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Should the World Trade Organization Incorporate Labor and Environmental Standards

Chantal Thomas

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Should the World Trade Organization Incorporate Labor and Environmental Standards?

Chantal Thomas*

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I. Introduction

While the Members of the World Trade Organization (WTO) have yet to adopt affirmative labor and environmental obligations, the link between trade, labor, and the environment has been pressed in much academic and policy discourse.¹ Particularly with respect to environmental issues, the judicial body of the WTO has been called on to identify some of the contours of appropriate linkage between such "nontrade" issues and WTO rules in a series of closely-watched disputes.² The holdings of these cases have shifted since the WTO's establishment in 1995, away from a deep suspicion about the propriety of linking trade with nontrade issues, and towards a nuanced view that accepts the validity of linkage as long as it meets certain formal parameters.

Some have applauded this shift, others have excoriated it. As the shape of WTO jurisprudence on linkage has shifted, calls for resolution through political negotiations have increased.³ Some perceive a "legislative" solution to offer greater legitimacy because it would represent a more "democratic" solution negotiated by the entire membership, rather than a rule adjudicated by a panel

1. See generally FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? (Jagdish Bhagwati & Robert E. Hudec eds., 1996); Symposium, *Linkage as Phenomenon: An Interdisciplinary Approach*, 19 U. PA. J. INT'L ECON. L. 201 (1998); Symposium: *The Boundaries of the WTO*, 96 AM. J. INT'L L. 1 (2002) (Jose E. Alvarez ed.); Andrew Guzman, *Global Governance and the WTO* (manuscript on file with author).

2. See *infra* Part III (describing the judicial branch's approach to enforcing WTO laws).

3. See *infra* Part IV (discussing how legislation should address the shifts in WTO policies on linkage).

of judges to resolve a dispute between particular members. Yet political negotiations are fraught with a host of separate problems. What might be called the "decision costs" of a legislative solution are high, possibly prohibitively so.⁴ A knotty problem arises for those concerned with linkage: there seems to be an inverse relationship between perceived legitimacy, on the one hand, and decision costs on the other. The expense of negotiating a specific rule, the dangers of holdout and other strategic problems, and the specter of capture might all render the legislative option unfeasible;⁵ more seriously, they may threaten the very legitimacy that the legislative solution purports to provide.

This Article considers the judicial and legislative responses to "the linkage question" within the WTO. First, the Article recounts why the question has arisen in the first place: the relative weakness of enforcement mechanisms within international labor and environmental law.⁶ Second, the Article reviews the range of WTO judicial responses to unilateral linkage efforts by member states, considered under existing "negative" provisions of WTO law—a law of exceptions that allows but does not mandate linkage.⁷ Third, the Article considers the obstacles confronting the legislative response of defining the relationship between trade, labor, and environmental policies through multilateral negotiations to create "positive" labor and environmental obligations within the WTO.⁸ Finally, the Article makes reference to a notably successful effort at transitioning from negative exception to positive obligation: the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPs).⁹ The TRIPs Agreement indicates that the costs of legislation need not prohibit successful negotiation; however, it also demonstrates that legislative outcomes will not always foreclose legitimacy concerns.

II. International Labor and Environmental Law Enforcement Mechanisms

The problem at the center of the "trade linkage" question is the discrepancy between enforcement in the WTO regime and enforcement in other international legal regimes. This Part recounts the enforcement processes that

4. See generally Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 VA. J. INT'L L. 1 (2001) (describing the transaction costs attendant to "prescriptive jurisdiction" transactions).

5. See *infra* Part IV (examining the legislative option).

6. *Infra* Part II.

7. *Infra* Part III.

8. *Infra* Part IV.

9. See *infra* Part V (discussing TRIPs).

have developed within international environmental and labor regimes and the challenges these processes continue to face.

A. International Labor Law

Established in 1919,¹⁰ the International Labor Organization (ILO) has established more than 180 binding conventions¹¹ and 190 nonbinding resolutions,¹² on subjects ranging from human rights¹³ to occupational safety.¹⁴ Despite one of the oldest pedigrees in international law, however, the ILO's enforcement record has proved woeful.

An initial problem is that differing groups of countries have ratified different treaties, creating a patchwork of inconsistent legal obligations (although those conventions dealing with "core" labor standards tend to have more uniform ratification).¹⁵ When a legal obligation does apply, moreover, the

10. CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANIZATION, Treaty of Versailles, June 28, 1919, Part XIII, 49 Stat. 2713, 225 Consol. T.S. 189, 373 [hereinafter ILO Constitution].

11. INTERNATIONAL LABOUR ORGANIZATION, THE ILO WHAT IT IS WHAT IT DOES 14 at <http://www.ilo.org/public/english/bureau/inf/download/brochure/pdf/page14.pdf> (last modified Feb. 10, 2000).

12. *Id.*

13. See generally, Worst Forms of Child Labour Convention, adopted June 17, 1999, at <http://www.ilo.org/ilolex/english/convdispl.htm> (No. 182); Convention Concerning Minimum Age Admission to Employment, adopted June 26, 1973, 1015 U.N.T.S. 297 (No. 138) (ILO) [hereinafter Minimum Age Convention]; Convention Concerning the Abolition of Forced Labour, adopted June 25, 1957, 320 U.N.T.S. 291 (No. 105) (ILO) [hereinafter Abolition of Forced Labour Convention]; Convention Concerning Freedom of Association & Protection of the Right to Organize, adopted July 9, 1948, 68 U.N.T.S. 17 (No. 87) (ILO) [hereinafter Freedom of Association & Protection of the Right to Organize Convention].

14. E.g., Convention Concerning Occupational Safety and Health and the Working Environment, adopted June 22, 1981, 1331 U.N.T.S. 279 (No. 155) (ILO) [hereinafter Occupational Safety and Health Convention]; Convention Concerning Working Conditions in Hotels, Restaurants, and Similar Establishments, adopted June 25, 1991, 1820 U.N.T.S. 445 (No. 172) (ILO) [hereinafter Working Conditions (Hotels & Restaurants) Convention]; Convention Concerning Labour Inspection in Agriculture, adopted June 25, 1969, 812 U.N.T.S. 88 (No. 129) (ILO) [hereinafter Labour Inspection (Agriculture) Convention]; Convention Concerning Food and Catering for Crews on Board Ship, adopted June 27, 1946, 164 U.N.T.S. 37 (No. 68) (ILO) [hereinafter Food & Catering (Ships' Crews) Convention].

15. The ratifications of "core" ILO agreements are as follows: The 1948 Freedom of Association & Protection of the Right to Organize Convention, *supra* note 13, has been ratified by 142 countries including Argentina, Austria, Uruguay, and Zimbabwe. The 1957 Abolition of Forced Labour Convention, *supra* note 13, has been ratified by 161 countries, including Argentina, Austria, Uruguay, and Zimbabwe. The 1973 Minimum Age Convention, *supra* note 13, has been ratified by 138 countries including Argentina, Austria, Uruguay, and Zimbabwe. The 1999 Worst Forms of Child Labour Convention, *supra* note 13, has been ratified by 145

ILO's provisions for enforcement favor fact-finding and reporting over sanctions.¹⁶ Although the ILO constitution authorizes sanctions in the event of noncompliance, the language is vague: "In the event of any Member failing to carry out within the time specified the recommendations . . . any other Member may take against that Member the measures of an economic character indicated . . . as appropriate to the case."¹⁷

As was the case with the trade regime prior to the WTO,¹⁸ even with respect to the most egregious labor practices, the ILO's enforcement capacity has been severely constrained, as in the case of allegations of forced labor practices in the country of Myanmar (known formerly as Burma).¹⁹ The international outcry against Myanmar sparked a movement for economic sanctions.²⁰ This mobilization resulted in, among other things, the adoption of

countries, including Argentina, Austria, Uruguay, and Zimbabwe. The record for noncore agreements is much different: The 1981 Occupational Safety and Health Convention, *supra* note 14, has been ratified by thirty-nine countries, including Uruguay and Zimbabwe, but not including Austria and Argentina. The 1991 Working Conditions (Hotels & Restaurants) Convention, *supra* note 14, has been ratified by thirteen countries including Austria and Uruguay, but not including Argentina and Zimbabwe. The 1946 Food & Catering (Ships' Crews) Convention, *supra* note 14, has been ratified by twenty-four countries, including Argentina, but not including Austria, Uruguay, and Zimbabwe. The 1969 Labour Inspection (Agriculture) Convention, *supra* note 14, has been ratified by forty-one countries, including Argentina, Uruguay, and Zimbabwe, but not Austria. The current lists of ratifications of these conventions are found at <http://www.ilo.org/ilolex/english/convdisp1.htm> (last visited Oct. 10, 2003).

16. Members are required to make annual reports as to their compliance with ILO conventions to which they are parties. ILO Constitution, *supra* note 10, art. 408, 49 Stat. at 2725, 225 Consol. T.S. at 379. If a member fails to comply, the ILO can publicize that failure. *Id.* art. 410, 49 Stat. at 2725, 225 Consol. T.S. at 380. A complaint can also be referred to a Commission of Inquiry, which can investigate and make findings and recommendations. *Id.* arts. 411–14, 49 Stat. at 2725–28, 225 Consol. T.S. at 380–81. A member may then choose to pursue the matter further in the International Court of Justice (ICJ). *Id.* arts. 415–18, 49 Stat. at 2728–29, 225 Consol. T.S. at 381.

17. *Id.* art. 419, 49 Stat. at 2729, 225 Consol. T.S. at 382.

18. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 107–37 (1995) (comparing the historical processes for enforcement of GATT agreements with the improved WTO process implemented after the Uruguay Round).

19. See *Report of the Commission of Inquiry Appointed Under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the Forced Labour Convention 1930* (No. 29), ¶ 102, ILO Official Bulletin v.81 1998 (Series B, Special Supp.) (July 2, 1998) (describing allegations made by the ILO that the Myanmar Government facilitated forced labor practices for both public and private purposes).

20. For a thorough account of the history and current status of the international sanctions movement against Myanmar, see generally Altsean-Burma, *Ready, Aim, Sanction!* (Nov. 2003), at <http://www.altsean.org/ReadyAimSanction112003.pdf>. For a notable perspective on the sanctions movement, see Archbishop Desmond Tutu, *Forward*, *id.* at 1 (comparing the possible use of sanctions against Myanmar with those used against South Africa).

procurement policies by several state and local governments in the United States that penalized companies for doing business with Myanmar.²¹ Within the ILO, noncompliance proceedings were triggered.²² As provided under the ILO constitution, a coalition of twenty-five "Worker's delegates" from a cross-section of developed and developing countries brought a formal complaint.²³ The resulting Commission of Inquiry found extensive violations of the Forced Labour Convention, amounting to "a saga of untold misery and suffering, oppression and exploitation of large sections of the population inhabiting Myanmar by the Government, military and other public officers."²⁴ The Commission condemned the "impunity with which government officials, in particular the military, treat the civilian population as an unlimited pool of unpaid forced labourers and servants at their disposal."²⁵ To date, however, Myanmar remains in noncompliance with the Convention, and the ILO has not authorized any sanctions.

B. International Environmental Law

Lack of enforcement has also characterized international environmental law. While the number and scope of multilateral environmental agreements continue to grow, few institutional mechanisms have emerged for the effective enforcement of environmental obligations.²⁶ Rather, as one commentator has described the situation:

21. See Paul Blustein, *Thinking Globally, Punishing Locally: States, Cities Rush to Impose Their Own Sanctions, Angering Companies and Foreign Affairs Experts*, WASH. POST, May 16, 1997, at G1 (noting examples of states and municipalities refusing to purchase goods from Myanmar); Robert S. Greenberger, *States, Cities Increase Use of Trade Sanctions, Troubling Business Groups and U.S. Partners*, WALL ST. J., Apr. 1, 1998, at A20 (same).

22. See *Report of the Commission of Inquiry*, *supra* note 19, at ¶¶ 1, 4 (documenting the series of ILO complaints and criticisms preceding the filing of a formal complaint and reporting on the action of the 267th meeting of the ILO Governing Body with respect to the filing of the formal complaint).

23. *Id.* ¶ 1 n.1 (listing the "Worker's delegates:" Lebanon, Ghana, Pakistan, France, United Kingdom, Sweden, Germany, Czech Republic, United States, Japan, Israel, Italy, Niger, India, United Republic of Tanzania, Canada, Ireland, Venezuela, Malaysia, Tunisia, Mexico, Zimbabwe, Cameroon, Barbados, and Poland).

24. *Id.* ¶ 543.

25. *Id.* ¶ 542.

26. See Johanna Rinceanu, *Enforcement Mechanisms in International Environmental Law: Quo Vadunt?*, 15 J. ENVTL. L. & LITIG. 147, 148-49 (2000) (discussing enforcement of international environmental law); see generally ULRICH BEYERLIN & THILO MARAUHN, *LAW-MAKING AND LAW-ENFORCEMENT IN INTERNATIONAL ENVIRONMENTAL LAW AFTER THE 1992 RIO CONFERENCE (1997)* (discussing international environmental law).

Frequently, there [is] a long lag in securing widespread ratification because of insufficient incentives for nations to sign up Nor is there any institutional mechanism to provide nations with incentives to comply when they have ratified

The making and negotiation of the instruments themselves has to start anew each time. No organization commands clear power to coordinate international environmental negotiations. Each negotiation proceeds differently

There is no institutional machinery to evaluate gaps that may be found in the international framework of agreements or to develop means of assigning priorities among competing claims for attention.²⁷

In 1972, the foundational Stockholm Declaration of the United Nations Conference on the Human Environment²⁸ provided the basis for establishment of the United Nations Environment Programme (UNEP),²⁹ which comes the closest to a central agency responsible for international environmental law. UNEP plays a "coordinating and catalytic role" but, at the same time, it "lacks any formal powers."³⁰ It has no authority to require states to cooperate with its efforts to gather information or to further the progressive development of international environmental law.³¹

27. Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 263 (1992).

28. *Declaration of the United Nations Conference on the Human Environment, adopted June 16, 1972, U.N. Doc. A/CONF.48/14, reprinted in 11 I.L.M. 1416 (1972)* [hereinafter Stockholm Declaration].

29. See G.A. Res. 2997, U.N. GAOR, 27th Sess., Supp. No. 30, at 43, U.N. Doc. A/8730 (1972), reprinted in 12 I.L.M. 433 (1973) (establishing the United Nations Environment Programme).

30. Palmer, *supra* note 27, at 260-61. Other agencies have also worked on parallel tracks. For example:

[A]lthough the international community's emphasis during the 1970s was on pollution of water, air, and soil, the International Union for Conservation of Nature and National Resources expanded the community's concern to endangered wildlife and played a big part in negotiating the 1973 Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora.

Andronico O. Adede, *The Treaty System from Stockholm (1972) to Rio de Janeiro*, 13 PACE ENVTL. L. REV. 33, 36 n.17 (1995); see generally Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243, reprinted in 12 I.L.M. 1085 (1973).

31. Notwithstanding this lack of formal authority, the UNEP has succeeded in encouraging states to negotiate new environmental treaties elaborating on such core principles as marine conservation. See Adede, *supra* note 30, at 36 ("UNEP initiated its Regional Seas Programme and negotiated a number of treaties . . ."). Among other things, the UNEP negotiated:

Many calls have gone out to improve the institutional basis laid down by the UNEP.³² Most significantly, in 1992 the United Nations Conference on Environment and Development (UNCED) undertook a major review and

[T]he 1976 Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution, the 1978 Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment From Pollution, the 1981 Abidjan Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, the 1981 Lima Convention for the Protection of the Marine Environment and Coastal Areas of the South-East Pacific, the 1982 Jeddah Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment, the 1983 Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, the 1985 Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, and the 1986 Noumea Convention for the Protection of the Natural Resources and Environment of the South Pacific Region.

Id. at 36–37. The UNEP's efforts have also proved key to the establishment of treaties on ozone depletion. See Palmer, *supra* note 27, at 261 ("In my opinion, without UNEP, the system to prevent ozone depletion now in place would not have been developed.").

32. In a document entitled the Hague Declaration on the Environment, several countries called for "new and more effective decision-making and enforcement mechanisms." The Hague Declaration on the Environment, *done* Mar. 11, 1989, 28 I.L.M. 1308, 1309. In 1988, the President of the World Federation of United Nations Associations proposed that a new mandate be issued to the United Nations Trusteeship Council to protect the "planetary systems on which our security and survival depends, as well as over the global commons." Durwood Zaelke & James Cameron, *Global Warming and Climate Change—An Overview of the International Legal Process*, 5 AM. U.J. INT'L L. & POL'Y 249, 280 (1990) (quoting address by Maurice F. Strong, National Conference on "Peacemaking and Peacekeeping: Canada and the United Nations," Dalhousie University, Nova Scotia, June 5, 1988, at 17 (on file at the office of the American University Journal of International Law and Policy)). The World Commission on Environment and Development, an expert group established by the United Nations, has called for the establishment of a centralized mechanism headed by a United Nations High Commissioner for the environment. Such a centralized mechanism would be responsible for investigating and making reports on state compliance with core principles of international environmental law. See THE WORLD COMM'N ON ENV'T & DEV., OUR COMMON FUTURE 308–51 (1987) (suggesting the establishment of a mechanism for investigating and reporting on compliance). More recently, commentators have called for the establishment of an International Court for the Environment. See, e.g., Amedeo Postiglione, *A More Efficient International Law on the Environment and Setting Up an International Court for the Environment Within the United Nations*, 20 ENVTL. L. 321, 323 (1990) ("The creation of an International Court for the Environment as part of the United Nations is urgently needed . . ."). A number of other international environmental scholars have also weighed in with their own proposals for a central institution for the monitoring and enforcement of international environmental law. See Palmer, *supra* note 27, at 278–82 (proposing an International Environment Organization); Rinceanu, *supra* note 26, at 172–77 (proposing the redirection of existing institutions such as the United Nations Security Council and the World Bank, as well as the creation of new institutions such as a "Universal Court of Environment").

expansion of international environmental law and sought to lay out a comprehensive blueprint for its development and implementation.³³

While many of the resulting documents were nonbinding, UNCED did establish some binding treaties, an example of which is the Convention on Biological Diversity.³⁴ Although this Convention benefits from formally binding status, many of its obligations are hortatory, qualified as they are by the phrase "as far as possible and as appropriate."³⁵ The Convention's institutional mechanisms are sparse.³⁶ In a communication to the World Trade

33. See generally GREENING INTERNATIONAL LAW (Philippe Sands ed., 1993) (discussing UNCED and the development of international environmental law). A few years prior to UNCED's review, the U.N. General Assembly had set forth a framework, the System-Wide Medium-Term Environment Programme, for the integration and implementation of international environmental law. G.A. Res. 32/197, U.N. GAOR, 32d Sess., Supp. No. 45, at 121, U.N. Doc. A/32/45 (1977); *System-Wide Medium-Term Environment Programme for the Period 1990-1995*, U.N. Environment Programme, U.N. Doc. UNEP/GC/SS.I/7/Add.1 (1988). Agenda 21 of UNCED, for example, outlined an extensive set of recommendations for the institutionalization of international environmental law. See Edith Brown Weiss, Introductory Note, *United Nations Conference on Environment and Development*, 31 I.L.M. 814, 814-15 (1992) (describing Agenda 21).

34. Convention on Biological Diversity, done June 5, 1992, 1760 U.N.T.S. 79, 31 I.L.M. 818 [hereinafter Convention on Biological Diversity]. The Convention was negotiated out of a separate initiative by the UNEP. See *Proceedings of the Governing Council at its Fifteenth Session*, UNEP Governing Council, 15th Sess., Agenda Item 12, at 165-66, U.N. Doc. UNEP/GC.15/12 (1989) (authorizing an ad hoc working group to "negotiate an international legal instrument for the conservation of the biological diversity of the planet").

35. Marc Pallemerts, *International Environmental Law in the Age of Sustainable Development: A Critical Assessment of the UNCED Process*, 15 J.L. & COM. 623, 660-61 (1996). Pallemerts observes:

The Convention is no doubt legally binding, but is it any more "authoritative" than [nonbinding statements], in the sense of imposing on the contracting parties precise rules of conduct . . . ? Indeed, all of the substantive obligations of the parties relating to the identification and monitoring of the elements of biological diversity (Article 7); to *in situ* conservation (Article 8) and to *ex situ* conservation (Article 9); to sustainable use (Article 10); to incentives (Article 11) and to environmental impact assessment (Article 14) are qualified by the phrase "as far as possible and as appropriate."

Id. These would be called "illusory promises" in ordinary contract law.

36. The only regular institutional mechanism is that of regular meetings of the state parties. See Convention on Biological Diversity, *supra* note 34, art. 23, ¶ 1, 1760 U.N.T.S. at 157, 31 I.L.M. at 832 (establishing a conference of the parties that should hold regular meetings). Implementation reports are called for, but there is no regular reporting requirement. Rather, parties are to present reports "at intervals to be determined by the Conference of the Parties." *Id.* art. 26, 1760 U.N.T.S. at 159, 31 I.L.M. at 834. This contrasts with the regular reporting requirements laid down as part of the WTO. See Trade Policy Review Mechanism, Apr. 15, 1994, WTO Agreement, Annex 3 [Treaties Binder 1, Treaties Booklet 3], L. & Prac. World Trade Org. (Oceana) 1 (Mar. 1995) (defining the intervals for review of the trade policies and practices of Members). For a brief description of the Trade Policy Review Mechanism, see

Organization, the Secretariat of the Convention conceded, "The Convention does not have a compliance procedure. Formal assessment of Parties or non-Parties compliance with the Convention has not occurred."³⁷

Perhaps the best institutionalized international environmental agreement is the Montreal Protocol on Substances that Deplete the Ozone Layer,³⁸ because it administers a fund to assist countries in achieving compliance.³⁹ The Montreal Non-Compliance Procedure (NCP)⁴⁰ allows disputes between parties to be submitted to an Implementation Committee, which then recommends "appropriate action" to the parties.⁴¹ While the Implementation Committee conducts extensive reporting of no compliance, it has not pursued sanctions against noncompliant parties.⁴²

Amelia Porges, Introductory Note, *General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations*, Annex III, 33 I.L.M. 1125, 1129 (1994). A similar laxity characterizes the Convention's dispute settlement provisions. The Convention allows, but does not require, parties to submit a dispute to compulsory arbitration or compulsory submission to the International Court of Justice. Convention on Biological Diversity, *supra* note 34, art. 27, ¶ 3, 1760 U.N.T.S. at 159, 31 I.L.M. at 834. If the parties have not both so agreed and cannot otherwise agree on a dispute settlement process, the dispute is to be addressed through the Convention's "conciliation" process. *Id.* art. 27, ¶ 4, 1760 U.N.T.S. at 160, 31 I.L.M. at 834. This process results in a "proposal for resolution of the dispute, which the parties shall consider in good faith." *Id.* Annex II, part 2, art. 5, 1760 U.N.T.S. at 169, 31 I.L.M. at 841.

37. Communication from the Secretariat of the Convention on Biological Diversity to the Committee on Trade and the Environment, WT/CTE/W/116, ¶ 3 (June 28, 1999), available at <http://www.wto.org>.

38. Protocol on Substances that Deplete the Ozone Layer, *opened for signature* Sept. 16, 1987, 26 I.L.M. 1541 [hereinafter Montreal Protocol]; see generally Elizabeth R. DeSombre, *The Experience of the Montreal Protocol: Particularly Remarkable, and Remarkably Particular*, 19 UCLA J. ENVTL. L. & POL'Y 49 (2000–2001) (discussing the success of the treaty process used in ratifying the Montreal Protocol).

39. See DeSombre, *supra* note 38, at 70 (describing the Multilateral Fund).

40. The Montreal Protocol explicitly addressed the issue of enforcement by calling on the parties to consider and approve enforcement mechanisms in the future. See Montreal Protocol, *supra* note 38, art. 8, 26 I.L.M. at 1556 ("The Parties, at their first meeting, shall consider and approve procedures and institutional mechanisms for determining noncompliance with the provisions of this Protocol and for treatment of Parties found to be in noncompliance.").

41. See Communication from the Secretariat for the Vienna Convention and the Montreal Protocol to the WTO Committee on Trade and the Environment, WT/CTE/W/115, ¶ 17 (June 25, 1999) (UNEP) (stating that potential actions "include assistance, caution or suspension of specified rights and privileges under the Protocol" and "[t]hat the measures for noncompliance include assistance, on the assumption that a Party's noncompliance is not deliberate but only due to its inability, is a novel provision introduced by the Parties to the Montreal Protocol"), available at <http://www.wto.org>.

42. See *id.* ¶ 18 ("So far, only the case of the Russian Federation and other Republics of the former Soviet Union are before the Committee for noncompliance, on the basis of the Secretariat's report.").

Overall, resources that exist for enforcement of international environmental law, as with international labor law, remain sparse.⁴³ It is possible that the relative nonenforcement of these other regimes represents the desire of states that these realms be relatively less authoritative, but rather serve as communities in which norms evolve slowly over time. It is also possible that the weakness of enforcement mechanisms in international labor and environmental law is vestigial, representative of an earlier international arena in which the technologies of enforcement were simply less well-developed. The question of the legitimate scope of authoritativeness of international labor and environmental rules has become more pressing as these regimes face a form of regulatory competition from trade law.

III. The Judicial Branch Approach: Incorporation Through Interpretation?

The framework agreement of the WTO contains preambular language that affirms the importance of both labor and environmental protections. With respect to the environment, as mentioned above, the WTO recognizes in its preamble the importance of "expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking . . . to protect and preserve the environment."⁴⁴ With respect to labor, the preamble also recognizes that states' "relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living,

43. One patently frustrated nongovernmental organization (NGO) bemoaned an "unfamiliar network of haphazardly coordinated [agencies] . . . a fantasm, with mirage-like powers, a creaking and fragmented process for deciding policy, and a surfeit of bureaucratic fiefdoms that consistently muster inadequate resources to meet even the most urgent challenges." UNITED NATIONS ASS'N OF THE U.S.A./THE SIERRA CLUB, UNITING NATIONS FOR THE EARTH: AN ENVIRONMENTAL AGENDA FOR THE WORLD COMMUNITY 33 (1990). Another commentator remarked, "The problem is that rhetoric about the environment is far easier to produce than action, and international forums tend on occasion to degenerate into 'rhetoric-fests,' where world leaders spout all the proper phrases but then go home and often fail to implement their internationally-formulated promises." Rane K.L. Panjabi, *From Stockholm to Rio: A Comparison of the Declaratory Principles of International Environmental Law*, 21 DENV. J. INT'L L. & POL'Y 215, 216 (1993).

44. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, pmbl. [Treaties Binder 1, Marrakesh Declaration Booklet], L. & Prac. World Trade Org. (Oceana) 7, 33 I.L.M. 1125, 1144 [hereinafter WTO Agreement]. This formulation departs notably from the stated objective of its predecessor, the GATT, to the unqualified "full use of the resources of the world" unfettered by recognition of environmental constraints. General Agreement in Tariffs and Trade, Oct. 30, 1947, pmbl., 61 Stat. A11, A11, 55 U.N.T.S. 194, 194 [hereinafter GATT 1947].

ensuring full employment and a large and steadily growing volume of real income and effective demand."⁴⁵ Beyond stating these general principles, however, the WTO Agreements do not contain affirmative obligations to uphold labor and environmental standards. They do, however, create room for states on their own to take measures that restrict trade in order to implement social regulations.

A pivotal question in WTO jurisprudence is how much room exists under these provisions. WTO members have pursued a host of claims testing WTO law on some salient touchstones of the linkage debate. The WTO judiciary's responses have come under fire from both sides of the debate—charged at once with going too far to protect states' rights under nontrade law and not going far enough.⁴⁶ Some have charged the WTO Appellate Body with undue judicial activism.⁴⁷ Others argue that WTO judges can and should allow states to invoke international law to defend pro-labor or pro-environment trade restrictions.⁴⁸ Examining WTO jurisprudence on some high-profile controversies reveals a range of interpretive possibilities in the conflict between trade rules and nontrade rules.

45. This language reproduces that of the 1947 GATT preamble. WTO Agreement, *supra* note 44, pmbl. [Treaties Binder 1, Marrakesh Declaration Booklet], L. & Prac. World Trade Org. (Oceana) at 7, 33 I.L.M. at 1144; GATT 1947, *supra* note 44, pmbl., 61 Stat. at A11, 55 U.N.T.S. at 194. A contrarian might argue that labor protections create "rigidity" in the labor market, preventing full employment, so that the preamble could be read to justify the rejection, rather than the adoption, of labor protections. This familiar argument follows supply and demand but is also qualified by key assumptions. In the case of a wage increase, for example, one must assume that other variables remain constant, so that labor productivity does not increase to offset the increase in production cost, and the employer cannot regain the increase in production costs by increasing market prices. Note that this also assumes a competitive market, which prevents the employer from being able to raise prices, and that the employer was operating at a marginal labor product of zero. When the wage increases, employer demand for labor will decrease (by the amount required for the employer to recover a marginal labor product of zero). Consequently, although those employed will benefit from higher wages, the overall number of employees will be fewer. However, the reference to raising standards of living seems to make clear that what is sought is not simply full employment, but full employment that improves quality of life.

46. See Susan Esserman & Robert Howse, *The WTO on Trial*, 82 FOREIGN AFF., Jan./Feb. 2003 at 130, 133–34 (discussing the positions taken by "antiglobalization advocates and doctrinaire free traders" against judicial activism).

47. See Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96 AM. J. INT'L L. 126, 133–34 (2002) (stating that the WTO Appellate Board should avoid making drastic changes to existing environmental laws).

48. See Joost Pauwelyn, *The Role of Public International Law: How Far Can We Go?*, 95 AM. J. INT'L L. 535, 566 (2001) (arguing that disputing parties should be allowed to invoke international laws found in sources outside of the WTO).

A. The General Exceptions of Article XX

The most prominent set of labor and environmental allowances is found in Article XX of the GATT.⁴⁹ Entitled "General Exceptions," Article XX recognizes that the social regulation objectives of governments may lead them to take measures that restrict trade in a way that contravenes other GATT rules.⁵⁰ Article XX permits such measures if they survive a designated test. The Article XX test requires that the measure in question possess two qualities: first, it is demonstrably germane to the stated social objective; and second, it does not abuse basic GATT/WTO principles of nondiscrimination. The measure cannot be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."⁵¹ This condition is referred to as the "chapeau" because of its location in an introductory paragraph that sits atop several brief subclauses.

The second objective is met by incorporating language that the measure at issue be in a defined nexus with the social objective—either "related to" or "necessary to."⁵² Relevant provisions here include those allowing measures that

49. See GATT 1947, *supra* note 44, art. XX, 61 Stat. at A60–63, 55 U.N.T.S. at 262 (outlining the exceptions that derive from member states' police powers).

50. The full relevant text of Article XX reads as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

I.(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health . . . ;

...

...

(e) relating to the products of prison labour . . . ;

...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

Id.

51. *Id.*

52. *Id.* Some provisions contain different "nexus" requirements, but these provisions relate to other types of objectives not relevant here. See, e.g., *id.* art. XX, para. I(f), 61 Stat. at A61, 55 U.N.T.S. at 262 (allowing measures "imposed for the protection of national treasures of artistic, historic or archaeological value"); *id.* art. XX, para. I(h), 61 Stat. at A61, 55 U.N.T.S. at 264 (allowing measures "undertaken in pursuance of obligations under any intergovernmental commodity agreement").

are "necessary to protect public morals,"⁵³ "necessary to protect human, animal or plant life or health,"⁵⁴ "relating to the products of prison labour,"⁵⁵ and "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."⁵⁶

1. *Environmental Measures*

On the environmental side, the "animal or plant life or health" and "conservation of exhaustible natural resources" are pointed to as providing the basis for incorporation of environmental standards into the WTO by exempting measures taken to meet these objectives. This text has generated a number of interpretations, which will be discussed from the least receptive to linkage to the most receptive.

a. *Tuna-Dolphin Case*

In the 1993 Tuna-Dolphin Case, the United States Marine Mammal Protection Act prohibited the import of tuna that was produced in a way that was not "dolphin-safe."⁵⁷ Mexico challenged the provision on the grounds that its tuna exporters were adversely affected. The Panel found that the measure

53. *Id.* art. XX, para. I(a), 61 Stat. at A61, 55 U.N.T.S. at 262.

54. *Id.*

55. *Id.*

56. *Id.*

57. See Dispute Panel Report on United States Restrictions on Imports of Tuna, Sept. 3, 1991, GATT B.I.S.D. (39th Supp.) at 155, ¶ 2.3 (1993) [hereinafter Tuna-Dolphin Case] (discussing U.S. restrictions on tuna imports). The Tuna-Dolphin Case was brought under the pre-WTO dispute settlement framework. The panel report was not adopted because the United States voted against it. See Howse, *infra* note 67, at 493 n.8 (explaining that before the establishment of the WTO, panel rulings had to be adopted by all the member states in order to become binding). It established an interpretive framework, however, which served as a departure point for WTO decisions.

violated the GATT's prohibition on import restrictions⁵⁸ and that it was not exempted under Article XX.⁵⁹

The Tuna-Dolphin Panel suggested that there was very little use for Article XX in regulating activity outside a state's own borders.⁶⁰ The Panel expressed a concern in particular that measures adopted by one government that seek to control production methods in another territory would constitute a brand of unilateralism that would jeopardize the multilateral framework established by the GATT.⁶¹ Thus, the Panel held that a government could only use Article XX to impose trade restrictions that addressed the content of the product themselves (the "product" as opposed to the "process"), and therefore constituted direct threats to residents of the government's territory.⁶² The Panel strongly suggested that Article XX could not be used to justify the unilateral adoption by states of measures that sought to affect behavior extraterritorially.⁶³ States could only adopt such cross-border environmental measures through explicit multilateral action.⁶⁴

This "anti-unilateral" result follows in part from the Panel's assertion that such state practices would conflict with the central trade-liberalizing principles of the WTO. While these central principles were to be interpreted broadly, Article XX exceptions were to be construed narrowly so as to impede trade liberalization as little as possible.⁶⁵ Thus, the Panel held that the term "necessary" in XX(b)'s phrase "necessary to protect animal or plant life or health" required that the measure in question be the least trade-restrictive

58. GATT 1947, *supra* note 44, art. XI, 61 Stat. at A32, 55 U.N.T.S. at 224–28. Article XI is a prohibition on quantitative import restrictions. It provides, in part, that "[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party." *Id.* art. XI, ¶ 1, 61 Stat. at A32, 55 U.N.T.S. at 224–26. This prohibition expresses the GATT policy preference that if governments must restrict imports, they do so through specific monetary charges rather than physical restrictions.

59. *See* Tuna-Dolphin Case, *supra* note 57, ¶¶ 5.22–6.4 (noting that Article XX did not justify the provisions of the United States Marine Mammal Protection Act).

60. *See id.* ¶ 5.27 ("The Panel considered that if the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement.").

61. *Id.*

62. *See id.* (stating that Article XX(b) should not be interpreted to allow "each contracting party . . . [to] unilaterally determine the life and health protection policies" of the other contracting parties).

63. *See id.* (same).

64. *See id.* (same).

65. *See id.* ¶ 5.28 (determining that the measure taken by the United States was not "necessary within the meaning of Article XX(b)").

measure available.⁶⁶ One might view the Panel's approach as a "strict scrutiny" approach for measures that restrict trade to promote social regulations.⁶⁷

b. Clean Air Act Case

In the 1996 Clean Air Act Case, Venezuela and Brazil challenged U.S. clean air legislation imposing emissions requirements on all refined gasoline consumed in the United States.⁶⁸ The challenge asserted that the United States measure favored domestic producers by allowing those producers more ways to comply with emissions requirements than foreign producers.⁶⁹ The United States did not challenge the assertion that this difference in available compliance methods conferred a disadvantage on foreign producers, but rather argued that Article XX saved the violation.⁷⁰

66. "Article XX is a limited and conditional exception from obligations under other provisions of the General Agreement, and not a positive rule establishing obligations in itself. Therefore, the practice of panels has been to interpret Article XX narrowly" GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, DS21/R-39S/155, ¶ 5.22 (Sept. 3, 1991), *reprinted in* 30 I.L.M. 1594.

67. See Robert Howse, *Appellate Body Rulings in the Shrimp-Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491, 501 (2002) ("In previous GATT jurisprudence, 'necessary' had been interpreted as triggering a very high level of scrutiny: a measure could only pass muster if it used the least restrictive means to achieve its end."). For a comparison of WTO jurisprudence to U.S. Supreme Court constitutional jurisprudence including the "strict scrutiny" standard, see Sheila Foster & Ari Afilalo, *The World Trade Organization's Anti-Discrimination Jurisprudence: Free Trade, National Sovereignty, and Environmental Health in the Balance*, 15 GEO. INT'L ENVTL. L. REV. (forthcoming 2003) (manuscript on file with author); John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511 (2000). For discussions of a "strict scrutiny" approach in other domains of WTO jurisprudence, see Raj Bhala & David A. Gantz, *WTO Case Review 2002*, 20 ARIZ. J. INT'L & COMP. L. 143, 178; Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, 34 LAW & POL'Y INT'L BUS. 109, 159 (2002).

68. WTO Dispute Panel Report on United States Standards for Reformulated and Conventional Gasoline, WT/DS2/R (Jan. 29, 1996), *reprinted in* 35 I.L.M. 274 (1996) [hereinafter Clean Air Case Panel Report], available at <http://www.wto.org>; WTO Appellate Body Report on United States Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, at 29 (May 20, 1996) (modifying the Dispute Panel's report), *reprinted in* 35 I.L.M. 603, 633 (1996) [hereinafter Clean Air Act Case Appellate Body Report], available at <http://www.wto.org>.

69. See Clean Air Act Case Panel Report, *supra* note 68, ¶ 3.12 (stating that the measure treated foreign refiners less favorably than U.S. refineries).

70. See *id.* ¶ 3.37 (noting that "if the [Dispute] Panel found the Gasoline Rule was consistent with" Article III of GATT 1947, it did not have to address the Article XX exceptions).

Although it emphasized that its decision against the United States should not be taken as a condemnation of environmental policy,⁷¹ the Panel applied a reading of XX(g) ("relating to the conservation of exhaustible natural resources") that seemed to mirror the "strict scrutiny" approach of the Tuna-Dolphin reading of XX(b) ("necessary for the protection of animal or plant life or health").⁷² The Panel held that the U.S. measure was WTO-inconsistent because there were alternative means of achieving the environmental goal that, although more costly to implement, were nonetheless "reasonabl[y] available."⁷³

The Appellate Body (AB) reversed the Panel report's reasoning, though not its result. In so doing, the AB revamped the Tuna-Dolphin approach. The AB began by loosening the test for applying XX(g), finding that the XX(g) term "relating to" set a lower bar than the "necessary to" language under XX(b).⁷⁴ This move potentially expanded the substantive zone for WTO-consistent environmental measures. In applying the Article XX chapeau, the AB focused on the language of the chapeau that requires that trade-restricting social measures not constitute "arbitrary" or "unjustifiable" discrimination or a "disguised restriction" on international trade.⁷⁵ It found that this language required governments to ensure, prior to imposing unilateral trade-restrictive social measures, that there were no other reasonably available measures to them.⁷⁶ The AB then rejected U.S. arguments that justified the stricter rules for foreign refiners on the basis of greater enforcement-costs, and an unsuccessful attempt at bilateral negotiation.⁷⁷

71. See, e.g., Clean Air Act Case Panel Report, *supra* note 68, ¶ 7.1 ("In concluding, the Panel wished to underline that it was not its task to examine generally the desirability or necessity of the environmental objectives of the Clean Air Act or the Gasoline Rule."). The panel of the Shrimp-Turtle I case discussed below made a similar declaration.

72. See Clean Air Act Case Appellate Body Report, *supra* note 68, at 16, 35 I.L.M. at 620 ("In other words, the Panel Report appears to have applied the 'necessary' test not only in examining the baseline establishment rules under Article XX(b), but also in the course of applying Article XX(g).").

73. Clean Air Act Case Panel Report, *supra* note 68, ¶¶ 6.26–6.28.

74. See Clean Air Act Case Appellate Body Report, *supra* note 68, at 17–18, 35 I.L.M. at 621–22 (explaining that the different terms used in Article XX do not require "the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized").

75. See *id.* at 22–29, 35 I.L.M. at 626–33 (noting that the U.S. measure did not consider costs for foreign refiners to comply with statutory baselines).

76. See *id.* at 26, 35 I.L.M. at 631 (analyzing less trade-restrictive alternatives).

77. *Id.* at 28, 35 I.L.M. at 632. The Appellate Body stated:

We have . . . located two omissions [by] the United States: to explore adequately means, including in particular cooperation with the governments of Venezuela and

By endorsing the desirability of environmentally conscious policy and by adopting a relatively generous reading of Article XX(g), the Clean Air Act AB Report may be read to shift subtly but definitively away from the strongly suspicious outlook of Tuna-Dolphin. A pro-environment critique of the report, on the other hand, might find the relaxation of Article XX(g) superficial: the AB arguably incorporated into Article XX's chapeau the strict scrutiny-type "least restrictive means" analysis it had rejected in the context of sub-clause XX(g).⁷⁸ Critics of this result worried that the Article XX interpretation adopted by the Appellate Body would allow it to quash any measure that did not mesh with the "preferred" approach conjured up, in the abstract and in hindsight, in the context of a WTO dispute.⁷⁹

c. *Shrimp-Turtle I*

The tug-of-war continued in the Shrimp-Turtle I Case,⁸⁰ in which the WTO faced facts similar to those of the Tuna-Dolphin Case.⁸¹ At issue was a U.S. measure prohibiting the import of shrimp produced in a way that harmed

Brazil, of mitigating the administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners; and to count the costs for foreign refiners that would result from the imposition of statutory baselines.

Id.

78. See *id.* at 16, 35 I.L.M. at 620 (finding that no Article XX exception applies). The Panel found the U.S. measure inconsistent with the GATT/WTO, although on different grounds. In particular, the Panel adopted a stricter interpretation of both "necessary" for the protection of plant, animal or human life or health, and "relating to" the conservation of natural resources. See Clean Air Act Case Panel Report, *supra* note 68, ¶¶ 6.20–6.41 (construing strictly the word "necessary" in Article XX). On appeal by the United States, the Appellate Body rejected this strict interpretation of the Article XX subclauses, shifting its strict scrutiny of the measure to its compliance with the Article XX chapeau. See *supra* notes 75–77 and accompanying text (discussing application of Article XX "chapeau" to U.S. measures). Although the rationale was different, the Appellate Board confirmed the ultimate conclusion of the Panel that the U.S. measure was inconsistent with GATT/WTO law. See Clean Air Act Case Appellate Body Report, *supra* note 68, at 29 (affirming in part the Dispute Panel's report).

79. See Martin A. McCrory & Eric L. Richards, *Clearing the Air: The Clean Air Act, GATT and the WTO's Reformulated Gasoline Decision*, 17 UCLA J. ENVTL. L. & POL'Y 1, 43–44 (1998–1999) (noting that the Appellate Board "applied a very strict version of a least restrictive approach").

80. For a nuanced discussion of the Shrimp-Turtle cases, see Howse, *supra* note 67.

81. See WTO Appellate Body Report on United States Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 5–8 (Oct. 12, 1998) *reprinted in* 38 I.L.M. 118 [hereinafter Shrimp-Turtle I Appellate Body Report] (regarding a prohibition by the U.S. on the importation of shrimp whose harvesting endangers sea turtles), available at <http://www.wto.org>.

endangered sea turtles.⁸² The initial disposition of the case did not bode well for environmentalists. Although the Panel once again hastened to disavow any opposition to the environmental objective at issue,⁸³ it set a high bar for the pursuit of environmental objectives in a WTO-consistent fashion. In particular, the Panel seemed to revive and reinforce the strong anti-unilateral approach of the Tuna-Dolphin decisions.⁸⁴ The Panel expressed strong concerns that allowing members to condition market access on the importing country's conservation policies would lead to a proliferation of conflicting measures that would undermine the "security and predictability" of the multilateral trading system.⁸⁵ The Panel reinforced these concerns by finding that multilaterally negotiated environmental policies were emphatically preferred to unilateral policies.⁸⁶ Relatedly, the Panel rejected the United States' argument that its policy implemented multilateral environmental objectives, finding that although a number of multilateral environmental agreements recognized the principle of wildlife conservation, these agreements did not provide for the specific measures required by the United States.⁸⁷

From an environmentalist point of view, the Panel's insistence on specific authorization of the measure in question by a multilateral instrument was worrisome. International environmental law, at least as currently composed, tends to articulate broad principles rather than concrete compliance measures. A multilateralism requirement runs the risk of imposing a Catch-22: the measure is invalid unless it derives directly from a multilateral instrument, but the very weakness of such instruments is what necessitates the unilateral adoption of specific implementation measures. For

82. *See id.* at 4–5 (describing the dispute over shrimp harvesting).

83. GATT Dispute Panel Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products, 37 I.L.M. 832, ¶ 8.2 (May 15, 1998) [hereinafter Shrimp-Turtle I Panel Report].

84. In the panel's view, if an interpretation of the chapeau of Article XX were to be followed which would:

[A]llow a Member to adopt measures conditioning access to its market for a given product upon the adoption by the exporting Members of certain policies, . . . the WTO Agreement could no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those agreements would be threatened Market access for goods could become subject to an increasing number of conflicting policy requirements for the same product and this would rapidly lead to the end of the WTO multilateral trading system.

Id. ¶ 7.45.

85. *Id.* ¶ 7.44.

86. *See id.* ¶¶ 7.50, 7.52 (addressing the United States's arguments in support of its unilateral trade restriction).

87. *Id.* ¶¶ 7.57, 7.58.

example, in the Shrimp-Turtle I Case, the United States could point to several instruments that stressed the importance of protecting sea turtles.⁸⁸ It could point to none, however, that imposed specific obligations to that end.⁸⁹ The United States argued that its measure was validly rooted in the principles established by these agreements.⁹⁰

As it had in previous cases, the Appellate Body reversed the more strictly anti-environmental elements of the Panel's reasoning in the Shrimp-Turtle I Case, although it upheld the Panel's conclusion. Most notably, the AB rejected the sweeping language related to unilateral measures by states intending to regulate extraterritorial environmental practices.⁹¹ The Appellate Body found that "[s]uch an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply."⁹²

Instead of broadly condemning unilateral measures, the Appellate Body focused more tightly on whether the United States implemented its unilateral measure in a discriminatory manner, concentrating again on the language of the Article XX chapeau. The Appellate Body found that the United States had failed to show that it had imposed the import ban in a way that did not discriminate among member states.⁹³ The United States imposed the import

88. See Shrimp-Turtle I Appellate Body Report, *supra* note 81, ¶ 132 (noting the importance of protecting living natural resources).

89. See *id.* ¶ 166 (noting the lack of international agreements for the protection and conservation of sea turtles).

90. See *id.* ¶ 23 (arguing that the rule was a bona fide conservation measure). Those agreements included the Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 19 I.L.M. 15; the Convention on Biological Diversity, *supra* note 34; the United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397. A commentator has surmised:

The unilateral effort of the United States is not the sole attempt at protecting sea turtles. A number of international agreements have entered into force which in effect should protect the sea turtles. The application and enforcement of these agreements is often difficult at best and impossible at worst. The efficacy of these agreements have come into question. No international treaties specifically call for the use of TEDs despite the efforts of the Department of State required by Section 609. Instead, many international agreements utilize broad provisions which may (or may not) be interpreted to obligate states to protect sea turtles through domestic regulations.

Matthew Brotmann, *The Clash Between the WTO and the ESA: Drowning a Turtle to Eat a Shrimp*, 16 PACE ENVTL. L. REV. 321, 345-46 (1999).

91. See Shrimp-Turtle I Appellate Body Report, *supra* note 81, ¶ 133 (finding a "sufficient nexus" between certain marine populations and the United States).

92. *Id.* ¶ 121.

93. See *id.* ¶ 173 (finding that the United States discriminated among member countries).

ban on the complainant states much more rapidly and with less consultation than a group of states in Latin American and the Caribbean.⁹⁴ The United States had negotiated a multilateral agreement with Latin American states regarding sea turtle conservation, but had failed to do the same for other importing states.⁹⁵ The Appellate Body concluded that although unilateral measures were not per se inconsistent with the WTO, the discrepancy in the U.S. negotiating overtures towards different groups of states rendered the implementation of its unilateral measure unjustifiably discriminatory under the Article XX chapeau.⁹⁶

Environmentalists roundly criticized the Clean Air Act and Shrimp Turtle I rulings as sharp blows to the cause of world conservation.⁹⁷ More recently, however, commentators have defended the approach as essential to the anti-discriminatory principles that frame the GATT/WTO system.⁹⁸ In each case, after all, there seemed to be a measure that clearly disadvantaged foreign producers. A more charitable view of the GATT/WTO framework is that, while it accepts the possibility of environmental and labor measures, it insists that the principle of nondiscrimination cannot be a casualty. Otherwise, such measures run a greater risk of serving purely politically expedient ends. In the Clean Air Act Case, for example, the Environmental Protection Agency (EPA) may have chosen to "externalize" compliance costs onto foreign producers in order to ease the way for domestic producers to comply and therefore ease domestic political opposition. Similarly, in the Shrimp-Turtle I Case, foreign producers may have borne the brunt of a politicized regulatory process.⁹⁹

Moreover, although the Appellate Body ultimately found the U.S. measure WTO-inconsistent, it rejected the strictly anti-unilateral orientation of the Panel. Because the United States lost the case, the importance of this jurisprudential shift was not immediately obvious. The shift would bear fruit, however, in the follow-up case: Shrimp-Turtle II.

94. *See id.* (describing the discriminatory nature of the timeline).

95. *See id.* (noting the exemptions granted Latin American countries).

96. *Id.* ¶¶ 161–69.

97. *See* LORI WALLACH & MICHELLE SFORZA, *WHOSE TRADE ORGANIZATION? CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY* 57–64 (1999) (noting that WTO rulings require countries to perform complex procedural inquiries and costly tests before they can adopt measures in response to identified health risks).

98. Foster & Afilalo, *supra* note 67; McGinnis & Movsesian, *supra* note 67, at 519.

99. *See* McGinnis & Movsesian, *supra* note 67, at 521–25 (assessing the pressure of interest groups on the WTO).

d. Shrimp-Turtle II

In this case, Malaysia challenged the new measures the United States had put into place to implement the Dispute Settlement Body (DSB) findings under Shrimp-Turtle I. Shrimp-Turtle II tested two of the potential implications of Shrimp-Turtle I found most objectionable by environmentalists: that a member could adopt a unilateral approach only after exercising a "duty to negotiate seriously" a multilateral solution; and, relatedly, that any unilateral measure must directly implement an explicit multilateral directive. One can read the Shrimp-Turtle II holding to renounce both of these interpretations of the earlier Appellate Body decision. Rather than insisting on a "duty to negotiate seriously," Shrimp-Turtle II "suggests that if a Member has adequately accounted for different conditions in different countries, then whether that country has engaged in negotiation may be irrelevant for purposes of the chapeau."¹⁰⁰ Moreover, "the international environmental instruments cited by the Appellate Body" in resolving the case "clearly anticipate[] that there will be solutions where it will not be possible to avoid unilateralism."¹⁰¹

2. Labor Measures

Apart from language in the preamble affirming "full employment" and "raising standards of living," WTO law contains no provisions that set out affirmative labor standards.¹⁰² As with environmental standards, the potential

100. Howse, *supra* note 67, at 509.

101. *Id.* at 510.

102. The international trade regime initially envisioned after World War II would have explicitly incorporated labor standards. See Havana Charter for an International Trade Organization, Mar. 24, 1948, art. 7, Dep't St. Pub. No. 3117, Apr. 1947, at 7 ("The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory."). That movement failed, and U.S. proposals for inclusion of labor standards in the GATT regime that ultimately developed apparently failed to win the approval of the other contracting parties. See Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1, 8 n.14 (1999) (quoting an informal proposal put forth by the United States to achieve fair labor standards as part of GATT); see also Janelle M. Diller & David A. Levy, Notes and Comments, *Child Labor, Trade and Investment: Toward the Harmonization of International Law*, 91 AM. J. INT'L L. 663, 685-86 (1997) (discussing the failure to gain support for labor standards because of the difficulty of defining unfair competition). The issue arose periodically in subsequent GATT negotiation rounds, especially the Tokyo Round, which was the last before the GATT transformed into the WTO. See Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61, 62-63 (2001) (discussing the history of failed efforts to include labor

for recognition comes mainly via exemption. Article XX sets out several clauses that might be considered to include labor standards, most explicitly, the provision that allows members to maintain measures that are otherwise WTO-inconsistent if they "relat[e] to the products of prison labour."¹⁰³ Article XX also contains more general clauses that could be applied to uphold labor standards. Article XX(a) provides an exemption for measures that are "necessary to protect public morals," and Article XX(b) allows for measures that are "necessary to protect animal or plant life or health."¹⁰⁴ All of these clauses are subject to the chapeau's conditions relating to arbitrary or unjustifiable discrimination or disguised protection.

An early case, *Belgian Family Allowances*, suggested that differences in labor standards violate the trade regime's basic principles of nondiscrimination.¹⁰⁵ However, *Belgian Family Allowances* did not discuss the applicability of Article XX's exceptions. Robert Howse has ventured that, in the contemporary context, the "public morals" exception of Article XX(a) could allow for such measures within the conditions established by the Article XX chapeau:

[T]here is an argument that the interpretation of public morals should not be frozen in time and that with the evolution of human rights as a core element in public morality in many post-war societies, the content of public morals extends to include disapprobation of labor practices that violate universal human rights.¹⁰⁶

Howse's premise finds support in Joost Pauwelyn's contention that WTO rules must be read in conjunction with the larger body of public international law.¹⁰⁷

B. *The SPS Agreement*

Although the WTO has declined to take social regulations head on, it has expanded to make that collision inevitable. During the Uruguay Round, members negotiated the Agreement on Sanitary and Phytosanitary Measures

standards in the GATT negotiations).

103. GATT art. XX(e).

104. *Id.* art. XX(a)-(b).

105. *Belgian Family Allowances*, Nov. 7, 1952, GATT B.I.S.D. (1st Supp.) at 59 (1953) (finding that a Belgian measure that imposed a tax on government-procured imports from countries without a system of public allowances violated the Most-Favored Nation Treatment rule of Article I).

106. Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 192 (1999).

107. Pauwelyn, *supra* note 48, at 560.

(the SPS Agreement), which sought to create guidelines for the establishment of consumer health and safety regulations relating to imports.¹⁰⁸ The SPS Agreement expands upon GATT 1947 Article XX, paragraph I(b) by providing that "[m]embers have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health."¹⁰⁹ It further elaborates that "[m]embers shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence."¹¹⁰

Viewed from one perspective, the SPS Agreement enables social regulation of trade; it seems to imply that if a country follows the SPS Agreement, its social regulations will be free from challenge under the GATT/WTO. Critics of the SPS Agreement, however, argue that the SPS Agreement imposes pressure on governments to reduce or weaken their social regulatory framework.¹¹¹ This difference of opinion was never as visible as during the recent WTO dispute in which Canada and the United States brought a complaint against the European Community (EC), challenging the EC's import ban on beef produced with artificial growth hormones.¹¹²

The so-called Beef Hormone Case became a lightning rod for concerns about the proper role of international trade law in constraining the social regulatory arm of member states.¹¹³ The EC argued that the import ban was

108. See Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Multilateral Agreements on Trade in Goods, Annex 1A [Treaties Binder 1, Treaties Booklet 1], L. & Prac. World Trade Org. (Oceana) 59, 59 (Mar. 1995) [hereinafter SPS Agreement] (recognizing the significance of sanitary and phytosanitary measures for health and trade).

109. *Id.* at 60.

110. *Id.*

111. See, e.g., WALLACH & SFORZA, *supra* note 97, at 59–61 (recognizing that because the SPS Agreement only permits measures based on "sound science," nations may be forced to ignore their cultural values).

112. GATT Appellate Body Report on EC Measures Concerning Meat and Meat Products (Hormones), ¶ 2 (Jan. 16, 1998) [hereinafter Beef Hormone Appellate Body Report] (stating that the EC measures were inconsistent with the SPS Agreement), <http://www.wto.org>.

113. The European Parliament expressed vocal concern about the decision. See, e.g., Dagmar Roth-Behrendt, Committee on the Environment, Public Health and Consumer Policy, European Parliament, *Opinion on the Communication from the Commission to the Council and the European Parliament on the EU Approach to the WTO Millennium Round* (COM (1999) 331 ("[T]he Beef-hormone example demonstrates how the existing system is geared towards trade concerns. It does not adequately respect the right of nations to take a different approach—tending to favour the vendor rather than the consumer."). For an American perspective that is equally critical, see WALLACH & SFORZA, *supra* note 97, at 59–61 (lamenting the shift of health policy-making authority from elected officials to the WTO).

imposed strictly in the interests of EC consumers.¹¹⁴ The complainants argued that the import ban played on consumer fears to justify protectionist measures that only benefited EC producers.¹¹⁵

In the resolution of the dispute, the conflict between WTO law, as currently interpreted, and other realms of international law came into stark relief. The EC justified its "zero tolerance" approach to artificial growth hormone in beef by reference to the "precautionary principle."¹¹⁶ The precautionary principle of international environmental law¹¹⁷ holds that if little is known about the health implications of a particular product or process, governments are justified in imposing very strict regulations as a precaution.

The Appellate Body ultimately rejected the EC's interpretation of the precautionary principle.¹¹⁸ The AB was careful to emphasize that its interpretation of the SPS agreement did not bar Member states from establishing levels of protection that were more restrictive than predominant scientific opinion might warrant. The Appellate Body did find, however, that when a Member chose to establish a higher level of protection, a "risk assessment" that was based on scientific research was required to support it; invocation of the precautionary principle without such scientific support failed to meet the risk assessment requirement.¹¹⁹

C. Social Regulation or Disguised Protectionism? The Interpretive Dilemma and Challenges to Judicial Legitimacy

In the range of cases on social measures that have come before the WTO dispute settlement mechanism, few have survived. A careful reading of the Appellate Body opinions shows that in many cases it took issue not with the

114. See Beef Hormone Appellate Body Report, *supra* note 112, ¶ 16 (arguing that the SPS agreement allows members to be cautious with health issues).

115. See *id.* ¶ 78 (noting Canada's argument that protective measures must be accompanied by scientific evidence).

116. See *id.* ¶ 16 (arguing that the precautionary principle allows for protective measures).

117. See, e.g., Gregory D. Fullen, Comment, *The Precautionary Principle: Environmental Protection in the Face of Scientific Uncertainty*, 31 WILLAMETTE L. REV. 495, 520-22 (1995) (encouraging the expansion of the precautionary principle); Bernard A. Weintraub, Note, *Science, International Environmental Regulation, and the Precautionary Principle: Setting Standards and Defining Terms*, 1 N.Y.U. ENVTL. L.J. 173, 197-204 (1992) (proposing that the precautionary principle furthers the goals of justice and equity).

118. See Beef Hormone Appellate Body Report, *supra* note 112, ¶ 125 (finding that the precautionary principle does not override the SPS Agreement).

119. See *id.* ¶ 194 (stating that a risk assessment need not reach a "monolithic conclusion," but must take into account all considerations).

measure itself, but with the means by which that measure was implemented, calling for a process that was either less discriminatory or better supported by scientific evidence. Nevertheless, for many labor and environmental advocates, these outcomes suggested that reform was needed to strike a better balance between trade concerns and "trade-related" social concerns. Ironically, from other quarters, the Appellate Body attracted criticism for being too generous to the concerns of labor and environmental advocates. After Shrimp-Turtle II's approval of the modified U.S. measure protecting sea turtles, some trade analysts pronounced the Appellate Body captured by "the persistent environmental lobbies of the North."¹²⁰

The criticism directed towards the Appellate Body indicates the dilemmas it faces in balancing the trade principles of the WTO with social concerns that are both policy objectives of WTO Members and principles of international labor and environmental law. Some scholars argue that WTO law *must* be read in conjunction with these latter principles.¹²¹ Others worry that such consideration strains the legitimacy of the Appellate Body as a body charged with applying WTO law.¹²²

An underlying controversy on the boundary between legitimate social regulation and illegitimate protectionism changes the debate over the propriety of judicial resolution of the linkage issue.¹²³ If one believes in the benefits of trade and the difficulty of convincing governments to lower barriers, the rationale for this suspicion gains some validity. With a deep suspicion of the protectionist impulses of governments in mind, the import-restricting measures relating to tuna, shrimp, refined gasoline, and beef all begin to look like poorly disguised concessions to domestic industries seeking to stave off outside competition to the detriment of consumers and ultimately to the detriment of aggregate global welfare.

Public choice literature reminds us that it is quite possible—and, under certain conditions, likely—for governments to cater to narrow protectionist interests at the expense of the wider population.¹²⁴ An insistently rosy view of the motives of governments, therefore, is not particularly appropriate. The concern about disguised protectionism is a valid one.

120. *E.g.*, Bhagwati, *supra* note 47, at 133.

121. Pauwelyn, *supra* note 48, at 560.

122. Guzman, *supra* note 1.

123. Robert E. Hudec, *Science and "Post-Discriminatory" WTO Law*, 26 B.C. INT'L & COMP. L. REV. 185, 190 (2003).

124. For surveys of public choice literature, see generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW & PUBLIC CHOICE* (1991); DENNIS C. MUELLER, *PUBLIC CHOICE II* (1989).

Given that this concern is valid, a true interpretive dilemma arises. The WTO decisionmaking bodies seem prepared to err on the side of enabling trade rather than enabling trade-restricting social measures. A view driven by only environmental and labor concerns might, in a similar fashion, blindly support all such measures without considering their impact on foreign producers, domestic consumers, and the world economy.

The proper interpretive stance becomes much harder to strike if one accepts both that disguised protectionism is a danger and should be discouraged, and that social regulations are nevertheless a central function of the state that are supported and required by international environmental and labor law. However difficult this puzzle is, it is quite clear that this problem cannot be avoided. The growing importance of WTO law, and of concerns relating to international environmental and labor standards, requires that the question be faced head-on and with a willingness to consider novel approaches.

Andrew Guzman, for example, has suggested that trade and nontrade linkage "be determined through a political process of negotiation rather than through the quasi-judicial dispute resolution processes of the WTO."¹²⁵ Guzman's argument might be buttressed by reference to the case of intellectual property rights. Article XX, the General Exceptions provision of the GATT, contains a clause allowing governments to take trade-restrictive measures necessary to enforce intellectual property law.¹²⁶ If the General Exceptions measure truly does provide all the support necessary for governments to enforce trade-related measures that might restrict imports, presumably no need to have negotiated TRIPs would have arisen. The TRIPs were negotiated, however, notwithstanding both a recognition of intellectual property protection in the GATT's General Exceptions provision and a well-developed body of existing international law outside of the GATT. The fact that negotiation occurred lends credence to the arguments that some integration of affirmative obligations to labor and environmental standards is required for those standards' proper enforcement and that the current exceptions-driven regime is inadequate.

This Part has examined the reasons within WTO law that negotiation of affirmative obligations might be necessary to preserve the integrity of international environmental and labor law. In other words, labor and environmental standards might better be incorporated through legislation rather

125. Andrew T. Guzman, *Trade Labor, Legitimacy*, 91 CAL. L. REV. 885, 887 (2003); see generally Guzman, *supra* note 1.

126. See GATT art. XX(d) (allowing for trade-restrictive measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to . . . the protection of patents, trade marks and copyrights").

than adjudication. The next Part looks at the basis for creating such obligations and some of the challenges that would accompany such an effort.

IV. Incorporation Through Legislation

This Part highlights issues that legislation of affirmative labor and environmental obligations would have to resolve. When the question of content is directly addressed, problems of form arise that are not evident simply by focusing on the question from within WTO law. These problems reveal themselves when asking basic questions about constructing a set of positive rules. First, what obligations would such an agreement impose? Second, how would such obligations be enforced in the WTO system? Beyond such questions of form, however, there is the question of the substantive propriety of incorporating nontrade issues into the international trade regime. This Part observes concerns that could be raised with respect to each of these questions, but finds that these concerns by themselves should not bar pursuit of incorporation of labor and environmental standards through incorporation.

A. Specification Costs

In determining the environmental and labor obligations to be incorporated, negotiating parties would confront several kinds of costs. As Joel Trachtman has observed, the negotiation of rights and obligations entails a host of costs.¹²⁷ The most immediate source of such costs would be the allocation of resources required to achieve greater specificity through negotiation and drafting.¹²⁸ In addition, however, the negotiation and drafting of specific rules would be susceptible to strategic behavior that, whatever its potential benefits, might also impose costs.¹²⁹ This Part elaborates on each of these basic insights.

127. See Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 VA. J. INT'L L. 1, 51 (2001) (stating that rules cost more to develop than standards); see also Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 350–56 (1999) (same).

128. Trachtman, *The Domain of WTO Dispute Resolution*, *supra* note 127, at 351.

129. See Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, *supra* note 127, at 31 (including strategic behaviour in transaction costs).

1. Negotiation and Drafting Issues

Traditionally, international environmental and labor law have developed through the slow accretion of obligations. Shifting from a "soft law" to a "hard law" mode of legal development would require a series of legal transformations. First, states would have to substantially increase the concreteness of their commitments under labor and environment agreements. International labor and environmental law each contain several hundred documents of legal significance. An immediate problem in drafting affirmative obligations would be the difficulty in identifying which obligations to incorporate. In international labor law, for example, the International Labor Organization (ILO) has adopted more than 400 formally binding conventions and nonbinding recommendations.

The identification of core labor standards, however, has tended to center around a relatively small set of instruments.¹³⁰ This small set of core instruments is one of the reasons that noted international labor law expert Virginia Leary has argued that labor rights are among the better-defined rights in public international law.¹³¹ The WTO's 1996 declaration that the ILO was the competent body for administering international labor law sparked a renewed effort by the ILO at consolidation and streamlining. One important result was the ILO Declaration on Fundamental Principles and Rights at Work.¹³² The Declaration identifies the following four core labor standards:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.¹³³

130. See Virginia A. Leary, *Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)*, in 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? LEGAL ANALYSIS 177, 215 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (noting the conventions that have been most widely ratified).

131. See *id.* at 181 (discussing the meaning of workers' rights).

132. See International Labour Conference: ILO Declaration on Fundamental Principles and Rights at Work, art. 2, June 19, 1998, 37 I.L.M. 1233, 1237-38 (1998) (stating that all member states have an obligation to promote the four core labor standards).

133. *Id.*

The Declaration appears to be the ILO's explicit recognition of the institutional challenge articulated by the WTO.¹³⁴ It also appears to recognize that a critical aspect of meeting this institutional challenge is articulating obligations that are finite and concrete rather than expansive and diffuse.

Although the list essentially reflects prevailing opinion, some accounts do vary. For example, regulations proposed in a 1996 Organization for Economic Co-operation and Development (OECD) study would prohibit forced but not compulsory labor; it would call for an end to "*exploitative forms of child labour*" rather than its effective abolition.¹³⁵ Labor economist Gary Fields would concur with the looser child labor standard and the stricter forced labor standard.¹³⁶ Fields would also eschew the nondiscrimination provision in favor of either a general commitment to safety in working conditions or full disclosure about the lack thereof.¹³⁷ Adelle Blackett has articulated a more general critique of the "core rights" approach.¹³⁸ Nonetheless, the Declaration firmly rests on accumulated principles of international labor law,¹³⁹ as well as on international human rights law.¹⁴⁰

134. See ILO Declaration Background, at <http://www.ilo.org/public/english/standards/decl/declaration/background/index.htm> (last modified July 24, 2001) (describing the 1996 WTO Singapore Declaration to the WTO Ministerial Conference as providing "the opportunity for a second step to be taken").

135. See ORGANIZATION FOR ECON. CO-OPERATION AND DEV., TRADE, EMPLOYMENT, AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE 26 (1996) (suggesting four "core" standards based upon human rights that create necessary framework for other meaningful labor standards).

136. See Gary S. Fields, *International and Comparative*, 49 INDUS. & LAB. REL. REV. 571, 572 (1996) (reviewing INTERNATIONAL LABOUR STANDARDS AND ECONOMIC INTERDEPENDENCE (Werner Sengenberger & Duncan Campbell eds., 1994)) (arguing that future labor agreements should prohibit all forced labor but allow child labor under certain circumstances).

137. See *id.* (providing a modest list of "core rights" to make it easier for countries to honor a rights agreement and punish violators).

138. Blackett, *supra* note 102, at 32–34 (preferring an examination of the legitimacy of "core labor rights" to a technical legal critique).

139. This foundation exists despite the fact that the ILO does not explicitly allude to any specific preceding instruments. For a discussion of this point, as well as a thorough exposition of the basis in prior international labor law for the ILO Declaration, see Blackett, *supra* note 102, at 13–25.

140. See ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 135, at 27 (stating that the list reflects "well-established elements of international jurisprudence concerning human rights . . ."). As Blackett stated:

Despite some differences, the principles contained in the ILO instruments are considered to be 'almost completely consistent' with UN texts such as Article 23(4) of the Universal Declaration on Human Rights, Article 22 of the International Covenant on Civil and Political Rights, and Article 8 of the International Covenant on Economic, Social and Cultural Rights.

Identifying a "core" set of environmental obligations is more difficult. Even with this difficulty, international environmentalists seem to view the proliferation of agreements as a good thing.¹⁴¹ There have been several coordinated attempts to establish a "core" agreement and other calls for such an instrument. The International Union for Conservation of Nature and Natural Resources (IUCN), or World Conservation Union, spearheaded a negotiation that resulted in a Draft International Covenant on Environment and Development.¹⁴² The draft Covenant sought to establish a single framework for all of the treaties.¹⁴³ Another stepping stone was the 1982 World Charter for Nature which, although focused on conservation, more broadly "announces a series of general principles intended to guide the actions of States, of international organizations and even of individuals, with respect to nature."¹⁴⁴

To date, however, there is no distillation of environmental principles similar to the ILO Declaration of Fundamental Principles and Rights at Work.¹⁴⁵ Potentially comparable instruments are either far too broad or far too specific. For example, the 1992 UNCED produced two instruments that attempted "distillation:" the Rio Declaration on Environment and Development,¹⁴⁶ and Agenda 21, a global agenda for achieving sustainable development.¹⁴⁷ Agenda 21 is not so much a declaration of core principles as a

Blackett, *supra* note 102, at 15. See also *Report of the World Summit for Social Development*, ch. I, ¶ 29, at 15, U.N. Doc. A/Conf.166/9 (1995) (committing to pursue goals of ensuring quality jobs, basic rights, and respect for conventions); see generally R. Michael Gadbrow & Michael T. Medwig, *Multinational Enterprises and International Labor Standards: Which Way for Development & Jobs?*, in HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE 141, 143-46 (Lance A. Compa & Stephen F. Diamond eds., 1996) (reviewing the legal and economic debates concerning trade and labor policy).

141. See Palmer, *supra* note 27, at 262 ("If we consider the new instruments that have developed the international law for the environment in the last twenty years, we would be pardoned for thinking that the record is a good one.").

142. *Draft International Covenant on Environment and Development*, International Union for Conservation of Nature and Natural Resources (2d ed. 2000), [hereinafter IUCN Draft Covenant] available at <http://www.iucn.org/themes/law/pdfdocuments/EPLP31ENsecond.pdf>. For an introduction to this document, see generally Nicholas A. Robinson, *IUCN's Proposed Covenant on Environment & Development*, 13 PACE ENVTL. L. REV. 133 (1995).

143. See IUCN Draft Covenant, *supra* note 142, art. 1 (stating that its objective is "to achieve environmental conservation and sustainable development by establishing integrated rights and obligations").

144. Pallemmaerts, *supra* note 35, at 627.

145. International Labor Conference: ILO Declaration on Fundamental Principles and Rights at Work, June 18, 1998, 37 I.L.M. 1233.

146. REPORT OF THE U.N. CONFERENCE ON ENV'T & DEV., at 8-13, U.N. Doc. A/CONF.151/26 (Vol. I), U.N. Sales No. E.93.I.8 (1992).

147. See *id.* at 15-16 (describing need for, and requirements of, "a global partnership for sustainable development").

compendium of specific policy recommendations, running into the hundreds of pages. The Rio Declaration suffers from the opposite problem; it offers little more than brief but extremely expansive aspirational statements. For example, Principle 1 declares that "[h]uman beings . . . are entitled to a healthy and productive life in harmony with nature."¹⁴⁸ Moreover, unlike the ILO Declaration, neither the Rio Declaration nor Agenda 21 developed from pre-existing international agreements. They are formally nonbinding instruments, so that any recognition of them as sources of "core" rules of international law would necessitate a finding that they constitute "customary international law." Determining which standards are customary international law, however, is a notoriously indeterminate business.¹⁴⁹

Critics have faulted these subsequent generations of public international law rights for their failure to follow traditional form. Consideration of the classical contours of legal entitlements yields the conclusion that a right yields a corresponding obligation on another party.¹⁵⁰ Take two prominent principles of international labor law and international environmental law: the right to work¹⁵¹ and the right to a healthy environment.¹⁵² It may not be immediately

148. *Id.* at 8.

149. *See, e.g.,* Chantal Thomas, *Customary International Law and State Taxation of Corporate Income: The Case for the Separate Accounting Method*, 14 BERKELEY J. INT'L L. 99, 101 (1996) (stating that the Supreme Court "has remained curiously indifferent to the apparent status of the separate accounting method as an international standard" despite foreign protest).

150. As defined by Wesley Newcomb Hohfeld, this consideration further exposes the uncertainties accruing to certain types of international environmental and labor rights. Hohfeld's well-known typologies run as follows:

| | | | | |
|--------------|-----------|-----------|------------|------------|
| Jural | rights | privilege | power | immunity |
| Opposites | no-rights | duty | disability | liability |
| Jural | right | privilege | power | immunity |
| Correlatives | duty | no-right | liability | disability |

Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913).

151. *See* Universal Declaration of Human Rights, art. 23, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 75, U.N. Doc. A/810 (1948) ("Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 6(1), 993 U.N.T.S. 3, 6 ("The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts . . .").

152. *See* Declaration of the U.N. Conference on the Human Environment, princ. 1, U.N. Doc. A/Conf.48/14 at 4 (1972), *reprinted* in 11 I.L.M. 1416, 1417-18 (1972) ("Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."); *see also* Declaration

clear whether these rights generate specific individual claims or obligations broadly owed to collective populations.¹⁵³

In considering these difficulties, however, it should be noted that international trade law, particularly in its earliest and most fundamental documents, contains rules equally as broad and undefined in application as core rules of labor or environmental law. For example, Article I of the GATT, viewed by many as the most important provision in the GATT/WTO regime, provides that all members must receive equal trade treatment from each other.¹⁵⁴ Article III of the GATT provides that each member state must provide equal trade treatment to domestic and foreign producers.¹⁵⁵ Through the dispute settlement system, member states have articulated and clarified the exact contours of the broad principles. As in constitutional law, the breadth of a principle may render it more, rather than less, suitable to elaboration through the settlement of disputes.

Another difficulty, at least as challenging, arises when one attempts to envision how the WTO's dispute settlement system as currently configured would enforce any core set of labor or environmental standards, assuming they could be identified. The complainant's standing to initiate a complaint in the system provides a significant problem.

At the international level, only governments may bring WTO disputes against another government.¹⁵⁶ Typically, the complainant state alleges that the respondent state has, in violating one or more obligations under the GATT/WTO, caused "nullification or impairment" of the complainant's

of Bizkaia on the Right to the Environment, UNESCO, 30th Sess., art. 1, at 4, U.N. Doc. 30C/INF.11 (1999) ("Everyone has the right, individually or in association with others, to enjoy a healthy and ecologically balanced environment."); W. Paul Gormley, *The Right to a Safe and Decent Environment*, 28 INDIAN J. INT'L L. 1, 10-12 (1988) (examining environmental rights of individuals and between nations); Luis E. Rodriguez-Rivera, *Is the Human Right to Environment Recognized under International Law? It Depends on the Source*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 1, 9-16 (2001) (defining a human right to environment); Melissa Thorne, *Establishing Environment as a Human Right*, 19 DENV. J. INT'L L. & POL'Y 301, 303-18 (1991) (discussing the emergence of a right to environment within the United Nations).

153. See Norbert Horn, *Normative Problems of a New International Economic Order*, 16 J. WORLD TRADE L. 338, 343 (1982) (providing a classic critique of the formal problems of "emerging" international law).

154. GATT 1947, *supra* note 44, art. I(i).

155. *Id.* art. III.

156. This intergovernmental form will likely persist for the foreseeable future, although some have argued for private rights of standing. See, e.g., Ronald A. Brand, *Private Parties and GATT Dispute Resolution: Implications of the Panel Report on Section 337 of the U.S. Tariff Act of 1930*, J. WORLD TRADE, June 1990, at 5. But see Roger Arnold, *Why a Private Right of Action against Dumping Would Violate GATT*, 66 N.Y.U. L. REV. 666, 696 (1991).

entitlements under the GATT/WTO.¹⁵⁷ GATT/WTO complaints derive from an asserted harm imposed by one government on another government's nationals, whose interests their government then represents in a claim against the harm-imposing government. The conceptions of harm require more indirect conception of the wrong resulting from the violation of a right than normally is recognized. The enforcement of these rules by the international trade regime would require substantial expansion of the concept of a right beyond its traditional boundaries.

Once again, these problems are not insurmountable, but they do require a broad understanding of the harms that result from a violation of international labor and environmental standards. A member wishing to bring a DSB claim must allege that its rights under the WTO have been violated by another member's noncompliance. An allegation of environmental harm, for example, would require an assertion that the respondent government's departure from its obligation harms not only the environment of its own territory, but also the complainant government's environment.

This broad conception of environmental harm is not novel. Rather, the principle of the "global commons" underlies many of the important international documents of environmental law.¹⁵⁸ Environmentalists argue that because of the global ecosystem's interdependence, environmental obligations should not follow territorial boundaries.¹⁵⁹ Indeed, many cases show that environmentally damaging practices in one country harm the environments of other countries.¹⁶⁰

157. See GATT 1947, *supra* note 44, art. 23 (addressing nullification and impairment).

158. See Sumudu Atapattu, *Sustainable Development, Myth or Reality?: A Survey of Sustainable Development Under International Law and Sri Lankan Law*, 14 GEO. INT'L ENVTL. L. REV. 265, 298–299 (2001) ("Traditional international environmental law dealt only with extra-territorial effects of state activities and the effects on the global commons."); Rajendra Ramlogan, *The Environment and International Law: Rethinking the Traditional Approach*, 3 RES COMMUNES: VT. J. ENV'T, ¶ 100 (Jan. 15, 2002), at <http://www.vje.org/articles/ramlogan.html> ("Again, the protection of the global commons is vital to human kind and the emergence of international environmental law to serve such a purpose is inevitable.").

159. For example, highly migratory fish stocks and turtle species transcend national boundaries. Howard L. Brown, *The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: An Analysis of International Environmental Law and the Conference's Final Agreement*, 21 VT. L. REV. 547, 549–550 (1996); see Carl Bruch, *Charting New Waters: Public Involvement in the Management of International Watercourses*, 31 ENVTL. L. REP. 11,389, 11,390–91 (2001) (discussing the importance of international waters to individuals).

160. Acid rain and other forms of transboundary pollution exemplify such effects. See John Warren Kindt, *Dispute Settlement in International Environmental Issues: The Model Provided by the 1982 Convention on the Law of the Sea*, 22 VAND. J. TRANSNAT'L LAW 1097, 1107 (1989) (citing water and air as media for transporting pollution).

Rendering international labor law enforceable under the WTO also requires a broad conception of harm. If, as is most likely, the victims of a respondent government's violation were the respondent's own nationals, they could not bring a complaint against their own government in the WTO dispute settlement system. Rather, another WTO member government would have to challenge the practice. The complainant state would have to allege that the respondent's failure to eliminate child labor nullifies and impairs its benefits under the agreement.

Again, this principle of cross-national harm is not alien to international labor law. The foundational document of the ILO declares that "the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries."¹⁶¹ According to this principle, one WTO member could argue that another member's failure to honor child labor standards impedes its own ability to uphold child labor standards in its own territory. Indeed, this "race to the bottom" argument animates much of the movement to set international labor standards.¹⁶² In the context of labor law, the argument is not an empirical one about the links between environmental damage in one region and environmental fallout in another. Rather, the argument concerns the economic impact of labor violations in one region on labor protections in another. The argument would be that a country's willingness to tolerate labor violations nullifies and impairs another country's protections by increasing the pressure on that country to tolerate similar labor abuses or risk losing investment to the violator.

Although empirical evidence may support some claims of indirect harm, it will undoubtedly not support all.¹⁶³ It is of central importance to note that

161. ILO Constitution, *supra* note 10, part XIII, § 1, 49 Stat. at 2714, 225 Consol. T.S. at 373.

162. See GATT Secretariat, *European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, L/6627-37S/86, 1989 GATTPD LEXIS 12, *128-30 (Jan. 25, 1990) (noting that governments cannot accurately predict the effect of their interventions on import volumes).

163. With respect to labor regulation, some commentators have argued that many labor protections will have little or no impact on the cost of production. A state's commitment to protecting the right to freedom of association, for example, imposes no immediate cost on producers. See Summers, *supra* note 102, at 67 (arguing that "[o]bservance of these core labor rights" such as those prohibiting forced labor, child labor, and discrimination "would have minimal impact on labor costs"). Increased freedom of association, however, may well lead to increased union formation, which will in turn lead to increased success in the introduction of certain concessions to labor, such as increased measures and decreased workweeks. Such concessions would almost certainly raise the marginal cost of labor. The common assumption is that increasing the cost of labor will increase the overall cost of production, and therefore will tend to increase price. Increased price will in turn tend to decrease consumption and therefore

WTO law, however, does not require the strictures of empirically proved causation. Indeed, an important turning point for the interpretation of GATT/WTO standards was a panel's conclusion that a complainant government did not have to show that the respondent government's violation of a rule resulted in an identifiable harm to the complainant government's nationals.¹⁶⁴ Rather, the Panel adopted an irrebuttable presumption that any rule violation would necessarily harm the "conditions of competition" for foreign nationals operating in the respondent government's market.¹⁶⁵ In this sense, the GATT/WTO regime has long departed from the traditional notion of a legal claim as requiring proof not only of the wrong, but also of the harm.

Based on the looser conception of actionability employed by the GATT/WTO, determining conceptions of harm required by international labor and environmental law will be less of a stretch. Under current GATT/WTO law, a complainant government argues that a respondent government's trade actions harm the "competitive conditions" for the complainant government's nationals, established by trade. Under a trade-related labor agreement, the complainant government could argue that the respondent government's actions harm the "conditions for securing labor standards" for its own nationals. Under a trade-related environment agreement, the complainant government could make a similar argument about the "conditions for securing environmental standards." Alternatively, the complainant government could argue that the respondent government's actions harm "conditions for global environmental integrity," thereby damaging the complainant government's nationals.¹⁶⁶

trade volume. Yet this assumption need not hold—increased labor costs need not increase overall production costs. On the contrary, improving labor conditions can increase labor productivity so that output per cost unit of labor actually increases. See OECD, *TRADE, EMPLOYMENT, AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE* 80–82 (1996). The focus on productivity is a touchstone of proponents of labor protection, including the ILO. Blackett, *supra* note 102, at 49 ("[H]igher labor standards may increase competitiveness and productivity."). Notably, however, the very same argument that labor protections will not affect production costs might undermine a case that a labor violation in one country creates a harm in another country.

164. United States—Taxes on Petroleum and Certain Imported Substances, 34 BISD 136 (1988), para. 5.1.9.

165. *Id.*

166. One could abandon any conception of empirical harm and adopt a much more altruistic understanding. That is, labor and environmental violations abroad harm me insofar as I want the interests of justice served worldwide. This broader conception contradicts not only the individualistic conception of rights, but also the notion that a foreign government, by virtue of its sovereignty, is not answerable to outsiders for wrongs it commits that impose harm exclusively on its own citizens. This is precisely the challenge posed by the international human rights movement.

The issue of remedy poses similar problems. Assume that the United States wins a complaint against Colombia for nonenforcement of international environmental obligations, or that Spain wins a complaint against Portugal for nonenforcement of labor standards. How would the WTO determine the appropriate remedy? How might the WTO measure the harm?

First, it is important to recall that the WTO dispute settlement system imposes a monetary penalty as a last resort only after the recalcitrant state has failed to reform its practices and policies satisfactorily within the stated time limit.¹⁶⁷ Nevertheless, monetary penalties, in the form of suspension of concessions by the adversely affected government, can be and are imposed under the WTO system.¹⁶⁸

At first, the problem of measuring the appropriate remedy for infraction of labor or environmental standards seems alarming. Quantifying the damage resulting from either of the hypothesized cases seems impossibly nebulous when compared with a hypothetical involving Colombia or Portugal imposing an inappropriate tariff. Upon closer examination, however, it turns out that similar problems of quantification already exist in the system. For example, the system provides a remedy when a country fails to impose intellectual property protection.¹⁶⁹ When such a remedy takes the form of a monetary amount, it is

167. The Dispute Settlement Understanding provides that "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement." Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Agreement, *supra* note 44, Annex 2, Art. 19, ¶ 1 [Treaties Binder 1, Treaties Booklet 2] L. & Prac. World Trade Org. (Oceana) 1, 17 (Mar. 1995), *reprinted in* 33 I.L.M. 1125, 1237 (1994) [hereinafter DSU] (citations omitted). The "Member concerned" must take appropriate action within a "reasonable period of time" generally not exceeding fifteen months from the date of adoption of the finding. *Id.* art. 21, ¶ 3 [Treaties Binder 1, Treaties Booklet 2], L. & Prac. World Trade Org. (Oceana) at 18, 33 I.L.M. at 1238.

168. Article 22 of the Dispute Settlement Understanding provides that

If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance . . . within the reasonable period of time determined . . . , any party having invoked dispute settlement procedures may request authorization from the DSB [Dispute Settlement Body] to suspend the application to the Member concerned of concessions or other obligations under the covered agreements . . . [T]he DSB . . . shall grant [such] authorization . . . within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request.

Id. art. 22, ¶¶ 2, 6, [Treaties Binder 1, Treaties Booklet 2] L. & Prac. World Trade Org. (Oceana) at 20, 22, 33 I.L.M. at 1239-40.

169. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, *supra* note 44, Annex 1C [Treaties Binder 1, Treaties Booklet 1], L. & Prac. World Trade Org. (Oceana) 383 (Mar. 1995), 33 I.L.M. 81 (1994) [hereinafter TRIPs Agreement].

determined through an evidentiary analysis similar to many instances of calculating damage awards. Moreover, the suspension of concessions need not take the form of a monetary amount; rather, it can take the form of the suspension of other obligations.¹⁷⁰

The above discussion demonstrates that, even if proponents of the establishment of WTO agreements on labor and environmental standards overcome the arguments against them, real problems of legal form will accompany any attempt to establish these standards. To begin with, issues of coherence may provide difficult problems in identifying core rules for incorporation, although international labor law has gone much further to redress this difficulty than international environmental law. Problems relating to the specific content of such standards, even if they could be identified, follow. Finally, problems of standing would arise with any attempt to enforce these standards under the current WTO dispute resolution system.

The discussions above have indicated that the same problems of coherence, content, and harm identification have arisen in the latter regimes. These difficulties do not confine themselves solely to international environmental and labor law. They have historically plagued international trade law as well.¹⁷¹ The fact that these difficulties of form have arisen in many

170. See DSU, *supra* note 167, art. 22, ¶¶ 2-3 [Treaties Binder 1, Treaties Booklet 2], L. & Prac. World Trade Org. (Oceana) at 20, 33 I.L.M. at 1239 (giving the complainant country the right, when it cannot reach an agreement on appropriate compensation with the breaching country through negotiations, to "request authorization from the DSB to suspend the application to the [breaching] member concerned of concessions or other obligations under the covered agreements" (emphasis added)).

171. During the Uruguay Round, many governments of developing countries argued that the incorporation of intellectual property rights would yield disproportionate benefits to developed countries and disproportionate costs to them. See generally Ruth Gana Okediji, *Copyright and Public Welfare in Global Perspective*, 7 IND. J. GLOBAL LEGAL STUD. 117 (1999); Evelyn Su, *The Winners and the Losers: The Agreement on Trade-Related Aspects of Intellectual Property Rights and its Effects on Developing Countries*, 3 HOUS. J. INT'L L. 169 (2000). For an historical account of TRIPS in the context of international law, as well as an account of how TRIPS stacks up on social issues, including public health pandemics of particular concern to some developing countries, see James Thuo Gathii, *Rights, Patents, Markets and the Global AIDS Pandemic*, 14 FLA. J. INT'L L. 261 (2002). For a more general discussion of transfer of technology, see Chantal Thomas, *Transfer of Technology in the Contemporary International Order*, 22 FORDHAM INT'L L.J. 2096, 2105-111 (1999).

Many now argue that the incorporation of labor and environmental standards is no more than another strategy by industrialized countries to tip the market's scales in their favor. Jose E. Alvarez & Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96 AM. J. INT'L L. 126, 127-28 (2002). Bhagwati and Alvarez write:

By [the] test of mutual advantage [between developed countries and developing countries], the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) does not belong to the WTO. It facilitates, even enforces with the aid of

different areas of international law demonstrates their prevalence in the challenge of constructing an international legal regime. The difference, therefore, is one of degree. Nevertheless, any attempt to establish affirmative labor and environmental obligations through the negotiation of WTO agreements would have to overcome these difficulties.

2. *Negotiating Skews and Challenges to Legislative Legitimacy*

The legislative incorporation of labor and environmental standards would confront numerous costs related to the identification and elaboration of relatively more specific rights and obligations than currently exist. The above discussion assumes, however, that given enough resources, an agreement that reflected the genuine aggregate preferences of member states would be possible. However, strategic dynamics might so skew negotiating tactics that this "genuine" aggregation could be indeterminable, adding significantly to the challenge of negotiation. Two familiar such problems are the danger of capture and the problem of strategic holdout.

trade sanctions, what is in the main payment by the poor countries (which consume intellectual property) to the rich countries (which produce it) We also demonstrated to the next set of northern lobbies that they could do the same. Thus, the unions now say: you did it for capital, so do it for "nature." And the poor countries that have no lobbies anywhere like the sumptuous ones such as the Sierra Club and the AFL-CIO now find themselves at the receiving end of a growing list of lobbying demands that the northern politicians are ready to concede.

Id.

Rather than being brushed aside, this similarity must inform any attempt at redrawing WTO law to incorporate labor and environmental standards. Sufficient sensitivity to the circumstances of developing countries, including economic, social, and cultural differences, is paramount. When the time comes to remove the gloves of diplomacy and get down to the brass tacks of negotiation, this sensitivity has required a quid pro quo approach: a recognition that compliance will prove disproportionately costly to developing countries, and a commitment to redress some of the cost. Quid pro quo of this sort is not only nonobjectionable, it is the lifeblood of intergovernmental negotiations and therefore a necessary component to any situation in which equally sovereign nations differ in their approaches to an issue.

Any integration of labor and environment standards, therefore, would almost certainly require offsetting measures for developing countries. Again, the example of TRIPs is informative. In exchange for IP concessions, developing countries gained agriculture and textiles concessions that had been denied to them throughout the preceding history of the trade regime.

a. Capture

Public choice literature reminds us that it is quite possible and, under certain conditions, likely for governments to cater to narrow interests at the expense of the wider population.¹⁷² Traditionally, trade circles most fear the interests of protectionist industries which seek to keep out competitive imports.¹⁷³ In the contemporary linkage debate, fears have turned to modern-day "green protectionism" in which interest groups in rich countries might seek to cloak anticompetitive impulses in expressions of concern about "social dumping" or, even more insidiously, solicit trade sanctions by claiming concern for the well-being of those in poor countries.¹⁷⁴ In the debate over incorporation of labor and environmental standards into the trade regime, some economic development advocates have characterized initiatives by Northern governments as serving both traditional industrial protectionists and new-fashioned social protectionists. The skewing of Northern interests, according to this account, has exacerbated effects on multilateral negotiations because of the imbalance of both negotiating capacity and economic bargaining power.

This story of capture by protectionists vastly understates the range of potential dangers. First, Northern observers just as often criticize protrade policy for being the consequence of government capture by multinational industries with a strong interest in keeping cross-border costs low.¹⁷⁵ Defenders of social regulations argue that *they* reflect "genuine" democratic preferences for balancing economic growth with other dimensions of quality of life, which free traders threaten to undermine.

If the story of capture in the North must be complicated, similar complications should attend examination of developing-country government positions. The notion of a North-South divide in which the North is aggressively pro-labor and pro-environment and the South is aggressively anti-labor and anti-environment is complicated not only because powerful interest groups clearly exist on the other side of the debate within the North, but also because the statement of a monolithic position from the South is far too simplistic. First, it adopts a puzzlingly thin view of domestic politics in

172. See generally FARBER & FRICKEY, *supra* note 124; MUELLER, *supra* note 124.

173. See Chantal Thomas, *Challenges for Democracy and Trade: The Case of the United States*, 41 HARV. J. ON LEGIS. (forthcoming 2004) (manuscript at 7–9, on file with Washington and Lee Law Review) (noting that domestic industries which are economically hurt by free trade will pressure legislatures to pass protective measures).

174. *Supra* notes 120–24 and accompanying text.

175. See Thomas, *supra* note 173, at 22–24 (asserting that multinational industries are more likely than smaller producers to lobby for antiprotection measures).

developing countries. If India is the largest democracy in the world, it comes as no surprise that one finds within India a range of views and interests at least as diverse as that of any industrialized nation. And, indeed, within India one finds a deep tradition of "green" politics and values, as well as the most vocal of environmental advocates. Just as the specter of capture looms within industrialized country governments from both sides of the linkage debate, the statements of trade representatives of developing countries may not reflect the full range of views therein. And with respect to international labor law, one might refer to the formal complaint brought against labor practices in Malaysia as one example of developing-country coalition politics around labor standards.

Not only is there a range of views within developing countries, there is also a range of views between them. A number of developing countries have endorsed increased enforcement of international environmental law. Such endorsement might derive from a relatively strong "green" political culture, as with Costa Rica's devotion to protection of its ecosystems. It might also derive from immediate concerns about cross-national environmental harms. In recent years, so-called "small island developing states" have argued that climate changes resulting from industrial pollution have caused weather-system volatility which in turn has led to hurricanes and tropical storms of great human and economic cost. The developing-country "bloc" in multilateral negotiations may not fully reflect this range of views among developing-country governments.

b. Strategic Holdout

In addition to susceptibility to capture by particular interests, governments would undoubtedly link legislative negotiations on labor and environmental standards to negotiations on other issues. "Strategic linkage," as David Leebron has observed, offers governments a bargaining tool in negotiations in which their respective positions are at cross-purposes.¹⁷⁶ Reciprocity in bargaining is a time-honored expectation that finds widespread, if contested, adherence in trade negotiations.¹⁷⁷ Such bargaining can lead governments to

176. See David Leebron, *Linkages*, 96 AM. J. INT'L L. 5, 12-14 (2002) (discussing how countries strategically link unrelated subjects in order to strengthen their negotiating positions). For example, the United States might attempt to link human rights with trade negotiations. *Id.*

177. As Steve Charnovitz recently observed, the 1947 GATT explicitly called for tariff negotiations on a "reciprocal and mutually advantageous basis." Steve Charnovitz, *Triangulating the World Trade Organization*, 96 AM. J. INT'L L. 28, 37 (2002) (quoting Art. XXVIII bis:1, 1947 GATT). As Charnovitz also noted, however, the traditional case for trade liberalization emphasizes its benefits independently of reciprocal action by other states; from

hold out on making certain concessions in order to win greater reciprocal concessions. From one perspective, this is an effective bargaining tool; from another, it is a source of distortion that might prevent otherwise optimal rules from reaching fruition.¹⁷⁸

3. *The Amendment Alternative*

Although the preceding discussion has focused on the costs of transitioning from a hard law regime to a soft law regime, it is important to note that such a regime can offer several benefits. Because devising rigorous rule systems is costly, a soft law regime can conserve resources. Take, for example, the stock soft law strategy of adopting a broad and nonbinding statement of principle over a specific and formally binding legal commitment. This strategy detracts from the coherence and enforceability of the rule, and critics view these detractions as net costs to the lawmaking effort. This strategy also offers several benefits. The specification costs substantially decline, because parties need only agree on a broad principle. In addition, the likelihood of cost-inducing strategic behavior decreases. Because a broad standard is less likely to impose an onerous compliance burden than a specific rule, the leverage generated by bargaining in exchange for concession to it will be much lower. Accordingly, the likelihood of holdout because of staunch political opposition by some member states makes ratification of a more specific and binding commitment impossible.¹⁷⁹

So far this Article has considered the feasibility, as measured by the relative costs, of negotiating specific affirmative obligations as an alternative to the status quo of "general exceptions" for social regulation. But intermediate, and therefore less costly, alternatives that preserve the "soft law" flexibility of

this view, at least some forms of conditional trade negotiation, namely those directed towards trade liberalization, constitute "unjustified strategic linkage." *Id.* at 34.

178. See Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, *supra* note 127, at 38 (noting that holdout problems, which stem from one negotiator's "inability to know the true valuation assigned by the other participant in the transaction," pose difficulty in systems requiring negotiation of each transaction).

179. The costs could be more benign, however, and could be associated with the difficulty of reaching agreement on a specific practice, even where states are committed to the principle. In such cases, vagueness may yield real transactional benefits by reducing transactional costs. For example, states may all desire to take measures to improve wildlife conservation, but they may differ in their preferences for what means to employ. Vagueness allows for agreement on this principle while avoiding, or at least deferring, the costs of specification. As discussed above, vagueness is widely characteristic of "core" or "framing" principles of legal systems, whether international or domestic.

the current international labor and environmental regimes might exist that also shore up the status of labor and environment commitments in current WTO law. For example, rather than crafting stand-alone obligations, one could amend the current provisions that provide exceptions or other allowances for governments to take social measures.

Amending these current laws to recognize basic international labor and environmental principles would support the efforts of individual governments to implement their commitments under these principles. For example, GATT Article XX, the "General Exceptions" provision, allows governments to take trade-restrictive measures that would otherwise violate GATT/WTO rules, when those measures fulfill specified social objectives.¹⁸⁰ One could amend the provisions of Article XX to incorporate identified principles of international labor and environmental law. Drafters could amend Article XX(b) to read "necessary to protect human, animal or plant life or health *in accordance with principles recognized in the multilateral environmental agreements listed in the annex hereto*,"¹⁸¹ and GATT Article XX(g) to read "relating to the conservation of exhaustible natural resources *in accordance with principles recognized in the multilateral environmental agreements listed in the annex hereto*."¹⁸² The annex would then list any multilateral environmental agreements that WTO members felt had attained a sufficient level of legitimacy to warrant their specific recognition. Likewise, Article XX(e) could read "relating to products *of labour conditions not in accordance with the international labour principles listed in the annex hereto*."¹⁸³ In a similar vein, the SPS Agreement could provide that members "have the right to take sanitary and phytosanitary measures *in accordance with the precautionary principle*."¹⁸⁴

One might argue that such an amendment is unnecessary because WTO Panels have already recognized other bodies of international law. As discussed

180. See *infra* note 213 and accompanying text (allowing governments to take trade-restrictive measures necessary to enforce intellectual property law).

181. Article XX, ¶ I(b) currently reads "necessary to protect human, animal or plant life or health." GATT 1947, *supra* note 44, art. XX, ¶ I(b), 61 Stat. at A61, 55 U.N.T.S. at 262.

182. Article XX, ¶ I(g) currently reads "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." GATT 1947, *supra* note 44, art. XX, ¶ I(g), 61 Stat. at A61, 55 U.N.T.S. at 262.

183. Article XX, ¶ I(e) currently reads "relating to the products of prison labour." GATT 1947, *supra* note 44, art. XX, ¶ I(e), 61 Stat. at A61, 55 U.N.T.S. at 262.

184. The SPS Agreement currently reads "[m]embers have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement." SPS Agreement, *supra* note 108, art. 2, ¶ 1 [Treaties Binder 1, Treaties Booklet 1] L. & Prac. World Trade Org. (Oceana) at 60.

above in Part III, however, not all GATT/WTO decisions have taken a charitable view of the relationship between Members' obligations under other international agreements and their trade-related environmental policies. Early decisions such as Tuna-Dolphin and Shrimp-Turtle I suggested that an environmental measure would have to be specifically required by a multilateral environmental agreement in order for its recognition as an implementation activity under that agreement.¹⁸⁵ Agreements that stick to broad statements of principle, therefore, may not justify specific practices. While more recently Shrimp-Turtle II seems to have relaxed that principle, the range of interpretations to be found in the jurisprudence may not provide sufficient security to members; put another way, the uncertainty might dissuade members from pursuing environmental policies that impact trade.

Indeed, WTO Panels have not specifically addressed the question of what happens when a WTO rule and a commitment to a multilateral environmental agreement directly conflict. An amendment to Article XX would be clear in protecting such specific practices, and in establishing that they should survive any conflict with GATT/WTO law. Similar dynamics would pertain to international labor law. In like fashion, the current interpretation of the SPS Agreement rejects the precautionary principle and therefore narrows the scope of the allowances under that agreement to adopt health and safety restrictions on trade. The proposed amendment would reverse the existing interpretation. What such amendments would not do is impose affirmative obligations on governments to adopt labor and environmental protections. In that sense, the amendment strategy falls far short of the "trade-related agreement" strategy of TRIPs or a labor or environment equivalent.

One need not view this entirely negatively. First, the amendment strategy preserves the flexibility of the existing soft law regime—potentially a necessity, depending on one's judgments about current political will. Second, among the major concerns of labor and environmental advocates regarding WTO law as currently applied is that it either discourages states from adopting labor and environmental protections that they would otherwise take or encourages states to dismantle existing labor and environmental protections—the "race to the bottom" phenomenon.¹⁸⁶ If this is true, then the concern may be not that the

185. *Supra* Part III.A.

186. Larry A. DiMatteo, et al., *The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime*, 36 VAND. J. TRANSNAT'L L. 95, 127–28 (2003); Robert Howse & Michael J. Trebilcock, *The Fair Trade-Free Trade Debate: Trade, Labor, and the Environment*, 16 INT'L REV. L. & ECON. 61, 76–77 (1996); Yasuko Okamoto, *Common but Differentiated Debates: Environment, Labour and the World Trade Organization*, 9 GEO. INT'L ENVTL. L. REV. 242, 243 (1996).

existing soft law strategy for progressive, incremental, and voluntary compliance is fundamentally flawed, but rather that the strong, new countervailing pressures imposed by the WTO have crippled its ability to operate. In effect, WTO law may block or erode a process of gradual accretion that not only otherwise would occur but that may be viewed as the optimal method for international legal development in these areas. The amendment strategy would resolve this concern. While it would not impose affirmative obligations, it would remove impediments currently imposed by the WTO regime on the development of parallel regimes addressing labor and environmental issues. A simple shift in the interpretive approach of the WTO DSB could, of course, achieve the same result. Explicit amendment of the relevant provisions would, however, afford Members greater legal predictability. It would also benefit from greater legitimacy, in that it would avoid the criticism of Panel and Appellate Body judges that they at times disobey their mandate not to "add to or diminish" the textual obligations of the WTO agreements.¹⁸⁷

Finally, the amendment strategy largely coincides with the positions of the international bodies that currently oversee and administer labor and environmental law. This consideration brings out the point that the problem of political will exists not only within the WTO, but also within the parallel regimes of international labor and environmental law. Neither the ILO nor the UNEP, the premier international agencies in labor and environmental law respectively, have endorsed the call for WTO agreements on labor and environment rights. Rather, each has focused on improving enforcement mechanisms in the existing labor and environmental regimes.¹⁸⁸

V. *The TRIPs Precedent*

This Part makes the observation that the WTO's intellectual property (IP) law has followed an arc similar to that now recommended by advocates for

187. The WTO rules on dispute settlement state that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." Art. 3(2), Understanding on the Rules and Procedures Governing the Settlement of Disputes, Annex 2, World Trade Organization. "In light of this [provision], any hardening of soft law that occurs in the course of WTO dispute settlements may well be regarded by at least some WTO members as illegitimate judicial lawmaking." Jose E. Alvarez, *The New Dispute Settlers: Half-Truths and Consequences*, 38 TEX. INT'L L.J. 405, 424 (2003).

188. See U.N. ENV'T PROGRAMME, GLOBAL ENVIRONMENT OUTLOOK 2000, 14 (1999) (recognizing that, for environmental regulations to be effective, inspection and enforcement must improve).

WTO incorporation of labor and environmental obligations. A primary objective of the WTO's establishment in 1995¹⁸⁹ was to extend trade discipline to areas of international economic activity that had been excluded under the previous international trade regime of the GATT.¹⁹⁰ The WTO retained the existing regime defined by the GATT and significantly expanded it. For example, agreements on intellectual property, such as TRIPs,¹⁹¹ and trade in services, such as the General Agreement on Trade in Services (GATS),¹⁹² resulted from this effort.

The rationale for a WTO agreement regulating trade in services is clear: services are a category of trade, just as goods are. By the time the Uruguay Round began in the 1980s, the importance of internationally provided services¹⁹³ justified the inclusion of services in the regulatory scope of international trade law, an area previously concerned only with goods.¹⁹⁴ The rationale for a WTO agreement regulating IP is quite another matter. Although countries can trade IP rights across borders in licensing and other rights transferring agreements, they need not trade such rights in order for the TRIPs Agreement to apply. The TRIPs signatories adopted the agreement because trade affects IP rights. The value of the IP right increases with the capacity of the right-holder to enforce it and decreases when the information can be accessed without going through the right-holder. The latter may occur because the producer is operating in a region where the right does not exist or is underenforced.¹⁹⁵

189. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994 [Treaties Binder 1, Marrakesh Declaration Booklet] L. & Prac. World Trade Org. (Oceana) 5 (Mar. 1995), 33 I.L.M. 1125, 1143 (1994) [hereinafter Final Act].

190. See GATT 1947, *supra* note 44, art. XI, ¶ 2, 61 Stat. at A33, 55 U.N.T.S. at 226 (listing trade activities excluded from the elimination of quantitative restrictions).

191. TRIPs Agreement, *supra* note 169.

192. General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, *supra* note 44, Annex 1B, [Treaties Binder 1, Treaties Booklet 1] L. & Prac. World Trade Org. (Oceana) 339 (Mar. 1995), 33 I.L.M. 44 (1994) [hereinafter GATS]; see generally Chantal Thomas, *Globalization in Financial Services—What Role for GATS?*, 21 ANN. REV. BANKING L. 323 (2002).

193. Services covered by the GATS include telecommunications, banking, insurance, accounting, lawyering, tourism, and health care.

194. See Paul Demaret, *The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization*, 34 COLUM. J. TRANSNAT'L L. 123, 130–31, 156–61 (1995) (describing the GATT's historical exclusion of services from its regulatory framework and explaining the implementation of the GATS); Jack W. Flader Jr., *A Call for a General Agreement on Trade in Services*, 3 TRANSNAT'L LAW. 661, 662–64 (1990) (describing the United States as a "prime proponent" for negotiations on trade in services).

195. The purpose of an IP right is to allow the right-holder to control access to the information to which the right attaches. If Disney is able to successfully control the use of all

As with IP protection, labor and environmental standards can affect trade flows by affecting production costs for goods and services.¹⁹⁶ Just as the value of an IP right will decrease if it can be evaded through trade, the value of a labor or environmental right will also decrease if evasion through trade is an option. Moreover, the rights themselves may erode, a phenomenon known as the "race to the bottom."¹⁹⁷

Without considering TRIPs, the trade versus nontrade distinction might appear to justify exclusion of labor and environmental standards. Considered in isolation, the institutional competence argument that the WTO should not incorporate labor and environmental issues because they are not themselves the subject of trade, even if they clearly influence and are influenced by trade, appears more persuasive. Upon consideration of TRIPs, however, this distinction finds itself on very shaky ground. TRIPs concerns itself primarily with IP rights not as a *subject* of trade, but as a body of standards that *affect* trade flows. In this respect, international IP law is indistinguishable from international labor or environmental law in its relation to trade. After considering the TRIPs Agreement, the trade versus nontrade distinctions fail to explain the exclusion of labor and environmental rights. The IP case shares other similarities with international labor and environmental law: the international enforcement regime that had developed was relatively weak. In addition, GATT law harbored a "negative" exception for IP law in Article XX, similar to those for labor and environmental standards, but the TRIPs signatories ultimately made the political decision to strengthen this early incorporation with clearer and more rigorous positive obligations.

Mickey Mouse images worldwide, its right to the Mickey Mouse image is very valuable. If a firm in Hungary does not have to ask Disney for the right to the Mickey Mouse image, then the value of that right decreases because Disney will lose the income from a licensing arrangement. Disney will also lose the income from consumers who will buy the Hungarian firm's Mickey Mouse T-shirts rather than Disney's. Others will see that the Hungarian firm has used the image and will do so as well, further decreasing the "rent" that Disney can gain from its right to the image. If the Hungarian firm can successfully sell Mickey Mouse T-shirts in the United States or in third countries, then Disney will lose further income.

196. Cf. *infra* notes 212–14 and accompanying text (describing the WTO's finding that, although environmental regulations do increase production costs, they do not reduce "competitiveness").

197. See, e.g., Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 HARV. INT'L L.J. 47, 61–62 (1993) (describing the "race to the bottom" theory of regulatory competition using the example of Delaware's regulation of corporations).

A. Lack of Enforcement in Pre-WTO International Intellectual Property Law

As with labor and the environment, IP rights developed in a free-standing international law regime with a relatively weak enforcement mechanism. The underenforcement of IP rights served as a major justification for integrating them into the WTO.¹⁹⁸ Prior to the Uruguay Round, multilateral instruments for IP protection were administered by the World Intellectual Property Organization (WIPO), a specialized agency of the United Nations.¹⁹⁹ WIPO was widely viewed as ineffectual.²⁰⁰ The relative weakness of the multilateral system, for example, provided a partial justification for U.S. development of forceful unilateral mechanisms to pursue its interests in international IP law.²⁰¹

As the importance of IP-related sectors to Western economies grew, particularly in the United States, the integration of IP rights into the international trade regime presented a solution to the problem of weakness in the multilateral system of IP law.²⁰² The incorporation of IP into the international trade regime had the potential for three salutary changes. First, the degree of uniformity in IP protections would greatly increase as a result of

198. WORLD TRADE ORG., TRADING INTO THE FUTURE 25 (1999) (noting that the extent of IP protection around the world "varied widely" prior to the Uruguay Round and suggesting that "internationally-agreed trade rules for intellectual property rights were seen as a way to introduce more order and predictability").

199. Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3 [hereinafter WIPO].

200. See Robert P. Merges, *Battle of Lateralisms: Intellectual Property and Trade*, 8 B.U. INT'L L. J. 239, 240 (1990) (describing an "increasingly lethargic and bureaucratized WIPO"); Brent W. Sadler, *Intellectual Property Protection Through International Trade*, 14 Hous. J. INT'L L. 393, 400-01 (1992) ("WIPO is of little practical use in protecting intellectual property rights . . . [because] it lacks meaningful enforcement provisions such as are found in the GATT . . .").

201. See Donald E. deKieffer, *U.S. Trade Policy Regarding Intellectual Property Matters*, in INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY: THE SEARCH FOR A BALANCED SYSTEM 97, 102-03 (George R. Stewart et al. eds., 1994) [hereinafter INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY] (describing how "agonizingly slow" progress during the GATT led the United States to employ unilateral and bilateral trade mechanisms such as the Trade Act of 1984 to encourage other countries to protect IP rights).

202. Sadler, *supra* note 200, at 393. Sadler argues:

Many countries do not protect intellectual property rights to the extent desired by the United States. Intellectual property laws differ from nation to nation, both in scope of protected rights and enforcement. Existing multinational agreements do not effectively protect intellectual property rights of United States citizens and industries in the global market.

Id.

the accession of all GATT members to a negotiated set of central protections.²⁰³ Second, the trade regime's dispute settlement system could address international IP disputes.²⁰⁴ Third, cross-sector links in the larger system would improve the efficacy of both negotiations and enforcement. For example, if a complainant prevailed on IP grounds, it could impose sanctions on the respondent in non-IP sectors.²⁰⁵

Thus, the TRIPs signatories viewed the introduction of IP rights into the trade regime as a way to significantly improve the efficacy of an international IP law system plagued by lax enforcement. The problem of underenforcement is pervasive in international law, however, and in this respect, the international IP regime differed little from many other international systems. Certainly, the same problem of underenforcement characterizes international law relating to both labor and the environment.

Of course, one can make the argument that IP enforcement impedes rather than expands international trade. This argument rejects the analogy of IP rights to traditional property rights and instead likens IP rights to monopoly rights.²⁰⁶ As monopoly rights, IP rights tend to exclude poor countries from production and therefore impede global competition in IP-related goods and services. Because the monopoly keeps prices high, world demand and therefore world

203. WTO Agreement, *supra* note 44, at 25 ("The extent of protection and enforcement of [IP] rights varied widely around the world; and as IP became more important in trade, these differences became a source of tension in international economic relations."). *But see* David Silverstein, *Intellectual Property Rights, Trading Patterns and Practices, Development and Standards of Living: A North-South Perspective on Patent Law Harmonization*, in INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY, at 155-56 (arguing that U.S. efforts to spread Western IP laws as a way to harmonize global IP laws will fail, whereas a "culturally-specific" system would address economic and social conditions of each country).

204. Robert W. Kastenmeier & David Beier, *International Trade and Intellectual Property: Promise, Risks, and Reality*, 22 VAND. J. TRANSNAT'L L. 285, 296 (1989) ("The key to a strong international intellectual property system within the GATT is . . . a strong dispute resolution mechanism.").

205. *But see* Merges, *supra* note 200, at 241 (noting, by contrast, that "[t]here is little potential for horsetrading in the WIPO context").

206. *See* Laurinda L. Hicks & James R. Holbein, *Convergence of National Intellectual Property Norms in International Trading Agreements*, 12 AM. U. J. INT'L L. & POL'Y 769, 771 (1997) ("There is an inherent conflict . . . between the free circulation of goods and services across countries' borders and the exclusive right of intellectual property owners to explore their creation at the exclusion of others, thus restricting the free circulation of goods and services within the common market."); *see also* Paul S. Grunzweig, Note, *Prohibiting the Presumption of Market Power for Intellectual Property Rights: The Intellectual Property Antitrust Protection Act of 1989*, 16 J. CORP. L. 103, 103-04 (1990) (noting that "[a]t their core, the policies that drive the patent laws and the antitrust laws of the United States always will conflict").

trade in these sectors remains lower than they would be with greater competition.²⁰⁷

In fact, there is a real rift in perspective that reflects the North-South divide, with the North, particularly the United States, pushing to include IP rights in the WTO, and the South losing faith in the entire system.²⁰⁸ Despite this divide, the view of IP protection as a facilitator rather than an inhibitor of international trade prevailed, culminating in the TRIPs agreement.²⁰⁹ When viewed as a facilitator of international trade, the logic for including international IP law becomes clear: to further the central objectives of the GATT/WTO system. By the same token, the logic for excluding international labor and environmental law also emerges. As standards that seek to restrain international trade, they would be anathema to the stated objectives of the system.

Considerable research shows that the interests of trade need not run contrary to labor and environmental protection. Recently, the WTO Committee on Trade and Environment commissioned a study on whether environmental regulations impose costs on production that tend to increase prices and thereby decrease trade volume. The resulting report found that, although environmental

207. See, e.g., Ruth Gana Okediji, *Copyright and Public Welfare in Global Perspective*, 7 *IND. J. GLOBAL LEGAL STUD.* 117, 163–64, 183 (1999) (suggesting that the push for heightened IP protection focuses too much on domestic concerns and largely ignores global economic effects, including disincentives to buy protected products).

208. See, e.g., Horacio Teran, *Intellectual Property Protection and Offshore Software Development: An Analysis of the U.S. Software Industry*, 2 *MINN. INTELL. PROP. REV.* 1, 58–59 (2001) (concluding that Westerners' long term exploitation of indigenous knowledge and resources has reduced the confidence of indigenous peoples in the Western system of IP); Jan D'Alessandro, Note, *A Trade-Based Response to Intellectual Property Piracy: A Comprehensive Plan to Aid the Motion Picture Industry*, 76 *GEO. L.J.* 417, 452–54 (1987) (noting that the Reagan administration engaged in "ongoing efforts" to add IP protection to the GATT and discussing other countries' considerations regarding same); see also Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 *IOWA L. REV.* 273, 282 (1991) (explaining that developing countries view ready access to IP as important to development, and consider enforcing IP law a burden on development not warranting scarce government funds); Joel R. Reidenberg, *Trade, TRIPs and NAFTA*, 4 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 283, 283 (1993) ("While the expansion of intellectual property protection around the world can be attributed to American trade pressure, the trade framework will constrain any country's ability to take unilateral measures against infringements of intellectual property rights.").

209. See Evelyn Su, *The Winners and the Losers: The Agreement on Trade-Related Aspects of Intellectual Property Rights and Its Effects on Developing Countries*, 23 *HOUS. J. INT'L L.* 169, 170–71 (2000) (noting the adoption of the TRIPs agreement at the 1994 Marrakesh summit and discussing the conflicting views of developed countries, which sought international IP enforcement to reduce the billions of dollars lost annually to IP piracy, and developing countries, which suffer potentially reduced access to technology under TRIPs).

protection increases production costs, its "competitiveness effect" is ultimately minor.²¹⁰ The report found that this minimal effect on competitiveness results, in part, because environmental protection costs are likely offset by cost-saving efficiency gains elsewhere in the production process.²¹¹ In addition, the report found that, with some exceptions, environmental regulations are not of primary importance in international investment decisions and that most industries do not move from developed to developing countries to reduce their environmental compliance costs.²¹²

B. *The Article XX Exception and the Legislative Response*

Article XX, the General Exceptions provision of the GATT, contains a clause allowing governments to take trade-restricting measures necessary to enforce IP law.²¹³ If the General Exceptions measure does provide all the support necessary for governments to enforce trade-related measures that might restrict imports, presumably no need to negotiate TRIPs would have arisen. The TRIPs was negotiated, however, notwithstanding both a recognition of IP protection in the GATT's General Exceptions provision and a well-developed body of existing international law outside of the GATT. The fact that negotiation occurred lends credence to the argument that some integration of affirmative obligations to labor and environmental standards is required for these standards' proper enforcement and that the current exceptions-driven regime is inadequate.

Legislating affirmative IP obligations required confronting problems of diffuseness and non-justiciability. At first blush, these problems seem much less troublesome in international IP law. Enumerated procedures identify IP rights owed to the right-holder, for example, the right to "prevent" others from "making, using, offering for sale, selling, or importing."²¹⁴ Every government

210. See HAKAN NORDSTRÖM & SCOTT VAUGHAN, WTO SPECIAL STUDY, TRADE AND ENVIRONMENT 36-38 (1999) (concluding that "superior environmental performance" does not always reduce profitability).

211. See *id.* at 51-52 (discussing the "tradeoff between production of goods and environmental quality" that changes with increases in income level).

212. See *id.* at 41 (suggesting that environmental regulations are not of primary importance in competitiveness and in location decisions).

213. See GATT 1947, *supra* note 44, art. XX, ¶ I(d), 61 Stat. at A61, 55 U.N.T.S. at 262 (allowing for trade-restrictive measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to . . . the protection of patents, trade marks and copyrights").

214. TRIPS Agreement, *supra* note 169, art. 28 ("Rights conferred"), ¶ 1(a).

who is a party to the agreement, which now includes all WTO members, owes these rights.²¹⁵ The right generates entitlements to certain types of legal protections—the right to deploy the state's enforcement power to exclude others from using the IP to which the right attaches.

Hindsight should not obscure the fact that real difficulties of this sort arose in the drafting of TRIPs, however. Although the Paris Convention²¹⁶ and the Berne Convention²¹⁷ were paramount in international IP law, a number of other international agreements developed. The Uniform Copyright Convention, for example, was a parallel instrument to the Berne Convention.²¹⁸ Moreover, contracting parties put into force several versions of the Paris and Berne conventions.²¹⁹ As a result of these numerous agreements, states significantly disagreed as to which international IP obligations were fundamental. For example, European states tended to regard the "moral rights" of authors against degradation of their work under the Berne Convention as fundamental, whereas the United States did not.²²⁰

215. The TRIPS Agreement is contained in Annex IX to the Agreement Establishing the World Trade Organization. Article II, paragraph 2, of the Agreement Establishing the World Trade Organization provides, "The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter Multilateral Trade Agreements) are integral parts of this Agreement binding on all Members." TRIPS Agreement, *supra* note 169, art. II, ¶ 2.

216. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 13 U.S.T. 2, 828 U.N.T.S. 107 [hereinafter Paris Convention], as last revised at Stockholm, July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 305.

217. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 168 Consol. T.S. 185 [hereinafter Berne Convention], as last revised at Paris, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

218. See Universal Copyright Convention, July 24, 1971, art. XVII, 25 U.S.T. 1341, 1367, 943 U.N.T.S. 178, 205 (providing that states' withdrawal from the Berne Convention would result in exclusion from the Convention's protections and that the provisions of the Convention do not affect the Berne Convention).

219. Contracting parties to the Paris Convention, for example, were states that had adopted one of the following: the Paris Convention, *supra* note 216, as revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305; the Paris Convention, *supra* note 216, as revised at Lisbon, Oct. 31, 1958, 53 Stat. 1748, 828 U.N.T.S. 107; the Paris Convention, *supra* note 216, as revised at London, June 2, 1934, 53 Stat. 1788, 3 Bevans 223; or the Paris Convention, *supra* note 216, as revised at The Hague, Nov. 6, 1925, 47 Stat. 1789, 2 Bevans 524. Contracting parties to the Berne Convention, likewise, were states that adopted one of the following: the Berne Convention, *supra* note 217, as revised at Paris, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221; the Berne Convention, *supra* note 217, as revised at Stockholm, July 14, 1967, 25 U.S.T. 1341, 828 U.N.T.S. 221; the Berne Convention, *supra* note 217, as revised at Brussels, June 26, 1948, 831 U.N.T.S. 217; the Berne Convention, *supra* note 217, as revised at Rome, June 2, 1928, 123 L.N.T.S. 233; or the Berne Convention, *supra* note 217, as revised at Berlin, Nov. 13, 1908, 1 L.N.T.S. 217.

220. See Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 145–46 (2000) (describing the clear disdain that the United States held

In addition to the issue of uniformity of principles, serious problems arose because the vagueness of the principles allowed for substantial variation across countries.²²¹ For example, although the Paris Convention established the basic principle of patent protection, it allowed for much more variation among member states than the specific obligations imposed by TRIPs.²²² Indeed, the frustration of the United States at the lack of uniformity of IP protection abroad provided a major incentive for its pursuit of IP negotiations in the trade regime.²²³ Moreover, awareness of the lack of uniformity of protections was acute in the context of the TRIPs negotiations; the primary achievement of the negotiations was to resolve these differences and arrive at a single set of "core" substantive standards.²²⁴

A final distinction departs from any appeal to structural or substantive logic, but appeals purely to pragmatic considerations. Particularly in the wake of the WTO's newfound institutional rigor, many commentators worry about the increased likelihood that the international trade regime will reach a "breaking point."²²⁵ The new WTO sets much loftier ambitions for institution-building than did the old GATT.²²⁶ Commentators worry that, while the GATT

towards adopting the European moral rights regime).

221. See Robert J. Gutowski, Comment, *The Marriage of Intellectual Property and International Trade in the TRIPs Agreement: Strange Bedfellows or a Match Made in Heaven?*, 47 *BUFF. L. REV.* 713, 724 (1999) ("The stark distinction between South Africa's and Peru's application of the well-known mark requirement of Article 6 is of the Paris Convention [described in this Article] highlights the problems of the Paris-Berne regime: lack of harmonization, disparate national treatment, and deficient enforcement and dispute resolution provisions.").

222. See Merges, *supra* note 200, at 242 ("The proposed GATT intellectual property code, which attempts to provide more substantive guidelines, has met with stiff opposition from some members of the Paris Convention, in part because of its specificity on certain matters (e.g., pharmaceutical patents).").

223. See *supra* note 126 and accompanying text (discussing the priority that the United States placed on IP issues).

224. See Kastenmeier & Beier, *supra* note 204, at 291 (observing that "[c]reating norms and standards for intellectual property would be the most important and difficult area" of upcoming TRIPs negotiations); Joel R. Reidenberg, *Trade TRIPS and NAFTA*, 4 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 283, 285 (1993) (citing as problems with TRIPS that "traditional rights now being enshrined in TRIPS are also at odds with emerging national trends" and that "[n]ew technologies do not fit neatly within traditional forms of intellectual property").

225. See Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 *MINN. J. GLOBAL TRADE* 1, 14 (1999) (anticipating that, because international legal systems depend on voluntary member government compliance, the WTO legal system cannot expect unanimous governmental compliance with its legal rulings).

226. See *id.* at 3-4 (noting the boldness of the WTO dispute settlement initiative and the legal rigor of new procedures).

was flexible and therefore never broke, the WTO may be overly rigid and overshoot the mark in seeking to establish a "legalistic" regime.²²⁷ The result might be a backlash of states that would erode the precious legitimacy that the global regime has built up over the postwar era.²²⁸

The jury is still out as to whether the WTO is institutionally viable over the long run. The dispute settlement system garnered early acclaim by resolving contentious issues between powerful members with relative success.²²⁹ The first new agreement-making meeting in Singapore went relatively smoothly and succeeded in making anticipated gains.²³⁰ However, the highly visible failure of the next ministerial conference in Seattle revived the old institutional concerns.²³¹ The Seattle experience demonstrated that state sovereignty still had bite, that is, if the member states desired, they could refuse to adhere to the built-in agenda, impeding the progressive development of the institution.²³² Thus, the anticipated progress in negotiations on services, agriculture, and other areas failed to materialize.²³³

227. See *id.* at 12 (displaying skepticism that member countries will be receptive to greater legal discipline in the WTO system); Miquel Montaña i Mora, *A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103, 178 (explaining that some scholars have observed a preference for informality in international economic law and observing that this preference explains the law's reluctance to employ rigid mechanisms).

228. See, e.g., Montaña i Mora, *supra* note 227, at 151–53 (voicing concerns about the WTO appellate review system: the lack of conditions for admissibility of appeals, the difficulty in agreeing on a review tribunal's composition, the shift towards legalism, the appellate body's probable approach towards interpretation, and the existence of individual opinions in the reports of the appellate body).

229. See, e.g., Hudec, *supra* note 225, at 14 (suggesting that the first three years of the WTO and its dispute settlement system were a "considerable initial success").

230. See *Success in Singapore*, WTO FOCUS (World Trade Org., Geneva, Switz.), Jan. 1997, at 1, 1 (reporting Chairman Yeo Cheow Tong's view that the negotiators "have delivered, . . . [and] have accomplished the task set upon us"), available at http://www.wto.org/english/res_e/focus_e/focus15_e.pdf.

231. See John H. Jackson, *The Perils Of Globalization and the World Trading System*, 24 FORDHAM INT'L L.J. 371, 375 (2000) (focusing on the "institutional" causes for the "failure of Seattle"); cf. Timothy M. Reif & Viji Rangaswami, *Joltin' Joe Has Left and Gone Away—Embracing Change: The Way Forward for U.S. Trade Policy and the WTO*, 32 LAW & POL'Y INT'L BUS. 427, 437–46 (2001) (arguing that the Seattle debacle occurred because institutional reform of the WTO has not gone far enough in increasing public input, heightening sensitivity to fairness, and implementing legislative processes).

232. See Joseph Kahn, *Swiss Forum Has Its Focus on Memories from Seattle*, N.Y. TIMES, Jan. 29, 2000, at C1 (noting that "government officials have stressed that the failure of trade talks owes more to negotiating positions taken by World Trade Organization members than to the influence of demonstrators").

233. See Daniel Pruzin, *WTO: Diplomats Say Seattle Scars Too Tender to Permit Big Push for WTO Trade Round*, BNA INT'L TRADE NEWS DAILY, Dec. 15, 1999 (noting that the

Particularly in the wake of Seattle, one might argue that at some point institutional modesty is required: The addition of items to the negotiation agenda would be too taxing. There may be some validity to this perception. It does not justify, however, the special exclusion of labor and environmental concerns, as opposed to other issues that are placed on the agenda. For example, negotiations on competition policy would require reconciling many different and complex regulatory regimes, but WTO members continue to consider the possibility of framing an agreement on competition. At the conclusion of their 1996 meeting in Singapore, WTO members agreed to "establish a working group to study issues . . . relating to the interaction between trade and competition policy . . . in order to identify any areas that may merit further consideration in the WTO framework."²³⁴ Controversy and disagreement continue to run high over the matter, and formal efforts to frame an agreement have not begun.²³⁵

In reviewing these political dynamics, one might notice that developing countries' interests, at least as commonly construed in this particular debate,²³⁶ run counter to IP protection as well as to labor and environmental concerns. At the time of the Uruguay Round negotiations, many developing countries staunchly opposed the incorporation of IP rights. The argument sounded quite similar to those made in the context of labor and environmental debates. Developing countries argued that the administration of IP rights properly belonged to the United Nations organization traditionally charged with that duty, the WIPO.²³⁷

breakdown of talks in Seattle preventing WTO members from fulfilling their commitment made "at the end of the Uruguay Round in 1994 to begin new negotiations on agriculture and services by 2000"); see also Daniel Pruzin, *WTO: Moore Outlines Incremental Approach Towards New Round of WTO Talks*, BNA INT'L TRADE DAILY NEWS, Feb. 3, 2000 (describing collapse of a meeting after the members could not resolve differences over the framework and objectives for agriculture talks, refusal of the United States to consider new negotiations on antidumping rules, and the inclusion of labor standards on the WTO's work agenda).

234. Ministerial Conference, Singapore Ministerial Declaration, ¶ 20, WT/MIN(96)/DEC (Dec. 18, 1996), reprinted in 36 I.L.M. 220, 226 (1997), available at <http://www.wto.org>.

235. See *WTO: Trade Officials Seek Doha Breakthrough, but Few Changes Occur in WTO Stances*, INTERNATIONAL TRADE DAILY, June 7, 2001 (stating that thirty-five to forty of the WTO's 141 members support negotiations on competition, with support strongest among Europe and Latin America and with opposition strongest from the United States, among others).

236. Of course, there are many reasons to believe that poor countries, or at least significant populations therein, stand to benefit from such protections.

237. *Indian Proposal Says Developing Countries Should Get Patent, Trademark Concessions*, 6 INT'L TRADE REP. (BNA) 953, 953 (July 19, 1989) (reporting that Third World countries, led by Brazil and India, argued that IP "should be dealt with by the World Intellectual Property Organization" rather than be included in GATT).

General opposition to IP standards in developing countries resulted not in an absolute opposition to their incorporation, but rather in a quid pro quo approach.²³⁸ Having reconciled themselves to the need to establish a comprehensive trade regime, many developing countries sought to leverage their willingness to countenance IP negotiations for the purpose of including negotiations on sectors of interest to them. Textiles and agriculture were two such notable sectors.²³⁹ Trade groups in the United States, which had an interest in maintaining the status quo of high protectionist barriers to imports, staunchly opposed negotiations on both of these topics.²⁴⁰

Were labor or environmental negotiations to begin, the quid pro quo approach would undoubtedly re-emerge. That is, if industrialized countries wanted better labor and environmental practices in poor countries, the industrialized countries would have to agree, at least partially, to fund the process of acquiring those practices. This approach has been a staple of recent international environmental law, in which the principle of environmental protection is now wedded to the goal of development in poor countries.²⁴¹ Many environmental agreements include provisions for technology transfer and funding mechanisms to aid developing countries in compliance efforts.²⁴²

238. See Chantal Thomas, *Balance-of-Payments Crises in the Developing World: Balancing Trade, Finance and Development in the New Economic Order*, 15 AM. U. INT'L L. REV. 1249, 1260–61 (2000) (discussing political trends leading to a deferential approach by industrialized countries toward Third World nations in applying GATT with cognizance of political issues facing those states).

239. See Agreement on Agriculture, Apr. 15, 1994, WTO Agreement, *supra* note 44, Annex 1A, [Treaties Binder 1, Treaties Booklet 1], L. & Prac. World Trade Org. (Oceana) 27, 27 (Mar. 1995) (calling on developed countries to take into account the "particular needs and conditions" of developing countries in increasing markets for their agricultural products); Agreement on Textiles and Clothing, Apr. 15, 1994, WTO Agreement, *supra* note 44, Annex 1A [Treaties Binder 1, Treaties Booklet 1], L. & Prac. World Trade Org. (Oceana) 77, 77 (Mar. 1995) (recalling agreement that "special treatment should be accorded to the least-developed countr[ies]").

240. See Edmund W. Sim, *Derailing The Fast-Track For International Trade Agreements*, 5 FLA. INT'L L.J. 471, 484–85 (1990) (noting that "[e]mbittered textile lobbyists threatened to 'do whatever is necessary'" to forestall concessions on textiles, and that some agricultural interests were "implacable opponents of the Uruguay Round," although other agricultural sectors such as grain and oil seed exporters supported trade negotiations in the hopes of increasing their overseas market share).

241. See Weiss, *supra* note 33, at 814–15 (outlining areas of concern and priorities relating to sustainable development and implementing economic progress while using resources in clean and efficient manner).

242. See, e.g., Montreal Protocol, *supra* note 38, arts. 10, 13, 26 I.L.M. at 1557, 1559 (discussing the funding and technical assistance mechanisms in Articles 10 and 13, respectively). Under Article 10, "[t]he parties shall, . . . taking into account in particular the needs of developing counties, co-operate in promoting technical assistance to facilitate participation in and implementation of this protocol." *Id.* at 1557. Article 13 provides that

Developing countries' resistance to linkage will likely continue as long as proponents of the trade-labor/environment linkage fail to construct cost-sharing arrangements, as in the case of labor regulations, or construct only partial arrangements, as in the case of environmental regulations. However, it is important to note that in many cases integrating trade, labor, and environmental regulations would impose no new obligations on member states. Particularly with respect to the most salient international agreements on labor and the environment, most rich and poor countries have reached agreement.²⁴³ The fact that poor countries have already assumed these obligations seems to neutralize any legitimate protest on their part to integrating into a regime that might provide more effective enforcement.²⁴⁴ As Jose Alvarez has argued, state accession to international law instruments is often conditional precisely on their relatively weak enforceability and the relatively high residual state autonomy to determine compliance.²⁴⁵

V. Conclusion

On reflection, this debate between the judicial and legislative responses to incorporation at an international level seems to parallel a tension between competing attributes of legitimacy in decisionmaking within domestic legal systems: expertise and independence on the one hand, versus accountability and representativeness on the other. Although the legislative response to linkage is politically more desirable, it appears to be less plausible. Judicial

"[t]he funds required for the operation of this Protocol . . . shall be charged exclusively against contributions from the Parties." *Id.* at 1559.

243. See International Labour Organization, International Labour Standards Ratifications, at <http://webfusion.ilo.org/public/db/standards/normes/app/> (listing current status of labor agreement ratification); see also United Nations Environment Programme, Environmental Conventions, at <http://www.unep.org/SEC/env3.htm> (listing current status of environmental convention ratification).

244. Summers, *supra* note 102, at 67. Summers argues that:

It is ironic that Egypt, Brazil, Indonesia and Pakistan, which were among those most vocal in opposing the [proposal to incorporate labor discussions into WTO talks in Seattle] have ratified conventions on all of these subjects, with the exception of Pakistan's failure to ratify a convention on child labor. They expressed outrage that [President] Clinton would suggest [in his proposal on labor] that they should be required to observe the conventions that they had ratified.

Id. (citation omitted).

245. See Jose E. Alvarez, *How Not to Link: Institutional Conundrums of an Expanded Trade Regime*, 7 WIDENER L. SYMP. J. 1, 1 (2001) (noting that the WTO is rare among international law regimes because it usually "secures at least procedural (if not always substantive) compliance").

response may represent the best option, particularly at an early stage. Moreover, judicial response might have an "action-forcing" effect, in which the relative benefit of codification through legislation increases over time to correct any deficiencies in the rules established by the legislature. However, potentially prohibitive decision costs might reduce overall welfare by barring collective action, resulting in the continuation of a rule that does not represent the aggregate preferences of the members and their respective constituencies.

On either side, however, the purported virtues can be seen as vices: One can regard the expertise of the judiciary as "insider" bias, and the accountability of the legislature is susceptible to capture. Even more complexly, recently these charges of insider bias and capture have sometimes strayed outside their traditional realms: Critics have charged the WTO judiciary with capture and the representatives of member states with insider bias. As the "Development Round" of WTO negotiations moves forward, the international debate on integrating trade, labor, and environmental law must determine not only the appropriate substance and form of the rule, but also the appropriate decisionmaking institution and process.

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