and Agric. Org. of the United Nations, Working Paper No. 11-02, 2011), available at <http://www.fao.org/docrep/013/am307e/am307e00.pdf>.

³¹ See Baradaran & Barclay, *supra* note 23, at 4-5 (citing Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20

to act upon their values without asking them to give up all forms of consumption associated with poverty-related harm.”³² Rosser elaborates on this idea and explains, “[c]onsumer indifference to the conditions and wages received by workers in the production of particular products helps ensure both that prices are kept low and that many people continue to lead lives marked by poverty.”³³ Consumer awareness is key to correcting this, and poverty offsetting institutions are potentially potent knowledge-spreading mechanisms.³⁴

In conjunction with Kysar’s insight that “private consumption takes on a self-consciously political dimension,”³⁵ Rosser’s poverty offsetting idea is significant in the cut flower industry.³⁶ Further, the World Bank has long touted the cut flower industry as a project in women’s empowerment by employing more women than men.³⁷ Even if this is accurate, Rosser still thinks “people are, or should be, troubled by the poverty associated with their consumption.”³⁸ Ideally, an “[a]wareness of the true social costs of consumption” will lead to “consumer-demanded improvements in how goods make it to the market.”³⁹ However, “even if it does not do so immediately, poverty offsetting institutions provide a direct mechanism for socially minded consumers to correct for the harms of their consumption.”⁴⁰

YALE J. INT’L L. 361, 403 (1995). Baradaran and Barclay invoke Daniel Ehrenberg’s proposal to treat child labor as an illegal trade subsidy that constitutes an unfair comparative advantage under the WTO.

³² Rosser, *supra* note 17, at 181.

³³ *Id.* at 179.

³⁴ *Id.*

³⁵ Kysar, *supra* note 12, at 531.

³⁶ Still, Rosser recognizes the limited application his poverty offsetting analysis may have to cut flower trade. E-mail from Ezra Rosser, Prof., American Univ. Washington Coll. of Law, to Prabhakar Singh, President’s Graduate Fellow, National Univ. Singapore (Mar. 6, 2013) (“I think the idea of flowers as a luxury product is great but it also might be worth exploring the social significance of moments where flowers move to slightly more exact such as funerals or weddings. ... Poverty offsetting is the payment for harms. I also not sure that the industry is the most suitable because the harms are there but payments might be better for lost wages but perhaps not for sexual exploitation for which payments may not be able to right the wrong.”) (on file with the author, and the Kentucky Journal of Equine Agriculture & Natural Resources Law, University of Kentucky College of Law).

³⁷ See generally V. Meier, *Cut-flower production in Colombia—A Major Development Success Story for Women?* 31 ENVIRONMENT & PLANNING 273-289 (1999); Constance Newman, *Gender, Time Use, and Change: Impacts of Agricultural Export Employment in Ecuador* (The World Bank Development Research Group/Poverty Reduction and Economic Management Network, Policy Research Report on Gender and Development Working Paper Series No. 18, 2001), available at <http://siteresources.worldbank.org/INTGENDER/Resources/wp18.pdf>.

³⁸ Rosser, *supra* note 17, at 181.

³⁹ *Id.*

⁴⁰ *Id.*

III. THE WTO'S AGREEMENT ON AGRICULTURE AND EXTERNALITIES IN CUT FLOWER PROCESSES AND PRODUCTION METHODS

Members, . . . *Hav[e] agreed* that in implementing their commitments on market access, developed country Members would take fully into account the particular needs and conditions of developing country Members by providing [among other things] the fullest liberalization of trade in tropical agricultural products as agreed at the Mid-Term Review, and for products of particular importance to the diversification of production from the growing of *illicit narcotic crops*.⁴¹

The *Agreement on Agriculture* is more than an instrument for promoting trade in agricultural products; it reflects the need for greater moral consciousness within international trade. Those inclined to use a constitutional vocabulary for international trade law might view this aspect of the Agreement as containing seeds of global constitutional commitments aimed at the elimination of harmful drugs.⁴² For example, Article 6.2 of the *Agreement on Domestic Support Commitments*, acknowledges that “government measures of assistance, whether direct or indirect, to encourage agricultural and rural development are an integral part of the development programs of developing countries.”⁴³ In line with this commitment, the *Agreement* exempts “domestic support to producers in developing country Members to encourage diversification from growing illicit narcotic crops . . . from domestic support reduction commitments that would otherwise be applicable to such measures.”⁴⁴ The *Agreement's* text further bolsters the constitutional analogy, not only as an instrument for the growth of trade in agriculture, but also through the promotion of a Kantian compassion for seeing consumers and producers as intertwined in the global community.⁴⁵

A. Negative Externalities and Applicable Legal Instruments

Media pressure and Non-Governmental Organization (“NGO”) campaigns have helped generate considerable consumer interest in the

⁴¹ AOA, *supra* note 2, at pmb1. (italics supplied).

⁴² See Prabhakar Singh, *Mercantile Metaconstitutionalism: Interpretation of the WTO Treaty and the Developing Countries*, 55 GERMAN YB INT'L L. 465-505 (2012) (offering a critique on the constitutional reading of WTO law).

⁴³ AOA, *supra* note 2, art. 6.2.

⁴⁴ *Id.* (Article 5, paragraph 6 of the *Agreement on Agriculture* relates to special safeguard provisions talks of “perishable and seasonal products” for which cut flower easily qualify).

⁴⁵ See AOA, *supra* note 2.

employment conditions of cut flower production in developing countries.⁴⁶ Flower farms in developing countries have been accused of using child labor, and at the same time, not allowing trade unions to function. In Colombia, for instance, the number of unions and union members continue to decline in the cut flower industry.⁴⁷ Trade unions are legitimate legal instruments for combating these negative externalities because as “an agency and a medium of power,” a trade union works to enhance the control cut flower workers have over their “conditions of employment by exerting ‘power’” on behalf of the workers.⁴⁸ Consequently, the demand for ethical trade practices, the right to form labor unions, observation of human rights, abolition of child labor, and sustainable environmental practices in developing countries participating in the global cut flower market has increased with the growth in cut flower trade.⁴⁹

Soil and water pollution is another negative externality of the cut flower farms in developing countries as low-cost but highly contaminating chemicals are used for both cultivating and preserving cut flowers during transit from the field to the consumers.⁵⁰ What is more, certain chemicals that are banned in developed countries are still used in developing and the least developed countries due to their low environmental and health law enforcement.⁵¹ It is not uncommon for run-off waste from flower farms, mostly fertilizers and pest control chemicals, to pollute nearby water bodies.⁵² Over the long run, it is likely that pollution from cut flower

⁴⁶ Mick Blowfield, *Ethical Trade: A Review of Developments and Issues*, 20 THIRD WORLD Q. 753, 754-55 (1999).

⁴⁷ By 2006-07, “[a]pproximately 742,000 workers (4 percent of the workforce of 18.2 million) were union members. Almost 60 percent of the workforce was employed in the informal sector. The Colombian labor code provides for automatic recognition of unions that obtain 25 signatures from potential members and comply with a registration process. Unions claimed that this process was slow and was used to block union registration, specifically in the cut flower sector.” See 2008 ANN. HUM. RTS.: COUNTRY PROFILES COLOMBIA, REP. U.S. DEP’T ST. 2484, 2504 (2007) (detailing human rights in Colombia). Neoliberalism has also created substantial obstacles for organized labor in the United States. See Mahmud, *supra* note 22, at 6, 16 (footnotes omitted) (In the U.S., neoliberalism has “[broken] the power of organized labor ... by direct coercion. This was inaugurated by the smashing of the Air Traffic Controllers’ strike in 1981 by President Reagan.”).

⁴⁸ Marc-Antonin Hennebert et al., *The Mobilization of International Framework Agreements: A Source of Power for Social Actors?* 33 COMP. LABOR L. & POL’Y J. 695 (2012) (“To accomplish this task they (the trade unions) must exercise “power over” actors, such as employers and state representatives.”). Additionally, child labor is a substantial problem in rural areas of Colombia, where children are relied on to supplement familial income. See 1999 ANN. HUM. RTS.: COUNTRY PROFILES COLOMBIA, REP. U.S. DEP’T ST. U.S. DEP’T ST. 545, 569 (1998).

⁴⁹ See generally *id.* (describing labor problems in Colombia); see also Martin Donohoe, *Flowers, Diamonds, and Gold: The Destructive Public Health, Human Rights, and Environmental Consequences of Symbols of Love*, 29 HUM. RTS Q. 164 (2007) (detailing the human rights challenges created by flower production).

⁵⁰ See USITC PUB. 3580, *supra* note 7, at 15.

⁵¹ See MAGGIE MURPHY, UNREPRESENTED NATIONS AND PEOPLES ORG, BLOSSOMING TRADE CONCEALS ROOTS OF EXPLOITATION (2009), available at http://www.unpo.org/images/blossoming_trade_conceals_roots_of_exploitation.pdf.

⁵² See Leipold & Morgante, *supra* note 16, at 6-8, 17-20.

production will cause large-scale, irreversible damage to the ecosystem.⁵³ For example, rose farm pollution is responsible for damaging Kenya's Lake Naivasha.⁵⁴ Furthermore, the chemicals used on cut flower farms are likely have long-term health effects on men and women.⁵⁵ Finally, because a majority of flower workers are women, gender injustice is another key issue in the cut flower trade.⁵⁶ Women working in cut flower production regularly face sexual harassment. In addition, bullying, inadequate maternity cover, and a lack of allowances for childcare responsibilities are also major issues.⁵⁷

Three different legal provisions within the WTO law's scope have the potential to address the aforementioned negative externalities which the global cut flower trade generates: (1) GATT 1994 Article XX; (2) Technical Barrier to Trade ("TBT"); and (3) Sanitary and Phytosanitary ("SPS") measures.⁵⁸ Kysar has concluded that between the TBT and SPS Agreements, the latter, with its scientific basis requirements, is clearly the more stringent of the two.⁵⁹ In addition, he notes that "there is a surprising

⁵³ *Id.*

⁵⁴ See M. M. Mekonnen et al., *Mitigating the Water Footprint of Export Cut Flowers from the Lake Naivasha Basin, Kenya*, 26 WATER RES. MGMT. 3725-42 (2012); see also Rosemary W. Kimani et al., *Treatment of Flower Farm Wastewater Effluents Using Constructed Wetlands in Lake Naivasha, Kenya*, 5 INDIAN J. SCI. & TECH. 1870 (2012) ("Lake Naivasha, Kenya, is a fresh water lake currently experiencing severe environmental problems as result of pollution from agricultural effluents and urban water surface runoff, uncontrolled water abstraction, improper land use practices in the catchment area and proliferation of wetlands' invasive species.").

⁵⁵ See Jinky Leilanie Del Prado-Lu, *Pesticide Exposure, Risk Factors and Health Problems Among CutfLOWER Farmers: A Cross Sectional Study*, J. OCCUPATIONAL MED. & TOXICOLOGY, Sept. 18, 2007, at 1, 1-2.

⁵⁶ See generally Doss et al., *supra* note 30.

⁵⁷ See Angela Hale & Maggie Opondo, *Humanising the Cut Flower Chain: Confronting the Realities of Flower Production for Workers in Kenya*, 37 ANTIPODE 301, 310-11 (2005); see also Nicole L. Grimm, *The North American Agreement on Labor Cooperation and Its Effects on Women Working in Mexican Maquiladoras*, 48 AM. U. L. REV. 179, 188, 200 (1998).

⁵⁸ Kysar, *supra* note 12, at 566. This does not, however, mean that consumer behaviors are within the application of the SPS precautionary principle. See generally Akawat Laowonsiri, *Application of the Precautionary Principle in the SPS Agreement*, 14 MAX PLANCK YEARBOOK OF U. NATIONS L. 565 (2010).

⁵⁹ See Kysar, *supra* note 12, at 566; see also Dukgeun Ahn, *Comparative Analysis of the SPS and the TBT Agreements*, 8(3) INT'L TRADE L. & REG. 85, 89 (2002) (both SPS and TBT Agreements explicitly include measures related to "PPMs within their jurisdictional ambit. The concept of PPMs has not been incorporated in the GATT regimes, especially in the context of Articles III and XX of GATT. The SPS and the TBT Agreements, however, expand the jurisdiction concerning trade in goods under the WTO by squarely accommodating SPS or TBT PPM measures."); Danielle Spiegel Feld, *Ensuring That Imported Biofuels Abide By Domestic Environmental Standards: Will The Agreement On Technical Barriers To Trade Tolerate Asymmetrical Compliance Regimes?*, 29 PACE ENVTL. L. REV. 79, 82 (2011) ("Conventional wisdom suggests that, where it applies, the TBT Agreement imposes more onerous obligations on members of the World Trade Organization (WTO) than does the GATT alone ... [as] it contains no obvious analogue to Article XX of the GATT, which provides members with an opportunity to maintain otherwise GATT inconsistent measures that serve legitimate non-protectionist goals."); Eric Gillman, *Making WTO SPS Dispute Settlement Work: Challenges And Practical Solutions* 31 NW. J. INT'L L. & BUS. 439, 439 (2011) ("The attendant scientific inquiry has strained the capacity of panels and the Secretariat and spurred controversy regarding the WTO's role in deciding scientific questions that often involve cultural norms and ethical standards."); See also John Bernetich, Note,

degree of uncertainty about how to determine which Agreement applies to a given product standard.”⁶⁰ In the European Union and North America, it is essential that exported cut flowers have an ethical trade history.⁶¹ The ethical trade aspect often manifests as, and is covered by, the TBT Agreement.⁶²

B. United States—Colombia Preferential Trade Agreement and Negative Externalities

A typical preferential trade agreement between a developed country and a developing country does not necessarily result in adequately improved labor conditions.⁶³ In 2010, the U.S. Department of Labor issued a report listing 128 products from 70 countries produced with some form of child or forced labor.⁶⁴ The report lists the various sectors in Colombia that employ child labor.⁶⁵ Notably, Colombia uses both child and forced labor in the production of coca, a stimulant plant.⁶⁶ A similar report published in 2012 identified Afghanistan and Ecuador as the only countries where child labor is used in flower production.⁶⁷ The US-Colombia Preferential Trade Agreement (“PTA”) was signed in May 2012.⁶⁸ A lot of political and diplomatic maneuvering preceded the inking of the PTA even though the

Sovereignty and Regulation Of Environmental Risk Under The Precautionary Principle In WTO Law, 35 VT. L. REV. 717, 724 (2011) (“The Appellate Body then conclude that the precautionary principle does not “override” Article 5.1”); Appellate Body Report, *EC Measures Concerning Meat And Meat Products (Hormones)*, ¶ 124, 125, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (“[H]owever, the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the SPS Agreement ... We accordingly agree with the finding of the Panel that the precautionary principle does not override the provisions of Articles 5.1 and 5.2 of the SPS Agreement.”).

⁶⁰ See Kysar, *supra* note 12, at 566.

⁶¹ See generally Lone Riisgaard, *How the Market for Standards Shapes Competition in the Market for Goods: Sustainability Standards in the Cut Flower Industry* (Danish Inst. for Int’l Studies Working Paper No. 7, 2009), available at <http://www.econstor.eu/bitstream/10419/44693/1/605422753.pdf> (discussing the applicable standards for the importation of cut flowers).

⁶² See generally Grant E. Isaac, *Ethical Issues in Trade*, in HANDBOOK ON INTERNATIONAL TRADE POLICY 404 (William A. Kerr & James D. Gaisford eds., 2007).

⁶³ See UNITED STATES DEP’T OF LABOR, LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR (2010), available at <http://www.free2work.org/wp-content/uploads/2011/12/DOL-Tainted-Goods-2010.pdf>.

⁶⁴ *Id.* at xiii.

⁶⁵ *Id.* at 11.

⁶⁶ See Univ. of Iowa Labor Ctr., *International Trade Issues*, CHILD LABOR PUB. EDUC. PROJECT, http://www.continuetolearn.uiowa.edu/laborctr/child_labor/about/international_trade.html (last visited Nov. 16, 2013).

⁶⁷ U.S. DEP’T OF LABOR, LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR 15, 18, 29 (2012) [hereinafter GOODS PRODUCED BY CHILD LABOR], available at <http://www.dol.gov/ilab/programs/ocft/2012TVPR.pdf>.

⁶⁸ Laura MacInnis, *U.S. Says Colombia Trade Deal Kicks Off in May*, REUTERS (Apr. 15, 2012, 6:15 PM), <http://www.reuters.com/article/2012/04/15/us-summit-americas-usa-trade-idUSBRE83E0F920120415>.

United States International Trade Commission (“USITC”) Report of 2006 states, “Colombia maintains a relatively positive record with regard to child labor, illiteracy, and women’s wage rates.”⁶⁹ Yet, on the very same page, the U.S. Department of Labor offers evidence that the Colombian flower industries employ child laborers that are younger than the minimum age established by Colombian law.⁷⁰

Alternatively, the United States could have coerced Colombia to improve its child labor issues by utilizing completion of the PTA as leverage. It is important to note that the establishment of minimum wage standards and levels in Colombia “is specifically excluded from the definition of labor laws, as specified in chapter 17” of the US-Colombia PTA.⁷¹ Indeed, in spite of the force and effects of soft power on international law, one should not expect an express extraterritoriality provision in a preferential trade agreement. An inclusion of a minimum wage standard by the United States for Colombia might lead to interference into Colombia’s sovereignty.⁷²

Nevertheless, human rights activists argue that President Obama’s approval of the PTA projects a premature and erroneous assumption that Colombia had complied sufficiently with the provisions of the *U.S.-Colombia Labor Action Plan*.⁷³ Even more alarming is that in the United States “proposals to increase the minimum wage or support the ability of workers to unionize inspire an inevitable backlash with rhetoric that suggests that the U.S. economy would collapse were all workers to earn a living wage.”⁷⁴

IV. INTERNATIONAL FLOWER TRADE: THE AFRICAN AND LATIN AMERICAN EXPORTERS

Clearly, the roses in Africa and Latin America are not growing without thorns.⁷⁵ While many of us believe we live in a modern and enlightened society, Ewelukwa Ofodile points out that “slavery lingers in the continent in the export-oriented industries such as the cocoa and flower

⁶⁹ U.S. INT’L TRADE COMM’N, U.S.-COLOMBIA TRADE PROMOTION AGREEMENT: POTENTIAL ECONOMY-WIDE AND SELECTED SECTORAL EFFECTS, (2006) [hereinafter PUB. 3896], available at <http://www.usitc.gov/publications/332/pub3896.pdf>.

⁷⁰ *Id.*

⁷¹ *Id.* at D-24.

⁷² See Stephen Coughlan et al., *Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization*, 6 CAN. J. L. & TECH. 29, 31 (2007).

⁷³ Adriaan Alsema, *Obama’s 2nd Term: Time to Take Affirmative Steps to Ensure Labor, Human Rights in Colombia*, COLOMBIA REP. (Jan. 29, 2013), <http://colombiareports.co/obamas-2nd-term-time-to-take-affirmative-steps-to-ensure-labor-human-rights-in-colombia/>.

⁷⁴ Rosser, *supra* note 17, at 180.

⁷⁵ See generally NIALA MAHARAJ & GASTON DORREN, *THE GAME OF THE ROSE: THE THIRD WORLD IN THE GLOBAL FLOWER TRADE* (1995).

industries”.⁷⁶ Ironically, much of the modern day slavery is used in the production of objects that the market projects as the signs of love, care and compassion, such as diamonds and flowers. Thus consumer choice would be the rejection of such signs of love and would translate into a political choice eliminating from the market such blood flowers. A compassionate and conscious consumer choice is indeed a political action that might help in arresting much of the negative externalities in cut flower trade.

A. Kenya

Cut flowers constitute close to 40% of Kenya’s horticultural exports, which makes Kenya “the world’s fourth largest exporter of cut flowers.”⁷⁷ The floriculture sector in Kenya has become a major source of foreign revenue due to increased exports to European Union markets.⁷⁸ A substantial number of Kenyan rose farms are located near Lake Naivasha.⁷⁹ Production of cut flowers in Kenya “has been associated with a wide variety of impacts to ecosystem services and ecosystem needs.”⁸⁰ Thus, it is not surprising that Kenyan rose farms’ water diversion for flower cultivation has led to the desertification and shrinking of Lake Naivasha.⁸¹ Despite Kenya’s extensive jurisprudence in environmental law,⁸² as a consequence of Kenyan rose cultivation and exportation, the issue of sustainable development has resurfaced.⁸³ This prompted George Ogendi to ask whether the transnational corporations are “just using water and passing the costs to the poor people?”⁸⁴

Kenya’s rose farms have a constant and steady supply of water, and the people around them have very little to no immediate access to water.⁸⁵ Often, locals are forced to fetch water from sources several kilometers

⁷⁶ Uche Ewelukwa Ofodile, *The Universal Declaration Of Human Rights And The African Child Today: Progress Or Problems?* 25 AM. U. INT’L L. REV. 37, 65 (2010).

⁷⁷ Kenya, Chapter 8, *infra* note 134 § 3.1.

⁷⁸ See Liepold & Morgante, *supra* note 16, at 2-3, 9.

⁷⁹ See Royal C. Gardner et al., *African Wetlands of International Importance: Assessment of Benefits Associated with Designations under the Ramsar Convention*, 21 GEO. INT’L ENVTL. L. REV. 257, 276 (2009).

⁸⁰ James Gathii & Keith H. Hirokawa, *Curtailing Ecosystems Exportation: Ecosystem Services as a Basis to Reconsider Export-Driven Agriculture in Economies Highly Dependent on Agricultural Exports*, 30 VA. ENVTL. L.J. 1, 16 (2012).

⁸¹ See *id.* at 18 n. 98.

⁸² See generally J. Bradley Larkin, Note, *The Evolution of Constitutional Environmental Law in Kenya*, 3 KY. J. EQ. AGRIC. & NAT. RES. L. 265 (2011).

⁸³ Robert Maria Moosburger, *Kenyan Flowers, Ethical Trade and the Question of Sustainable Development* 24-30 (Sept. 14, 2007) (unpublished MSc dissertation, University of London) (on file with the University of London), available at <http://static.twoday.net/moro/files/Kenyan-Flowers.pdf> (discussing the environmental impact of agricultural production of flowers in Kenya).

⁸⁴ George Ogendi, *Panel: Water Ethics in a Globalized World*, 6 SANTA CLARA J. INT’L L. 57, 63 (2008); Jeremy Allouche et al., *Water Security: Towards the Human Securitization of Water?*, 12 WHITEHEAD J. DIPL. & INT’L REL. 153, 162 (2011); Chimni, *supra* note 15 at 66.

⁸⁵ Ogendi, *supra* note 84, at 65.

away.⁸⁶ The *Masai*, a tribal people located around Lake Naivasha, have been egregiously affected by their limited access to water resources.⁸⁷ This “is one area where flower production is leading to a serious pressure on the ecosystem, even social conflicts.”⁸⁸

B. Ethiopia

The “higher altitudes and the stable hours of sunlight” make climatic conditions in Ethiopia even more favorable for flower production than Kenya.⁸⁹ Consumer demand for bigger and better quality products has led to a preference for certain flowers cultivated in this region. These conditions facilitate the growth of the large headed robust roses that consumers demand.⁹⁰ It is therefore not surprising that the rose is one of Ethiopia’s largest floral exports.⁹¹ Furthermore, “the availability of land, lower labor costs, a favorable investment climate, and a relatively shorter distance to the European market (compared to Kenya)”⁹² combined with ease in transport and government support make Ethiopia very attractive for the growth of cut flowers.⁹³

The Ethiopian Government actively supports the growth of the cut flower industry.⁹⁴ Through the Ethiopian Development Bank, “the Government finances 70% of initial loans together with a three-year grazing period, giving rose producers space to increase the production before paying installments on the loan.”⁹⁵ Because of its success in producing high quality roses, the Ethiopian industry has already moved ahead in terms of preference when compared to other countries. For example, it has out-paced “Tanzania and Uganda when it comes to size of production area and has also established a reputation in the international arena as high quality rose producers.”⁹⁶

Ethiopian flower farms reportedly use fertilizers that lead to soil

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ NATHALIE VAN HAREN ET AL., BOTH ENDS & INT’L UNION FOR CONSERVATION OF NATURE, TRADE MATTERS!: THE FLOWER INDUSTRY IN KENYA AND ETHIOPIA 12 (2007), available at <http://www.search4dev.nl/download/363159/200318.pdf>.

⁸⁹ *Id.* at 9.

⁹⁰ NORAGRIC REP. NO. 43, *supra* note 10, at 21.

⁹¹ See Zelalem T. Chala, Economic Significance of Selective Export Promotion on Poverty Reduction & Inter-Industry Growth of Ethiopia (June 25, 2010) (unpublished Ph.D. dissertation, Virginia Polytechnic Institute & State University) (on file with Virginia Tech Digital Library and Archives), available at http://scholar.lib.vt.edu/theses/available/etd-09082010-160119/unrestricted/Chala_ZT_D_2010.pdf.

⁹² VAN HAREN ET AL., *supra* note 88, at 9.

⁹³ NORAGRIC REP. NO. 43, *supra* note 10, at 21.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

pollution.⁹⁷ In 2009, faulty advice by Dutch consultants led to one of the most expensive litigations in Ethiopia's judicial history.⁹⁸ Mekia Mamio Sikessa, the owner of Top Flower Company, filed suit against two consultants associated with Dutch horticulture consulting companies and claimed damages of \$30 million (U.S.).⁹⁹ The Company alleged that the consultants had provided poor advice on the type of fertilizers and seeds to use on its flower farm.¹⁰⁰ The defendant, FLODAC B.V. however, claimed that it was not compensated for its advice and stated that the accusations by Top Flower Company were "baseless."¹⁰¹

Nonetheless, over a hundred chemicals are used in the country's floriculture industry, many of which are deemed extremely harmful.¹⁰² For instance, in addition to causing miscarriages, "these chemicals can cause lasting damage to brain cells and the immune system."¹⁰³ Ethiopian workers, much like Colombian workers, have no avenues to protect themselves from these harms; "workers have no collective bargaining power because they have been forbidden from forming trade unions...."¹⁰⁴ When workers do attempt to organize themselves into unions, they are often fired.¹⁰⁵

C. Ecuador

In the *EnCana Corporation Arbitration*, Ecuador agreed to issue refunds to cut flower exporters while tax refunds are only allowed for producers of manufactured goods under Ecuadorian law.¹⁰⁶ This decision is exemplary of the efforts undertaken by the federal government of Ecuador to promote its flower export industry.¹⁰⁷ However, Ecuador's flower farms have been accused of using child labor.¹⁰⁸ The International Labor Organization ("ILO") has played a significant role in improving the

⁹⁷ Afro Gadaa, *The Impact of Flower Industry in Oromia, Ethiopia*, AFRO GADAA INITIATIVE BLOG (Apr. 1, 2011, 2:51 PM), <http://flowerindustry.afrogadaa.org/#home>.

⁹⁸ *Ethiopia: High Court Says Two Dutch Men Free to Leave Ethiopia*, SERKADIS.COM (June 9, 2009), <http://www.serkadis.com/v14/8581>.

⁹⁹ Gadaa, *supra* note 97.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² MURPHY, *supra* note 51, at 2 ("Furthermore, one hundred and twenty chemicals are used in Ethiopia's floriculture industry, of which fifteen are classified as carcinogenic by the World Health Organization.").

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *EnCana Corporation v. the Republic of Ecuador*, London Ct. Int'l Arb., 45 I.L.M. 901, 915 (2006).

¹⁰⁷ *Id.*

¹⁰⁸ *Fairness in Flowers*, INT'L LABOR RIGHTS FORUM, <http://www.laborrights.org/creating-a-sweatfree-world/fairness-in-flowers> (last visited Nov. 16, 2013).

standards of workers employed by rose farms of Ecuador.¹⁰⁹ Ecuador ratified the ILO Convention No. 182 on *Worst Forms of Child Labor Convention, 1999*.¹¹⁰ Since then, however, Ecuador has still been accused of using child labor.¹¹¹

Subsequent international consumer concern about the use of child labor in flower production in Ecuador and Colombia provided an additional impetus for organizing *el Foro Social Florícola* in 2005.¹¹² The ILO has played a large role in the Flower Forum's creation.¹¹³ Presently, the ILO continues to support the Forum through technical and financial means.¹¹⁴ In order to protect children who are above the minimum age for employment from hazardous conditions, such as the application of pesticides, to non-hazardous aspects of flower production, the Forum must focus on moving these children into non-hazardous areas within this industry.¹¹⁵ After being removed from non-hazardous work, the Forum must also fight to ensure the "children do not work in excess of the limits on the number of hours worked prescribed by the Ecuadorian Labor Code."¹¹⁶ However, due to pressure from Chinese competition, Nora Ferm has grim hopes for the future, predicting that "even further deterioration of working conditions in the flower plantations, as companies try to compete with China's \$25-per-month wages in a tragic race to the bottom."¹¹⁷

D. Colombia

Cut flowers are a significant export for Colombia to the European Union and North America.¹¹⁸ Colombia controls 75% of the U.S. cut flower market.¹¹⁹ The 2012 Free Trade Agreement with the United States has

¹⁰⁹ See INTERNATIONAL BUSINESS FORUM ON ENGAGING BUSINESS-ADDRESSING CHILD LABOR CASE STUDIES 3-4 (2009) [hereinafter INTERNATIONAL BUSINESS FORUM], available at http://www.uscib.org/docs/Forced_Child_Labor_Forum_CaseStudies.pdf.

¹¹⁰ INT'L LABOUR OFFICE, COMM. ON LEGAL ISSUES AND INT'L LABOR STANDARDS, RATIFICATION AND PROMOTION OF FUNDAMENTAL ILO CONVENTIONS 17, 20 (2001), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb282/pdf/lils-7.pdf>.

¹¹¹ See GOODS PRODUCED BY CHILD LABOR, *supra* note 67, at 12.

¹¹² INT'L LABOUR ORG., SOWING THE FUTURE: THE EXPERIENCE OF THE SOCIAL FORUM FOR FLOWER PRODUCTION (ECUADOR) 1 (2010); see also U.S. DEP'T OF LABOR, 2008 FINDINGS ON THE WORST FORMS OF CHILD LABOR - ECUADOR (2009), available at <http://www.unhcr.org/refworld/docid/4aba3ee2c.html> (citing statistics on child labor in Ecuador).

¹¹³ See INTERNATIONAL BUSINESS FORUM, *supra* note 109, at 3.

¹¹⁴ *Id.*

¹¹⁵ See *id.* at 3-4.

¹¹⁶ *Id.* at 3.

¹¹⁷ Nora Ferm, Letter to the Editor, *China's Export Roses*, N.Y. TIMES, Oct. 2, 2006, <http://query.nytimes.com/gst/fullpage.html?res=9807EEDF1430F931A35753C1A9609C8B63>.

¹¹⁸ See Andrew Muhammad et al., *Preferential Trade Arrangements on EU Imports from Developing Countries: The Case of Fresh Cut Flowers*, 32 APPLIED ECON. PERSP. & POL'Y 254, 257 (2010) (citing figures showing that approximately 80% of Colombian flowers are exported to the U.S. and 13% of E.U. cut flower imports are from Colombia).

¹¹⁹ CHRISTINA NGUYEN ET AL., NAT'L CTR. FOR METRO. TRANSP. RESEARCH, EVALUATION

helped Colombia advance from its position in 1998. At that time, Colombia stood before the WTO's *Committee on Trade and Environment* under Items 3(b) and 6 of its Work Programme to defend its flower exports.¹²⁰ Colombia explained to the *Committee on Technical Barriers to Trade* that "[r]oughly since 1990, campaigns have been waged to discredit Colombian flowers on some international markets."¹²¹ However, the U.S. Department of Labor is responsible for the preparation of a report that contributed to the discrediting of Colombian flowers.¹²² Specifically, it addressed "Laws Governing Exploitive Child Labor."¹²³

Both the World Bank and International Monetary Fund are intimately involved in the promotion of Colombia's floriculture sector.¹²⁴ In the 1990's, Colombia's flower industry experienced large-scale growth due in part to government incentives.¹²⁵ Specific actions taken by the government included: lowering trade barriers, legislating to improve exportation requirements, and promoting cheap labor through the social security system, the Colombian government has played a central role in this growth.¹²⁶ It is clear that Colombia highly values the cut flower industry and that this sector is economically important to the country.¹²⁷ This is the reason the World Bank considers the Colombian cut flower industry a major success story.¹²⁸

The success of Colombian cut flower exports to the United States has pushed many domestic growers out of business.¹²⁹ Many U.S. farmers, such as those in California, have shifted toward growing higher end

OF TRANSPORTATION PRACTICES IN THE CALIFORNIA CUT FLOWER INDUSTRY 1, available at http://www-bcf.usc.edu/~torriello/California_cut_flower_trans.pdf.

¹²⁰ See WORLD TRADE ORG., ENVIRONMENTAL LABELS AND MARKET ACCESS: CASE STUDY ON THE COLOMBIAN FLOWER-GROWING INDUSTRY I (1998).

¹²¹ *Id.* at 1, 4.

¹²² See generally PUB. 3896, *supra* note 69, at 6-20.

¹²³ See generally *id.* at 6-20; Trade Act of 2002, 19 U.S.C.A. § 3802 (West 2013); see also Office of Trade and Labor Affairs, *Free Trade Agreements*, US DEPARTMENT OF LABOR, <http://www.dol.gov/ilab/programs/otla/freetradeagreement.htm> (last visited Aug. 30, 2013).

¹²⁴ Muhammad et al., *supra* note 118, at 257.

¹²⁵ Thanks to strong governmental policy incentives, the floriculture industry exploded during the 1990s, however, relatively few enterprises maintain ownership over the majority of production. *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See *Queen's Flowers v. United States*, 981 F. Supp. 617, 619 (Ct. Int'l Trade 1997) (discussing background concerning recession of antidumping statute); see also *Timken U.S. Corp. v. United States*, 434 F. 3d 1345, 1347 (Fed. Cir. 2006) (discussing "Colombian Flowers," review of which requires a "clerical" error and not a methodological, substantive, or judgment error); see also *Floral Trade Council v. U.S.*, 991 F. Supp. 655, 657 (Ct. Int'l Trade 1997) (discussing U.S. flower producers' petition to the International Trade Association to investigate receipt of countervailing duties by Colombian flower producers, which revealed subsidies were received by Colombian producers); see also *Certain Fresh Cut Flowers From Colombia: Preliminary Results and Partial Recession of Antidumping Duty Administrative Review*, 62 Fed. Reg. 16772, 16772 (Apr. 18, 1997).

flowers, diversifying their production.¹³⁰ Kasey Cronquist, Ambassador of the California Cut Flower Commission, explains that the “purpose of free trade with Colombia is to advance the United States’ geopolitical interests in the region”¹³¹ Cronquist argues that free trade will have a “real and adverse effect on domestic cut flower farmers and their ability to compete with cheaper imports that benefit from lower labor costs, limited environmental and business regulations, duty free access and direct U.S. and Colombian government subsidies.”¹³²

Some Americans have long felt that the “[e]xisting American trade laws satisfy neither free trade advocates nor domestic producers seeking protection from unfair foreign competition.”¹³³ Trade scholars do agree, however, that restrictions on flowers entering American markets cause U.S. buyers to suffer losses due to low competition and high prices.¹³⁴ Many believe the Generalized System of Preferences (“GSP”) is an effective way to resolve the unfairness because:

[w]ithout GSP [Generalized System of Preferences], a tariff would be applied to flowers from Colombia and Ecuador. Results show that Colombian carnation prices have a negative effect on EU flower expenditures, resulting in preferential treatment for Colombia being mostly trade-creating. When a tariff is applied to Colombia, imports of Colombian carnations and Kenyan roses fell by 7.3% and 1.9%, respectively, and other flowers from Ecuador and Israel fell by 1.9% and 1.8%, respectively. Total EU flower imports fell by 1.4%.¹³⁵

Portions of the GSP incentive scheme provide developing countries, such as Ecuador and Colombia, special preferences if they actively combat the illegal drug trade.¹³⁶ As a result of these incentives, Colombian and Ecuadorian flower products often enter the European Union without

¹³⁰Hearing on The Pending Free Trade Agreement, *supra* note 1, at 2.

¹³¹*Id.* at 1.

¹³²*Id.* at 1; *see also* Tanya Korovkin & Olga Sanmiguel-Valderrama, *Labour Standards, Global Markets and Non-State Initiatives: Colombia’s and Ecuador’s Flower Industries in Comparative Perspective*, 28 *THIRD WORLD Q.* 117, 122 (2007) (discussing cheap labor in Colombia and its role in the flower market).

¹³³ Christopher C. Barbuto, *Towards Convergence of Antitrust and Trade Law: An International Analogue to Robinson-Patman*, 62 *FORDHAM L. REV.* 2047, 2049 (1994).

¹³⁴*See generally id.* (discussing how international trade policy can injure domestic producers and increase prices of goods); *see also* JAMES BOVARD, *THE FAIR TRADE FRAUD* 1-6 (1992).

¹³⁵ Muhammad et al., *supra* note 118, at 254.

¹³⁶*Id.* at 255; *see also* U.S. INT’L TRADE COMM’N, PUB. NO. 4188, *ADEAN TRADE PREFERENCE ACT: IMPACT ON U.S. INDUSTRIES AND CONSUMERS AND ON DRUG CROP ERADICATION AND CROP SUBSTITUTION*, 2009 (2010).

imposing tariffs or taxes.¹³⁷ However, GSP preferences are not guaranteed.¹³⁸ In fact, due to accusations of violence toward labor unions and violation of international labor standards, these incentives are at risk.¹³⁹

V. THE WTO, SANITARY AND PHYTOSANITARY AND TECHNICAL BARRIERS TO TRADE AGREEMENTS

Within the scope of international trade law, the WTO's *Agreement on Agriculture* regulates the cut flower trade.¹⁴⁰ One of the WTO's main objectives is the support of free exchange of goods, services, and facilitation of the cut flower trade, along with many other agricultural products.¹⁴¹ As a means of assisting such exchanges, the *Agreement on Agriculture* "allows developing countries to provide subsidies to reduce the cost of domestic marketing and international freight," *inter alia*, for cut flowers.¹⁴² SPS recognizes that developed countries and developing countries have the right to maintain the level of health protection they deem appropriate.¹⁴³ Accordingly, apart from the "general exceptions" listed within Article XX of GATT 1994, both SPS and TBT allow the creation of additional barriers for cut flower exportation to developed countries.¹⁴⁴ Aspects of the SPS and TBT aimed at "protecting the environment, health, and safety ... furnish a particularly useful disguise for the imposition of burdens on competing imports," such as cut flowers.¹⁴⁵ In order to achieve the WTO's objectives, developed countries must ensure their laws do not create unnecessary barriers for cut flower imports from developing countries.¹⁴⁶

¹³⁷ Muhammad et al., *supra* note 118, at 255.

¹³⁸ *Id.*

¹³⁹ *Id.* ("Colombia may also be at risk due to allegations of violence against trade unionists and weak enforcement of international labor regulations.").

¹⁴⁰ See Rudloff & Simons, *supra* note 2, at 3, 5, 6; see also *Agreement on Agriculture*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Article 9(d)-(e), 1867 U.N.T.S. 410, available at http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#a Agreement (last visited Sept. 1, 2013).

¹⁴¹ See generally *About the WTO – A statement by former Director-General Pascal Lamy*, WORLD TRADE ORG. (Oct. 13, 2013, 1:05 PM), http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm.

¹⁴² FOOD AND AGRICULTURE ORGANIZATION OF THE U.N., *Kenya 2 AGRICULTURE, TRADE AND FOOD SECURITY ISSUES AND OPTIONS IN THE WTO NEGOTIATION FROM THE PERSPECTIVE OF DEVELOPING COUNTRIES* (2000), available at http://www.fao.org/docrep/003/X8731e/x8731e09.htm#P5_37.

¹⁴³ *Understanding the WTO Agreement on Sanitary and Phytosanitary Measures*, WORLD TRADE ORG. (May 1998), available at http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm.

¹⁴⁴ See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 596-602 (2000) (discussing short falls of the SPS and TBT).

¹⁴⁵ *Id.* at 549.

¹⁴⁶ Anne-Célia Disdier, Lionel Fontagné & Mondher Mimouni, *The Impact Of Regulations On Agricultural Trade: Evidence From The SPS And TBT Agreements*, 90 AM. J. AGRIC. ECON. 336, 347 (2008) ("cut flowers remain negatively and significantly affected by SPS and TBTs"). Lan Liu & Chengyan Yue, *Non-tariff Barriers to Trade caused by SPS Measures and Customs Procedures with*

Kysar asserts that, while some “appear to read the SPS Agreement broadly, arguing that the Agreement applies so long as the protection of human or animal health and safety at least partially justifies the measure, irrespective of whether other nonscientific interests also might support it.” Others’ interpretation of the SPS Agreement give “nations more latitude to characterize the motivations behind a product measure and therefore to determine whether it falls within the scope of the SPS Agreement.”¹⁴⁷ Moreover, the WTO adjudication bodies have interpreted the standards of ‘less favourable treatment,’ ‘likeness,’ and ‘regulatory purpose’ differently, creating “high fragmentation of the non-discrimination principle in international economic law.”¹⁴⁸

GATT jurisprudence has drawn a “bright-line distinction between (1) a product and (2) the process or production method (“PPM”).”¹⁴⁹ For instance, the application and scope of Article III’s “National Treatment” obligation in Article III’s application and scope has been reduced and only applies to “measures that apply to or affect the characteristics of the product itself.”¹⁵⁰ The WTO has, however, crafted a jurisprudence, which permits PPM through meeting the requirement of GATT Article XX.¹⁵¹ Additionally, both TBT and SPS agreements address the PPM issue.¹⁵² Nonetheless, Luan and Chaisse argue that “the risk assessment under the ... [TBT] Agreement is different from that under the ... [SPS] Agreement.”¹⁵³ Moreover, when an Article III “National Treatment” is not applicable, a quantitative restriction within Article XI could still be used to justify embargo based on the way cut flowers are cultivated and packaged.¹⁵⁴ As Kysar succinctly describes, the issue of determining which agreement applies depends on the specific situation:

For instance, on this reading, if the European Union described its GM labeling regulation as a matter of consumer awareness rather than as one of health and safety protection, then the regulation might be analyzed under the

Product Quality Changes, 34 J. AGRIC. & RESOURCE ECON. 196, 211 (2009) (finding that if Japan were to remove non-tariff barriers, Japan’s import market for cut flowers would significantly increase).

¹⁴⁷ Kysar, *supra* note 12, at 566.

¹⁴⁸ Nicolas F. Diebold, *Non-Discrimination and the Pillars of International Economic Law: Comparative Analysis and Building Coherency*, ILLJ EMERGING SCHOLARS PAPER 18, abstract (2010).

¹⁴⁹ MITSUO MATUSHITA ET AL., *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 240 (2d ed. 2006).

¹⁵⁰ *Id.* at 240-41.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Xinjie Luan & Julien Chaisse, *Preliminary Comments On The WTO Seals Products Dispute: Traditional Hunting, Public Morals And Technical Barriers To Trade*, 22 COLO. J. INT’L ENVTL. L. & POL’Y 79, 81 (2011).

¹⁵⁴ Kysar, *supra* note 12, at 641 (discussing how the process/production distinction could lead to bans on products).

TBT Agreement, not the SPS Agreement. Much turns on this interpretive question. If a nation's citizens demand the prohibition of both the importation and the domestic production of a certain good, but insufficient scientific evidence of health or safety threats exists to support their opposition to the good, does the ban nevertheless constitute a measure designed to "protect human or animal life or health" subject to the dictates of the SPS Agreement, or does it instead represent a nondiscriminatory consumer protection measure governed by the TBT Agreement?¹⁵⁵

Recently, scholars pointed out that GATT Article XI's quantitative restriction "requires WTO members to refrain from banning or restricting imports of particular products."¹⁵⁶ Howse and Langille argue that the "architecture of the GATT would make little sense if internal laws, regulations, and requirements could also be viewed as restrictions and prohibitions on imports or exports."¹⁵⁷ It follows "then, [that] internal laws, regulations, and requirements would be prima facie violations of the GATT, even if they were nondiscriminatory."¹⁵⁸ In other words, it is possible for countries to have internal laws that regulate the import of products provided they are justified within the overall scheme of the GATT/WTO system:

The permissiveness of nondiscriminatory internal laws, regulations and requirements as provided by the National Treatment obligation—an essential feature of the balance between trade liberalization and domestic policy space—would be undermined, because once a measure falls under Article XI, and provided it does not qualify under any of Article XI's specific exceptions, the measure is prima facie a violation of the GATT, whether discriminatory or not.¹⁵⁹

Thus, according to Howse and Langilly, the violation of Article III and Article XI "are best understood as arguments in the alternative."¹⁶⁰ This conclusion is important for cut flower exporting countries. It is important to note that Article XX of the GATT 1994 allows for general exceptions to trade for a variety of reasons, and should not be confused with other GATT

¹⁵⁵ Kysar, *supra* note 12, at 566-67.

¹⁵⁶ Robert Howse & Joanna Langille, *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values*, 37 YALE J. INT'L L. 367, 405 (2012) (footnotes omitted).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

Articles, such as Article XXI that allows “exceptions necessary for a member’s essential security interests.”¹⁶¹

VI. ACCESS TO EUROPEAN UNION MARKETS: FREE TRADE VERSUS HUMAN RIGHTS AND ENVIRONMENT

The United Nations Economic Commission of Europe has an established standard that applies “to fresh cut flowers and flower buds for bouquets or for ornamental purposes.”¹⁶² The use of pesticides and chemicals in cultivation, harvesting, and exportation of flowers has received increasingly negative attention.¹⁶³ European Union states seeking to maintain a certain level of health protection have implemented numerous laws and regulations, forcing cut flower exporters to wade through the compliance requirements of numerous regional and international laws and regulations.¹⁶⁴ In an effort to combat confusion and streamline the process, the European Union has attempted for years to harmonize the market in cut flowers.¹⁶⁵

Nonetheless, “[e]thical trade forms an important part of the value chains for floral products sourced from Africa by major European buyers.”¹⁶⁶ Given that most of the exporters are African and Latin American countries, such regulations have a significant impact on job creation and environmental exploitation in those countries.¹⁶⁷ Generally, “market access requirements are either compulsory legislation or non-legislative requirements set by market parties.”¹⁶⁸

In 1998, to promote exportation, the European Commission Regulation 309/88 authorized Member States to take measures deviating from certain requirements of the “quality standards” applicable to exporters

¹⁶¹ See McGinnis & Movsesian, *supra* note 144, at 590 n. 435.

¹⁶² U.N./ECE, STANDARDS FOR CUT FLOWERS (AGRI/WP.1/46) STANDARD FOR CUT FLOWERS (H-1) *revised* (1994), available at http://www.unece.org/fileadmin/DAM/trade/agt/standard/flowers/flower_e/h1flower.pdf.

¹⁶³ See generally Pat Thomas, *Behind the Label: Cut Flowers*, ECOLOGIST (Aug. 19, 2009), http://www.theecologist.org/green_green_living/behind_the_label/302429/behind_the_label_cut_flower_s.html.

¹⁶⁴ Lorand Bartels, *The Trade and Development Policy of the European Union*, 18 EUR. J. INT’L L. 715, 716 (2007).

¹⁶⁵ The European Union has regulated imports under a common organizational scheme for decades. See Case 43/88, *Comm’n v. Netherlands*, 1989 E.C.R. 1649, 1 C.M.L.R. 736 (1989) (holding that the Netherlands violated Council Regulation No. 234/68 for the cut flower importation market and Council Regulation No. 2358/71 for the agricultural importation market).

¹⁶⁶ Anne Tallontire et al., *Reaching the Marginalised? Gender Value Chains and Ethical Trade in African Horticulture*, 15 DEV. PRACTICE 559, 559 (2005).

¹⁶⁷ See James M. Roberts, *How Western Environmental Policies are Stunting Economic Growth in Developing Countries*, THE HERITAGE FOUNDATION: BACKGROUNDER NO. 2509, Jan. 24, 2011, at 1, 15. (finding trade policies of developed nations are negatively impacting developing countries’ economic outlook).

¹⁶⁸ See, e.g., MILCO RIKKEN, *THE EUROPEAN MARKET FOR FAIR AND SUSTAINABLE FLOWERS AND PLANTS* 51 (2010).

of flowering bulbs, corms, and tubers in non-member countries.¹⁶⁹ Since then, however, the European Union has become one of the largest importers of cut flowers.¹⁷⁰ To further promote exportation, the *Dutch Ministry of Foreign Affairs*, created a database detailing requirements for market access of different European Union countries.¹⁷¹

Despite these efforts, confusion and disagreement over compliance is still prevalent. One example involves “Amsterdam Schiphol”, an international hub for flower trade that features direct transportation to Aalsmeer, home of the world’s largest flower auction.¹⁷² Currently, the German carrier, Lufthansa Cargo, has undertaken legal action challenging Netherlands’ ban on the transportation of flowers from Colombia into the Amsterdam Schiphol airport.¹⁷³ Lufthansa Cargo believes its flower shipments complied with international law.¹⁷⁴

Market collaboration within the EU has led to the gradual liberalization of European Union cut flower importation.¹⁷⁵ In *Commission of the EC v. Italy*, for example, the European Court of Justice criticized Italy for failing to fulfill its obligations “under Article 30 EEC, in conjunction with Article 10(1) of Regulation 234/68 on the establishment of a common organisation of the market in ... cut flowers.”¹⁷⁶ Additionally, preferential trade arrangements such as the GSP, the Lomé Convention, and Cotonou Agreement “contribute to the competitiveness of cut flower exports from developing countries.”¹⁷⁷ This has been particularly true for “developing countries that account for a significant share of EU cut flower imports such as Kenya, Colombia, and Ecuador.¹⁷⁸” Without these special agreements, “these countries’ exports would fall under the less generous GSP, where the tariff rate for cut flowers is [eight and a half percent (8.5%)].”¹⁷⁹ In order to benefit from these preferential trade agreements, “developing countries must implement key international conventions on

¹⁶⁹ Commission Regulation 309/88, 1988 O.J. (L 031) 7 (EEC).

¹⁷⁰ Bettina Gollnow, *Exporting Cut Flowers*, NEW S. WALES GOV’T: DEPARTMENT OF PRIMARY INDUSTRIES (Oct. 21, 2002), <http://www.dpi.nsw.gov.au/agriculture/horticulture/floriculture/industry/export>.

¹⁷¹ See DUTCH MINISTRY OF FOREIGN AFFAIRS, CUSTOMS: IMPORT CONTROLS, *available at* <http://www.government.nl/issues/export-import-and-costums/customs-import-controls>.

¹⁷² See Bruce Barnard, *Lufthansa Cargo Fights Dutch Ban on Flower Flights*, J. COMMERCE (Dec. 19, 2012, 12:39 PM), http://www.joc.com/air-cargo/cargo-airlines/lufthansa-cargo/lufthansa-cargo-fights-dutch-ban-flower-flights_20121219.html.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ See, e.g., Case C-249/91, *Comm’n of EC v. Italian Republic*, 1994 E.R.C. I – 4322, I – 4323 & 4334 (finding Italy’s “requiring prior authorization for all imports of plants susceptible to fire blight (*Erwinia amylovora*)” violated “Article 30 of the [EEC] Treaty in conjunction with Article 10(1) of Regulation No 234/68” of the Council of 27 February 1968).

¹⁷⁶ *Id.*

¹⁷⁷ See Muhammad et al., *supra* note 118.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

human and labor rights, sustainable development, and standards of good governance. Preferential access to EU markets could be denied in the case of noncompliance to any of these criteria.”¹⁸⁰ The laws and regulations impacting the cut flower industry mostly relate to the environment, labor standards, arresting child labor on the production side, and health and safety on the consumer side (regulated by the SPS and the TBT agreements).¹⁸¹ Though much of the trade is conducted directly between exporters in producing countries and importers in the consuming countries, in the European Union “the lion’s share of flowers from developing countries enters via the” flower auction markets in the Netherlands.¹⁸²

A. Regulations within the European Union

1. Phytosanitary Regulations

The European Union phytosanitary regulations are the most important legislation for exporters of floricultural products.¹⁸³ Under these regulations, producers must conform to stringent phytosanitary requirements to ensure their products are disease free and carefully treated after harvest.¹⁸⁴ The European Union’s phytosanitary legislation is designed to prevent organisms harmful to plants or plant products from entering into or spreading within the EC.¹⁸⁵ To ensure compliance, agricultural products must have a certificate.¹⁸⁶

¹⁸⁰ *Id.* (“For instance, GSP plus eligibility for Sri Lanka and El Salvador is currently subject to pending investigations due to reports of human rights violations.”).

¹⁸¹ INTERNATIONAL BUSINESS FORUM, *supra* note 109, at 3-4.

¹⁸² NETHERLANDS MINISTRY OF FOREIGN AFFAIRS, CBI MARKET STUDY: THE EU MARKET FOR SUMMER FLOWERS 13 (2009).

¹⁸³ See European Comm’n, *Ornamental Seeds & Plants*, EUROPA.EU [hereinafter *Ornamental Seeds*], http://ec.europa.eu/food/plant/plant_propagation_material/eu_marketing_requirements/ornamental_flowers_plants_en.htm (last updated Nov. 13, 2013); see also European Comm’n, *Sanitary & Phytosanitary Requirements*, EUROPA.EU [hereinafter *Sanitary Requirements*], http://exporthelp.europa.eu/thdapp/display.htm?page=rt/rt_SanitaryAndPhytosanitaryRequirements.html&docType=main&languageId=EN (last updated Dec. 6, 2013).

¹⁸⁴ See *Ornamental Seeds*, *supra* note 183; see also *Sanitary Requirements*, *supra* note 183.

¹⁸⁵ See generally *Who we are*, INT’L PLANT PROTECTION CONVENTION, <https://www.ippc.int/about> (last visited Sept. 15, 2013); see also INTERNATIONAL PLANT PROTECTION CONVENTION, IPPC FACT SHEET, available at https://www.ippc.int/sites/default/files/documents/20130603/1368088877_ippc-factsheet-2011-09-en_201305101045en_2013060314%3A46_143.7%20KB.pdf. The International Plant Protection Convention (IPPC) is an international agreement on plant health with 177 current signatories. It “aims to protect cultivated and wild plants by preventing the introduction and spread of pests.” The Secretariat of the IPPC is associated with the Food and Agriculture Organization of the United Nations. See generally International Plant Protection Convention, Dec. 6, 1951, 150 U.N.T.S. 67, (revised Nov. 28, 1979), available at <https://www.ippc.int/about>.

¹⁸⁶ See *Ornamental Seeds*, *supra* note 183; see also *Sanitary Requirements*, *supra* note 183.

2. Regulation (338/97 EC)¹⁸⁷

This regulation compliments the European Union's implementation of the Convention on International Trade in Endangered Species ("CITES").¹⁸⁸ The CITES preamble provides that "international cooperation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade."¹⁸⁹ Despite this strong language, EU Regulation 338/97 EC is stricter than the CITES convention, which sets additional import restrictions.¹⁹⁰ CITES does include an additional species list, which requires exporters of certain products to apply for import permits.¹⁹¹

3. Breeder's Intellectual Property Right

Because the breeding of new plant varieties is generally a costly undertaking, intellectual property laws provide breeders with certain control over the commercial use of the new plant varieties they produce. Several protective frameworks are available for owners of these new plant varieties. For example, on the international level, breeders' rights are organized by the International Union for the Protection of New Plant Varieties.¹⁹² In the European Union, the Community Plant Variety Office protects breeders' rights.¹⁹³ Finally, most European Union and North American countries have their own national patent registration offices that provide additional protection.

4. EU Regulation (Regulation 316/68) and VBN Product Specifications

Regulation 316/68 specifies minimum requirements for floricultural products traded in the European Union.¹⁹⁴ However, these quality standards are very general and rarely applied.¹⁹⁵ In fact, the product specifications set

¹⁸⁷ See Council Regulation 338/97, O.J. (L 61) 1 (EC).

¹⁸⁸ See generally *id.*

¹⁸⁹ See Convention on International Trade in Endangered Species of Wild Fauna & Flora preamble, opened for signature Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

¹⁹⁰ See European Comm'n, *The Differences Between EU and CITES Provisions in a Nutshell*, EUROPA.EU, http://ec.europa.eu/environment/cites/pdf/differences_b_eu_and_cites.pdf (last visited Oct. 13, 2013).

¹⁹¹ See Convention on International Trade in Endangered Species of Wild Fauna & Flora, opened for signature Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

¹⁹² See, *The UPOV System of Plant Variety Protection*, INT'L UNION FOR PROT. NEW VARIETIES PLANTS, http://www.upov.int/about/en/upov_system.html (last visited Feb. 2, 2014).

¹⁹³ See COMMUNITY PLANT VARIETY OFFICE, STRATEGIC PLAN: 2010-2015, *available at* http://www.cpvo.europa.eu/documents/News/CPVO_Strategic_Plan_2010.pdf.

¹⁹⁴ See Council Regulation 316/68, O.J. (L 71, 21.3.1969 p. 8) (EEC).

¹⁹⁵ *Id.*

by the Dutch auctions (“VBN”) are a more accurate depiction of the actual requirements of the European floricultural trade.¹⁹⁶

5. Wood Packaging Material

Packaging is another issue that creates political disagreements. For instance, “cut flower producers in Kenya, Colombia, and Ecuador . . . denounced Germany’s packaging.”¹⁹⁷ Additionally, in March of 2005 a new amendment surfaced regarding new phytosanitary measures for all wooden packaging material used with imports into the European Union from developing countries.¹⁹⁸ These requirements are designed to prevent the entry of organisms harmful to plants and plant products into the European Union via wood packaging material. Finally, Directives 2004/102/E¹⁹⁹ and 2005/15/EC require heat treatment or fumigation and marking of wooden packaging materials. These requirements refer to International Standards for Phytosanitary Measures or ISPM 15.²⁰⁰

6. Tariffs and Quota

A substantial amount of cut flowers imported from developing countries, enter the European Union free of tariffs or under preferential tariffs.²⁰¹ This special access is institutionalized in GSP. Tariffs for imports from India and China, for example, are 3.5% lower than the regular

¹⁹⁶ See generally ASS’N OF DUTCH FLOWER AUCTIONS, SPECIFICATIONS: CUT FLOWERS: GENERAL (2012), available at <http://www.vbn.nl/en-US/Productspecification%20Cutflowers/Cutflower%20general%20UK.pdf>.

¹⁹⁷ Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO’s Treatment of Trade and Environment Matters*, 25 HARV. ENVTL L. REV. 1, 22 n. 75 (2001).

¹⁹⁸ See European Comm’n, *Health & Consumers: Plant Health*, EUROPA.EU, http://ec.europa.eu/food/plant/organisms/imports/special_en.htm (last visited Oct. 13, 2013).

¹⁹⁹ See Commission Directive 2004/102/EC of 5 October 2004 Amending Annexes II, II, IV, and V to Council Directive 2009/29/EC on Protective Measures Against the Introduction into the Community of Organisms Harmful to Plants or Plant Products and Against Their Spread Within the Community, 2004 O. J. (L 309) 9; see also Council Directive 2005/15/EC of 28 February 2005 Amending Annex IV to Directive 2009/29/EC on Protective Measures Against the Introduction into the Community of Organisms Harmful to Plants or Plant Products and Against Their Spread Within the Community, 2005 O. J. (L 56) 12; see also European Comm’n, *Requirements for Wood Packaging*, EUROPA.EU, http://ec.europa.eu/food/plant/organisms/imports/special_en.print.htm (last visited Aug. 28, 2013).

²⁰⁰ See European Comm’n, *Requirements for Wood Packaging*, EUROPA.EU, http://ec.europa.eu/food/plant/organisms/imports/special_en.print.htm (last visited Aug. 28, 2013); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, INTERNATIONAL STANDARDS FOR PHYTOSANITARY MEASURES: REGULATION OF WOOD PACKAGING MATERIAL IN INTERNATIONAL TRADE 12 (2009), available at https://www.ipcc.int/file_uploaded/1323945454_ISPM_15_2009_En_2011-11-29_Refor.pdf.

²⁰¹ See generally Muhammad et al., *supra* note 118 (discussing the effects that the Generalized System of Preferences schemes for developing countries have on European Union demand for imported cut flowers).

customs tariff.²⁰² Prior to 2007, the European Union and the African, Caribbean, and Pacific Group of States (“ACP”) traded under the terms of the 2000 Cotonou Agreement. However, in 2007, the WTO ruled that the Cotonou Agreement caused unfair competition, and required a new regime be adopted.²⁰³ This led to the creation of so-called Economic Partnership Agreements or EPAs.

In 2008, the nonreciprocal arrangements under Lomé [convention] were replaced with reciprocal Economic Partnership Agreements (“EPAs”). Although EPAs required African countries to eliminate tariff barriers on EU products, the EU granted a reprieve on this provision because there was concern that fragile sectors in the African countries would be unable to immediately compete with the EU’s exports.²⁰⁴

The EPAs are very detailed bilateral agreements between individual countries and the European Union.²⁰⁵ In November 2007, Kenya and other East African Community states signed an interim EPA that allowed tariff-free and quota-free access to European Union markets for all products, except rice and sugar.²⁰⁶

7. Authorized Economic Operator (“AEO”):

Regulation (EC) 648/2005 creates the AEO, which is an accreditation granted to businesses that satisfy strict customs criteria by demonstrating consistent quality, compliance, and trustworthiness in the international supply chain.²⁰⁷ In collaboration with the U.S. government, European Union customs collectively established a security and safety certificate that enabled the development of more secure supply chains.²⁰⁸ Under the regulation, an importing company must provide documentation that it has the required procedures in place prior to registration.²⁰⁹ For example, a company must be able to trace flower movement back to the original producers. Non-certified companies have to comply with full

²⁰² RIKKEN, *supra* note 168, at 52.

²⁰³ See generally Bartels, *supra* note 164.

²⁰⁴ Muhammad et al., *supra* note 118, at 255.

²⁰⁵ See *Economic Partnerships*, EUROPEAN COMMISSION, http://ec.europa.eu/trade/policy/countries-and-regions/development/economic-partnerships/index_en.htm (last visited Oct. 13, 2013).

²⁰⁶ Muhammad et al., *supra* note 118, at 255.

²⁰⁷ See Taxation and Customs Union, *Authorised Economic Operator (AEO)*, EUROPEAN COMMISSION, http://ec.europa.eu/taxation_customs/customs/policy_issues/customs_security/aeo/ (last visited Oct. 13, 2013).

²⁰⁸ See EUROPEAN COMM’N, *AUTHORISED ECONOMIC OPERATORS*, *infra* note 210.

²⁰⁹ *Id.*

physical and administrative inspection, which delays the exportation process and reduces the freshness of cut flowers.²¹⁰

B. Access to United States Markets: Laws and Regulations

The United States takes a different approach to trade preferences from the Free Trade Agreements. It regularly extends “trade preferences that are non-reciprocal, meaning that developing countries do not have to provide equivalent trade benefits to the United States.”²¹¹ However, prior to receiving these preferences, countries must meet certain criteria such as: “providing adequate protection of intellectual property, operating an open market economy under established multilateral trade rules, and adopting internationally recognized worker rights.”²¹² Studies performed by U.S. Agencies have found that these preferences are directly beneficial to the countries to which they are extended.²¹³

Domestically, U.S. intellectual property law includes both statutory and common-law protection.²¹⁴ The Code of Federal Regulations specifically deals with the issue of fresh cut flowers under Title 7, Agriculture.²¹⁵ Additionally, the U.S. Department of State Dispatch collects and maintains individual country information on imports and exports, and includes data on cut flowers.²¹⁶ Finally, intellectual property rights in plants are the responsibility of the Plant Committee.²¹⁷ The Committee proposes changes to existing intellectual property law and monitors the creation of new variations in legal protection.²¹⁸ By excluding the unauthorized importation, use, or sale of parts of a protected plant variety, such as cut

²¹⁰ Regulation (EC) 648/2005 of the European Parliament and of the Council of 13 April 2005 Amending Council Regulation (EEC) 2913/92 Establishing the Community Customs Code 2005 O.J. (L 117) 13, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:117:0013:0019:en:PDF>; see also EUROPEAN COMM’N, AUTHORISED ECONOMIC OPERATORS: GUIDELINES 6 (2012), available at http://english.bmf.gv.at/Customs/Trade/AuthorisedEconomicO_470/aao_guidelines2012_en.pdf.

²¹¹ See, e.g., VIVIAN C. JONES ET AL., CONG. RESEARCH SERV. TRADE PREFERENCES: ECONOMIC ISSUES AND POLICY OPTIONS (2012), available at http://assets.opencrs.com/rpts/R41429_20121114.pdf.

²¹² *Id.*

²¹³ *Id.* at 13 (“A study by the United States International Trade Commission estimated that ATPA [(Andean Trade Preferences Act)] helped expand job opportunities in the flower and asparagus industries, particularly to individuals who otherwise might have engaged in illicit drug crop production and related activities.”).

²¹⁴ See generally Jake Linford, *A Second Look at the Right of First Publication*, 58 J. COPYRIGHT SOC’Y U.S.A. 585 (2011) (discussing the history of publication rights in the United States).

²¹⁵ 7 C.F.R. § 319.74-1 (2013); The Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 § 1, 7 U.S.C.A. § 6801 (West 2003).

²¹⁶ See, e.g., U.S. DEP’T OF ST., Republic Of Colombia, 3 DEP’T OF ST. DISPATCH 172-173 (1992).

²¹⁷ A.B.A., Committee No. 1002: Plants, A.B.A. Sec. Intell. Prop. L. Ann. Rep. 1 (2001-2002).

²¹⁸ *Id.*

flowers, the Committee strives to strengthen plant patent holders' rights.²¹⁹

Merchandise imported into the United States is appraised under Section 402 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979.²²⁰ There has been considerable discussion concerning the proper method for valuing consignment entries of cut flowers in the United States.²²¹ According to the USITC Report on the cut flower trade, "[a]lmost 85 percent of total U.S. imports of cut flowers in 2001 entered duty-free under preferential trade programs."²²² The Andean Trade Preferences Act, which primarily benefits cut flower imports from Bolivia, Colombia, Ecuador, and Peru, governed over three-quarters of imports into the United States,²²³ with a majority of the imports originating from Colombia and Ecuador.²²⁴

The second-most-important program with regards to cut flowers is NAFTA; imports from Canada and Mexico combined accounted for almost 10 percent of duty-free cut flower imports in 2001. Small amounts of cut flowers enter under Caribbean Basin Economic Recovery Act ("CBERA") (mostly from Costa Rica) and the Generalized System of Preferences ("GSP") (mostly from Chile). Israel is a significant world supplier of cut flowers and shipped \$6.8 million to the United States in 2001 duty-free under the U.S.-Israel Free Trade Area. Duty-free imports of roses under the African Growth and Opportunity Act ("AGOA") program are currently low; however, Kenya is now the leading supplier of roses to Europe and began to ship to the U.S. market under AGOA for the first time in 2001.²²⁵

"Phytosanitary regulations," the Report states, "are the only nontariff measure that affects trade in cut flowers."²²⁶ Despite this, the United States has caused the proliferation of many SPS measures designed to protect human life from risks posed by toxins in foods.²²⁷ When conducting a risk

²¹⁹ *Id.*

²²⁰ Tariff Act of 1930 § 402, 19 U.S.C.A. § 1401a (West 2012).

²²¹ See Letter from Myles B. Harmon, Director, U.S. Customs and Border Protection, Commercial and Trade Facilitation Division, to Port Director (Nov. 1, 2011) (on file with author), available at rulings.cbp.gov/hq/2011/h165361.doc.

²²² USITC PUB. 3580, *supra* note 7, at 1.

²²³ JOANNA BONARRIVA, U.S. INT'L TRADE COMM'N, INDUSTRY AND TRADE SUMMARY: CUT FLOWERS 26 (2003).

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ See World Trade Organization: *The Impact of TBT and SPS Agreements on Food Labeling and Safety Regulations*, CENTER FOR SCI. PUB. INT. INT'L, <http://cspinet.org/reports/codex/wtospsbt.htm> (last visited Oct. 13, 2013).

assessment, Members must take into account the available scientific evidence, sampling, and testing methods in addition to ecological and environmental considerations.²²⁸ To determine the appropriate application of a SPS measure, the SPS Agreement requires Members to take into account various indices, such as “economic factors, the spread of the pest or disease, the costs of containing the pest or disease, and the cost-effectiveness of other approaches to limiting risks.”²²⁹

Furthermore, the SPS Agreement encourages Members to minimize the impact of SPS measures, and requires Members to avoid “arbitrary or unjustifiable distinctions” within their levels of protection.²³⁰ This risk assessment consists of two components: (1) an analysis of the potential for harm and (2) an evaluation of risks posed by a specific agent, such as a disease, pest, or pesticide.²³¹

Interestingly, in the United States, cut flower importation cases have led to significant legal decisions of a more systemic nature.²³² The United States has relied upon these domestic tests in its arguments at the WTO. For instance, in 2010, the United States referenced its old policy on cut flower imports before a WTO panel in a complaint against China on antidumping.²³³

VII. LABOR AND ENVIRONMENTAL ISSUES IN INTERNATIONAL FLOWER TRADE

A. *The Trade and Labor Debate*

Andrew Guzman argues that the WTO’s increased involvement in labor rights will ensure better protection of workers in developing countries.²³⁴ The WTO, he points out, has said little about labor practices and workers’ rights;²³⁵ “[i]t has no committee or working group on trade and labor, no agreement addressing labor standards, and the only directly relevant provision in the General Agreements on Tariffs and Trade (“GATT”) is an Article XX exception to trade obligations for measures

²²⁸ Agreement on the Application of Sanitary and Phytosanitary Measures art. 5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 5, 1867 U.N.T.S. 493, available at http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² See, e.g., *Asociacion Colombiana de Exportadores de Flores v. United States*, 22 C.I.T. 173 (Ct. Int’l Trade 1998).

²³³ Panel Report, *United States—Definitive Anti-Dumping And Countervailing Duties On Certain Products From China*, ¶ 8.37, WT/DS379/R (Oct. 22, 2010); see also, James R. Cannon Jr., *Simplification of Antidumping Actions: Efficiency at What Price*, 25 L. & POL’Y INT’L BUS. 1 (1993-1994) (discussing *Certain Fresh-Cut Flowers from Colombia*, 56 F.R.C. 50, 554, 50, 558-59 (1991)).

²³⁴ See generally Andrew Guzman, *Trade, Labor, Legitimacy*, 91 CAL. L. REV. 885 (2003).

²³⁵ *Id.*

relating to the products of prison labor.”²³⁶ Guzman also posits that, given the history of active rulings by the Appellate Body, expect the phrase “prison labour” to yield expanded meaning in the future.²³⁷ Indeed, the absence of any significant case law on Article XX(e), prompted Peter van den Bossche, prior to his appointment as a member of the Appellate Body, to predict that “evolutionary interpretation” would apply to “products produced in conditions contrary to the most fundamental labour standards.”²³⁸

Moreover, according to Guzman, the WTO is so determined to keep labor issues at a distance that it explicitly stated in its 1996 Singapore Ministerial Declaration that the ILO “is the competent body to set and deal with these [core labor] standards.”²³⁹ However, Kolben argues that “the focus on the WTO by proponents of trade and labor linkage is misplaced and that the focus on labor rights in the WTO is more distracting than constructive.”²⁴⁰

International trade in flowers is also subject to fair and ethical trade practices by private companies.²⁴¹ Multinational companies, trade unions, and social and environmental organizations have worked together to promote corporate social responsibility by creating better labor and environmental conditions in developing country flower farms.²⁴² One product of this effort is the International Code of Conduct (“ICC”) for the production of flowers, which provides universal standards for flower farms that promote reducing the negative impact of flower production.²⁴³ Still, the cultivation of flowers continues to create health hazards for both producers and consumers.²⁴⁴

NGOs have also pushed for better labor and sanitary conditions in flower farms. As a result, “there is a small emerging market for certified organic and fair-trade flowers.”²⁴⁵ This has caused farm owners in cultivating countries to become better educated on worker safety and welfare. More importantly, as a consequence of the United Nations’ newly adopted human rights framework, support for human rights has become an

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ PETER VAN DEN BOSSCHE, LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 640 (2d ed. 2008).

²³⁹ Guzman, *supra* note 234, at 885.

²⁴⁰ Kevin Kolben, *The WTO Distraction*, 12 STAN. L. & POL’Y REV. 461, 462 (2010).

²⁴¹ See Case C-125/07 P, *Erste Group Bank v. Comm’n of the European Cmty.*, 2009 E.C.R. I-08681, 5 C.M.L.R 9 (2009) (analyzing how practices of private entities can impact international trade).

²⁴² Liepold & Morgante, *supra* note 16, at 2, 8, 23 (discussing pressures for greater social and environmental responsibility in the Kenyan cut flower industry).

²⁴³ See Appendix—*International Code of Conduct for the Production of Cut Flowers*, 1 GLOBAL CITIZENS FOR A GLOBAL ERA, May 2002, at 31.

²⁴⁴ See Liepold & Morgante, *supra* note 16, at 6-8, 17-20.

²⁴⁵ Barbara Dinham, *Flowers—A Tale of Beauty and the Beast*, 82 PESTICIDES NEWS 22 (2008).

important market access requirement for market access to the European Union.²⁴⁶ This new-found human rights focus has caught the attention of exporters in these developing countries.²⁴⁷

B. Eco-Labeling

Under Paragraph 32 of the Doha Declaration, WTO Members explicitly mandated the Committee on Trade and Environment to identify areas where the WTO required clarification, such as labeling requirements, environmental measures, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”).²⁴⁸ Despite this action, dominant enterprises have attempted to establish criteria favoring their local products to the disadvantage of cut flower competitors in developing countries.²⁴⁹ Producers with transport inputs at a greater distance from the European Union are the primary targets of such strategies.²⁵⁰

By using eco-label, local producers are effectively able to reduce the competitive advantages enjoyed by international producers.²⁵¹ Before the WTO, Colombia – in many ways representing the view of developing countries – “reiterated the importance of applying Article 4 of the TBT Agreement which states that Members shall take such reasonable measures as may be available to them to ensure that non-governmental standardizing bodies within their territories accept and comply with the Code of Good Practice.”²⁵²

It must be recognized, however, that the call for fair and clean trade warrants the use of eco-labeling on products to inform consumers of the minimum manufacturing standards adhered to by producers and reducing greenhouse gas emissions in the so-called carbon trade.²⁵³ “Ecolabel criteria,” according to Lewis and Clark Law School’s *International Environmental Law Project*, “sometimes intentionally and often

²⁴⁶ DUTCH MINISTRY OF FOREIGN AFFAIRS, HUMAN RIGHTS AS PART OF MARKET ACCESS REQUIREMENTS (2012), available at <http://www.cbi.eu/marketintel/Human-rights-as-part-of-market-access-requirements/166997/platform/177404/mar>.

²⁴⁷ *Id.*

²⁴⁸ DOHA WTO Ministerial 2001: Ministerial Declaration, WORLD TRADE ORG. (Nov. 14, 2001), http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

²⁴⁹ See Gilles Grolleau et al., *Industrialist Hand in Hand With Environmentalist: How Eco-labeling Schemes Can Help Firms to Raise Rivals’ Costs*, 24 EUR. J.L. & ECON. 215, 221 (2007).

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² WORLD TRADE ORG., ENVIRONMENTAL LABELS AND MARKET ACCESS: CASE STUDY ON THE COLOMBIAN FLOWER-GROWING INDUSTRY ¶ 48 (1998), available at www.wto.org/center.org.tw/SmartKMS/fileviewer?id=4088.

²⁵³ See generally Gijsbert van Liemt, *Globalization and Labour Issues: An International Perspective*, in LABOUR ISSUES IN THE CONTEXT OF ECONOMIC INTEGRATION AND FREE TRADE: A CARIBBEAN PERSPECTIVE 21, 21 (Willi Momm ed., 1999).

unintentionally, target products from developing countries.”²⁵⁴ Germany provides one such example; there, “a German NGO designed ecolabel . . . specifically targeted Colombian flower producers, due to the Colombian flower industry’s known use of pesticides, which are restricted as health hazards in other countries.”²⁵⁵ As expected, Colombia complained that such requirements should apply to all flower producers, and “that the Colombian flower industry had established its own criteria for improving standards.”²⁵⁶ Consequently, in a joint initiative, human rights organizations, labor unions, churches, flower producers, and flower retailers have developed a “flower label program.”²⁵⁷ It is a private, non-governmental, not-for-profit association that promotes socially and environmentally responsible flower, fern, plant, and foliage cultivation.²⁵⁸

Within the WTO, eco-labeling issues, including the applicability of the TBT Code of Good Practice and voluntary eco-labeling programs, have been brought to the attention of the TBT Committee.²⁵⁹ The TBT agreement governs eco-labeling program requirements for non-product related processes and production methods. On an international level, the impact these eco-labeling programs have had on trade, as well as the best implementation and management methods of these programs, is still up for debate.²⁶⁰ In relation to Colombia and Ecuador, Korovkin and Sanmiguel-Valderrama argue:

[International NGOs] have also created a wide range of labelling schemes to certify products made in a socially (and environmentally) responsible manner. The NGOs activism is mirrored in the private sector’s activities. Many companies have embraced the notion of corporate social responsibility that takes them beyond their obligation to abide by labour law into an approach that involves co-operation with local communities and NGOs. In effect, many companies collaborate with NGO labelling initiatives or develop their own codes of conduct. Some authors see these developments in a highly positive light as a way to promote an ethical form of globalization.²⁶¹

²⁵⁴ INT’L ENVTL. LAW PROJECT, THE LEGISLATOR’S GUIDE TO INTERNATIONAL TRADE LAW: LEGISLATING FOR ENVIRONMENTAL PROTECTION AND CONSUMER WELFARE 13 (2012).

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 14.

²⁵⁷ INT’L TRADE CENTRE, FLOWER LABEL PROGRAM – FLP: AT A GLANCE (2011), available at www.standardsmap.org/workarea/downloadasset.aspx?id=58621.

²⁵⁸ See *Flower Label Program (FLP)*, ECOLABEL INDEX, <http://www.ecolabelindex.com/ecolabel/flower-label-program-flp> (last visited Oct. 13, 2013).

²⁵⁹ *Id.*

²⁶⁰ HAKAN NORDSTROM & SCOTT VAUGHAN, TRADE AND ENVIRONMENT 79 (WTO 1999).

²⁶¹ *Id.* at 120.

Supermarkets in the European Union and North America waded into the fray and began requiring labeling schemes with verifiable standards to demonstrate to consumers that their products have met certain social and environmental standards.²⁶² Developing countries, however, continue to point to the adverse effects of eco-labeling on the cut flower trade.²⁶³ As a result, international producers have sought relationships with mass merchandisers within the U.S. in an attempt to bypass the supermarket labeling requirements.²⁶⁴ Under these agreements, the mass retail outlet will often assume a much more active role in the production decisions at the grower level,²⁶⁵ by establishing certain specifications and conditions that the farms must comply with. Although this forces growers to surrender a good deal of autonomy, these deals also remove a great deal of risk because their products are guaranteed access to a market with high demand.²⁶⁶

VIII. CONCLUSION

This Article has argued that since the WTO is already overburdened with non-trade concerns, the best solution for addressing the negative externalities within the cut flower trade is for consumers to assume the role of political actors. Professor Chimni says that the lens of class analysis within international law has not become obsolete.²⁶⁷ When the cut flower trade is examined through the lens of class, there emerges a class of subaltern subjects – the women, children, men and tribal peoples – prone to exploitation and health risks with multinational corporations on the other side:

There are other manifestations of *new forms* of ‘class struggles’ as well. The growing informalization of labour in the third world coupled with the phenomena of sub-contracting and outsourcing of work by the transnational corporate sector has meant that reconfiguration of the global map of capital-labour relations.²⁶⁸

²⁶² *Id.*, 251, at 79 (“At the first triennial review of the TBT Agreement, in 1997, the Committee agreed on some measures which should be taken to improve the transparency of, and compliance with the Code of Good Practice” – regulate labeling schemes).

²⁶³ Richard G. Tarasofsky, *The WTO Committee on Trade and Environment: Is It Making a Difference?* 3 MAX PLANCK Y.B.U.N.L. 471, 477 (1999).

²⁶⁴ USITC PUB. 3580, *supra* note 7, at 14.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ Chimni, *supra* note 15, at 66-72.

²⁶⁸ *Id.* at 80.

Indeed, the outsourcing of the cut flower industry from developed to developing countries and the attendant opportunities of exploitation that translate into tangible profits offer a pointed example of the aforementioned “reconfiguration of the global map of capital-labour relations”. Additionally, due to fluctuating demand for cut flowers and organic products, combined with the potential for over-production as more developing countries diversify their agricultural production and enter these markets, only a consumer-centric view can help the cut flower trade solve the issue of negative externalities.²⁶⁹

Today, the global floral trade is plagued by the exploitation of local populations through child labor, sexual harassment, exposure to hazardous chemicals, and low wages, for the profit of few. Despite this, institutions are working on strategies to “increase import of agricultural products from low-income sub-Saharan African countries to Norway by benefiting from zero tariffs, and in a way that is environmentally sustainable and contributes towards poverty reduction.”²⁷⁰ Indeed, the global floral trade possesses amazing potential to greatly improve the lives of many in developing countries by supplying jobs, empowering women, creating healthier working environments, and reducing instances of child labor.

Like many other trade and development issues, the global floral trade desperately needs attention. Not only is the industry plagued by potential hazards, but there are also violations with respect to pay and benefits.²⁷¹

In hazardous, relatively low-paying sectors such as floriculture where demand for labour often fluctuates, employment benefits other than fair wages are of great importance to workers. Benefits such as maternity leave, childcare provision and transport may be especially important to women, enabling them to balance unpaid caring work with paid work in the industry.²⁷²

Furthermore, there is no better example of export dependence than cut flower trade in Africa and Latin America. As such, it is time that lawyers, environmentalists, and policy makers focus on the floriculture industry. It is “necessary to look more deeply at the dynamics of buyer-driven supply chains and how current pricing and purchasing practices can undermine the efforts of workers to establish their human rights” in the cut

²⁶⁹ See generally Sucharita Sen & Saraswati Raju, *Globalisation and Expanding Markets for Cut-Flowers: Who Benefits?*, 41 *ECON. & POL. WKLY.* 2725, 2725 (2006).

²⁷⁰ NORAGRIC REP. NO. 43, *supra* note 10, at 3.

²⁷¹ Dolan et al., *Gender, Rights and Participation in the Kenya Cut Flower Industry* 48 (UK Dep’t for Int’l Development, SSR Project No. R8077 2002-4, NRI Report Working Paper No. 2708).

²⁷² *Id.*

flower business.²⁷³ Unless the ugly side of cut flowers is illuminated, it is hard to understand why consumers would organize to offset the negative externalities of sexual exploitation, child labor, and the dangerous environmental practices that exist in developing countries. In conclusion, countries must address labor, gender, and child labor issues, so that the cut flower trade can begin to blossom, generating more positive than negative externalities.

²⁷³ Hale & Opondo, *supra* note 57, at 321.

