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Linkage of Free Trade and Social Regulation: Moving Beyond the Entropic Dilemma

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INTRODUCTION

In the early 1990s, as the historic Uruguay Round struggled toward a successful conclusion, a panel established under the General Agreement on Tariffs and Trade ("GATT"),[1] which had governed international trade for the previous half century, struck down a recently enacted US embargo on Mexican yellow-finned tuna.[2] The US Marine Mammal Protection Act of 1972[3] had proscribed a certain controversial tuna fishing practice that inevitably caused the incidental killing of dolphins on a large scale. The gist of the panel's ruling was that the US embargo was not necessary to protect marine mammals because the US had failed to explore other reasonable, less trade-restrictive alternatives, including reaching a cooperative arrangement with tuna exporters such as Mexico.

Whatever the merits of the panel decision, environmentalists in the US and other Western countries led popular protests against the decision based on the view that it had arrogantly countermanded a widely popular domestic measure intended to protect the beloved dolphin, as well as other endangered marine mammals. Some protesters performed a scene in which "GATTzilla," a demonization of GATT as the famed Japanese monster, devoured helpless little

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1 The General Agreement on Tariffs and Trade, in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* 485 (GATT Secretariat 1994) (hereinafter GATT 1947).

2 GATT Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS21/R–39 S/155 (Sept 3, 1991).

3 Pub L No 92-522, 86 Stat 107 (1972), codified at 16 USC § 1361 (1994).

dolphins. Through this and other similar publicity methods, protesters were quite successful in depicting GATT—and free tradists in general—as cold-blooded monsters that cared little about legitimate environmental causes.

In the late 1990s, hope and frustration contended once again in the lead-up to the historic Seattle Round, which was marred by a protest with an estimated 50,000 to 100,000 participants. This global alliance of protesters, unprecedented in scale and intensity, accused the World Trade Organization ("WTO"),[4] the successor to the old GATT, of ignoring environmental values in the name of free trade. This time, the alleged victims were sea turtles sacrificed in the process of shrimp harvesting. In a decision rendered not long before the Seattle Ministerial Meeting, the WTO Appellate Body struck down a US ban on shrimp harvested by India, Malaysia, Pakistan, and Thailand which used shrimping methods that inevitably caused the incidental killing of sea turtles on a large scale. The Seattle protest was fueled by a generalized antiglobalization mood, reinforced by an unlikely alliance between "Turtles and Teamsters," and finally aided by then President Bill Clinton's unexpected expression of sympathy for the goals of the street protesters. In the end, the Seattle Round proved to be a fiasco.

The two cases described above illustrate a glaring tension between free trade and social regulations in areas such as environmental protection. On the one hand, such tension eloquently demonstrates the existence in a phenomenological sense of a certain "link" or "linkage" between various competing values associated with the regulation of international trade. In fact, this linkage seems an inevitable phenomenon considering the multiplicity of values that individuals, states, and institutions pursue. People seem to desire free trade—or at least global free markets, driven by the principle of efficiency—that expands economic opportunity and promotes material welfare. At the same time, they also yearn for a better quality of life—including better social hygiene in the areas of environmental quality and human safety—and value the principle of regulatory autonomy.

Yet in the real world, such values and policy objectives are not formulated or analyzed in isolation. Rather, they tend to be addressed in combination by means of relational approaches that emphasize areas of mutual influence. This relational posture, which is strongly influenced by the current high level of economic interdependency, is itself a function of the natural linkage among the values in question.

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4 Marrakesh Agreement Establishing the World Trade Organization, in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* 6 (cited in note 1) (hereinafter WTO Agreement).

On the other hand, tension stemming from competing values constitutes a threat to the institutional integrity of the global trading system. Since no trading system can long survive a high degree of internal friction, hostility, or contradiction, the global trading system has tended to try to eliminate or at least mitigate such internal tension wherever possible. From a deontological perspective, linkage or "trade and . . ." phenomena should be addressed effectively in order to maintain a healthy global trading system.

Given the normative significance of the linkage phenomenon for the future of international trade, it comes as no surprise that international law scholars have recently attempted to diagnose and prescribe solutions from a variety of analytical perspectives. Yet despite the richness and creativity of this growing body of literature, the existing works still leave much to be desired. For instance, however ambitious they may be, many are too theoretical or hypothetical, leaving their practical or pragmatic value in doubt.[5] A more serious problem lies in their failure or inadequate devotion to analyze the *telos* of the global trading system—that is, "what the global trading system is for" and "where it should be directed"—in the context of the linkage debate. Just as any meaningful prescription for institutional change must be rooted firmly in a clear understanding of the identity and purpose of that institution, so it is that any normative or institutional attempt to tackle linkage issues must be premised on the very rationale of the contemporary global trading system, for example, the coherent pursuit of trade *and* social values.[6] Otherwise, any approach to linkage, however ingenious it may appear on the surface, will ultimately prove to be vulnerable to attack from either side.

Focusing on the tension between free trade and social regulation, this Article argues that the WTO, in alliance with other international institutions, must develop a synergistic, nonentropic linkage within the constitutional structure of the global trading system. In the analysis set forth below, considerable emphasis is placed on the concept of a "trade constitution." This is because any practical prescriptions for achieving the desired synergy must necessarily flow from an accurate understanding of the capabilities and constraints of legal and political realities inherent to a broad multisphere trading system composed of Member states, the WTO, and other international organizations. In each context, the development of a synergistic solution will require us to select, depending upon institutional feasibility, from a variety of institutional options reflecting various degrees of linkage. For example, the WTO jurisprudence on trade and the environment has a different meaning, and makes a different contribution to a synergistic linkage between free trade and

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5 See Sections II–III of this Article for an extended discussion of this issue.

6 See Sections III–IV.

environmental protection, than do discussions and recommendations under the WTO Committee on Trade and the Environment. This pragmatic multifaceted approach will eventually form the basis of a holistic vision of the global trading system.

In the discussion that follows, Section I begins by exploring the genesis of linkage. Although its relative emphasis may be a recent development, linkage is not itself a new phenomenon, but a long-contemplated topic in the history of international trade. Section II surveys and categorizes the contemporary linkage debate from three aspects: motivation (*why* to link), desirability (*whether* to link), and issue areas (*what* to link). It then critiques the existing literature, arguing that representative works are either too hypothetical, unempirical, or narrowly focused on particular regulatory topics. Against the backdrop of this critique, Section III shifts the focus of the linkage debate to the tension between free trade and social regulation. Based on the view that this tension could, if left unaddressed, ultimately lead to an entropic disaster of either trade failure or regulatory failure, Section IV proposes a synergistic understanding of competing values that emphasizes, and is consistent with, the WTO's integrationist *telos*. Based on this synergistic vision, and within the bounds of institutional feasibility, Section IV explores a multifaceted list of options, the implications of which extend well beyond the narrow terrain of WTO activities. These options include jurisprudence, harmonization, surveillance, international standards and government networks, and interinstitutional cooperation. In a brief conclusion, I argue that the proper management of linkage will enhance the legitimacy of the global trading system as a whole.

I. THE GENESIS OF LINKAGE

The history of linkage dates back to the dawn of the modern global trading system. After the end of World War II, the Allies, at the behest of the US, came up with an ambitious blueprint for a postwar international economic order. This project, commonly known as the "Bretton Woods system,"[7] comprised three main pillars: "international trade" under the auspices of an International Trade Organization ("ITO"), "international monetary and financial matters" under the auspices of the International Monetary Fund ("IMF"), and "international development" under the auspices of the International Bank for Reconstruction and Development. Initially, the operational sphere of the ITO was very broad, addressing a number of important social issues such as labor and competition

[7] Bretton Woods is a small resort town in New Hampshire that hosted the epic meetings at which the broad outlines of a postwar international economic order were conceived.

policy that lay outside the scope of international trade per se.[8] In this initial linkage between trade and nontrade, the inclusion of social concerns must be understood in the context of the bitter social upheaval that accompanied the Great Depression and scattered the seeds of World War II.[9]

Yet this grand vision never materialized, mainly because the US administration at the time failed to secure congressional approval for the creation of the ITO. Interestingly, it was the inclusion of such subjects as labor and unemployment that undermined congressional support for the ITO. The Republican-dominated Congress was resistant to the idea that the Executive Branch should play such a comprehensive role in the international arena without the traditional checks and balances. Following the official demise of the ITO and a number of intermittent efforts to revive it, the grand enterprise was reduced to GATT. Originally conceived as one of many chapters of the ITO Charter, GATT took the form of an executive agreement with the Protocol of Provisional Application consisting of little more than derogations and exemptions. Nonetheless, even in this minimalist approach, a certain link between trade and social regulation could be found. Whereas GATT Articles I and III enshrined bedrock free trade principles such as Most-Favored Nation and National Treatment, Article XX (General Exceptions) responded to a variety of social concerns, such as protection of the environment and human health, and provided that they could, under certain circumstances, override the free trade obligations set forth in other provisions. Although a detailed discussion of the historical development of the international trading system is beyond the scope of this Article, the foregoing summary should suffice to illustrate that linkage is not a new issue per se.[10] On the other hand, the phenomenon of linkage has recently begun to receive an unprecedented degree of scholarly attention for reasons that will be discussed in the following section.

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8 See John H. Jackson, *World Trade and the Law of GATT* (Bobbs-Merrill 1969).

9 For a general discussion, see John Gerard Ruggie, *International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order*, 36 Intl Org 379 (1982). See also Anne-Marie Burley, *Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State*, in John Gerard Ruggie, ed, *Multilateralism Matters: The Theory and Praxis of an Institutional Form* 125 (Columbia 1993).

10 See Debra P. Steger, *Afterword: The "Trade and . . ." Conundrum—A Commentary*, 96 Am J Intl L 135 (2002). See also John H. Jackson, *The Perils Of Globalization and the World Trading System*, 24 Fordham Intl L J 371, 374 (2000):

> [S]ome people in the United States have argued that we should reverse course and take the WTO back to the time when it was responsible only for border measures, thereby limiting its ability to affect national regulation internally. . . . This is folly, because such time never existed. It was always recognized that there were measures in GATT that would have effects behind the border.

II. THE LINKAGE NARRATIVES: CURRENT DEBATES

A. CATEGORIZATION

The recent academic debate surrounding the linkage issue has produced a voluminous and expanding literature. Containing as it does many useful insights and contributions, a careful review of this literature is a necessary prerequisite to the task of diagnosing problems and prescribing solutions to the linkage issue. A detailed and systematic review of such a rich and variegated body of work, however, would require far more space than a brief article permits.[11] Therefore, the focus of the following critique of this literature is restricted to three major concerns: motivation (*why* to link), desirability (*whether* to link), and issue areas (*what* to link). Importantly, these three aspects of linkage are inseparably connected to one another. For example, the "desirability" of linkage tends to influence its "motivation." Those who advocate the close linkage of human rights to trade may hold a great incentive in strategizing their position in the negotiation settings.[12] For another example, "issue areas" are naturally revealed in the course of analyzing the "desirability" of linkage. Those who denounce the linkage of human rights to trade as yet another manifestation of protectionism would naturally strive to exclude this area from the normative reach of international trade.

B. VARIOUS ASPECTS OF LINKAGE

1. Motivation (Why to Link)

Some scholars view linkage not only as a natural phenomenon, driven by economic interdependency, but also as a purposeful enterprise. For instance, Frieder Roessler argues that linkage proposals, such as "green[ing]" the WTO or "tak[ing] up" labor rights, aim to "change domestic policies in these [issue] areas" via trade restrictions.[13] He suggests four motivations behind these proposals: "offset[ing] differences between domestic policies," "eliminat[ing]

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11 For another attempt to categorize the linkage literature, see Jeffrey L. Dunoff, *"Trade and": Recent Developments in Trade Policy and Scholarship—And Their Surprising Political Implications*, 17 Nw J Intl L & Bus 759, 760–761 (1996–97) (identifying three different approaches to linkage: "traditional," "critical," and "interdisciplinary").

12 See Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 Am U J Intl L & Poly 1, 34 (1996) (proposing the creation of a side agreement as a "human rights arm" under the WTO system to enforce human rights via trade sanctions).

13 Frieder Roessler, *Diverging Domestic Policies and Multilateral Trade Integration*, in Jagdish Bhagwati and Robert E. Hudec, eds, *Fair Trade and Harmonization: Prerequisites for Free Trade? Vol 2: Legal Analysis* 21, 36 (MIT 1996).

differences between domestic policies," "domestic bargaining across issue areas," and "international [political] bargaining across issue areas."[14] He then criticizes these motivations by arguing that a tariff or subsidy can be a better tool to offset such differences, that positive harmonization to eliminate such differences is hard to achieve under the WTO, that trade restrictions should not be employed to support "domestic political coalitions" among interest groups, and that linkages beyond manageably related issue areas cannot be stably maintained.[15]

From yet another purposeful standpoint, certain subject matters or issue areas can be exchanged and bargained for in negotiation settings. For instance, in the Uruguay Round negotiation, developed countries successfully included new issues such as intellectual property rights and services in the WTO system in return for acceptance of developing countries' perennial wish lists, including a phase-out of textile quotas.[16] David Leebron depicts this strong "reciprocal" type of linkage as "strategic linkage"[17] or "issue barter."[18] In a similar tone, José Alvarez describes the "nesting" of various subjects within the WTO.[19] Yet scholars like John Jackson challenge this type of linkage on the ground that reciprocity, unlike traditional tariff negotiation, does not address the "non-tariff" regulatory barriers that most linkage issues involve.[20] It would be fair to say that such linkage bargaining does not enjoy a normative justification, though it can certainly be translated into a kind of political bargaining "game."[21] Worse, if such bargaining is conducted in a disproportionate manner that provides benefits to rich countries at the expense of poor countries, it becomes tantamount to the "launder[ing]" of unilateral pressures by rich and powerful (Western) countries.[22] As Alvarez pointedly observes, the result may decidedly seem to be a form of "neoimperialism" to those in poorer countries.[23]

Attempts at laundering or the strategic linkage of certain issue areas espoused by developed countries and the northern nongovernmental organizations ("NGOs"), such as human rights or labor standards, are often

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14 Id at 36–37.

15 Id at 51–52.

16 José E. Alvarez, *The WTO as Linkage Machine*, 96 Am J Intl L 146, 147 (2002).

17 David W. Leebron, *Linkages*, 96 Am J Intl L 5, 12 (2002).

18 Id at 13.

19 Alvarez, 96 Am J Intl L at 147 (cited in note 16)

20 John H. Jackson, *Afterword: The Linkage Problem—Comments on Five Texts*, 96 Am J Intl L 118, 121 (2002).

21 See Duncan Snidal, *The Game Theory of International Politics*, 38 World Pol 25, 45 (1985).

22 Alvarez, 96 Am J Intl L at 148 (cited in note 16)

23 Id at 152.

characterized by a moralistic streak. Moralism is invoked to justify the use of the WTO's *teeth*—in other words, sanctions—in the event of violations of these norms. However, many developing countries have alleged that the reality behind such rhetoric, obscured by the moral high ground, amounts to little more than disguised protectionism. Following this line of argument, Jagdish Bhagwati observes that forced harmonization toward higher social standards often originates from "commercial" considerations. That is, the phenomenon is driven not by altruistic concern for the welfare of people living in developing countries but by the complaints of producers in rich countries that a lower regulatory burden on poor country exporters is "unfair."[24] The conflict between these contrasting positions ultimately raises the issue of the "desirability" of linkage, which is discussed in the following section.

2. Desirability (Whether to Link)

The demand for linkage often stems from a desire to capitalize on certain institutional benefits of the WTO, such as its enforcement mechanism, in addressing nontrade issues, such as labor standards and human rights, when national regulatory efforts fail to satisfy certain domestic constituencies. In this regard, the WTO has certainly become a popular "magnet" for social policies,[25] "pull[ing] many international lawyers towards international adjudication as the primary method for linkage."[26] Yet as Leebron points out, this "regime borrowing" is only a "second-best solution" since it falls short of improving an unsatisfactory linked regime independently.[27] In the same context, Alvarez warns against the linkage of human rights and trade on the ground that international human rights law is porous and incomplete, providing, for example, no universal consensus on the content of material obligations.[28] From a different perspective, Jeffrey Dunoff argues that the "incorporation of other bodies of international law" into the WTO system may unduly increase the legalization of those other bodies when such a development is not proper.[29]

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24 Jagdish Bhagwati, *Introduction*, in Jagdish Bhagwati and Robert E. Hudec, eds, *Fair Trade and Harmonization: Prerequisites for Free Trade? Vol 1: Economic Analysis* 1, 5 (MIT 1996).

25 Steve Charnovitz, *Triangulating the World Trade Organization*, 96 Am J Intl L 28, 29 (2002); Sylvia Ostry, *The WTO and International Governance*, in Klaus Günter Deutsch and Bernhard Speyer, eds, *The World Trade Organization Millennium Round: Freer Trade in the Twenty-First Century* 285, 290, 293 (Routledge 2001).

26 José E. Alvarez, *How* Not *To Link: Institutional Conundrums of an Expanded Trade Regime*, 7 Widener L Symp J 1, 15 (2001).

27 Leebron, 96 Am J Intl L at 27 (cited in note 17).

28 Alvarez, 7 Widener L Symp J at 6 (cited in note 26).

29 Jeffrey L. Dunoff, *The WTO in Transition: Of Constituents, Competence and Coherence*, 33 Geo Wash Intl L Rev 979, 1012 (2001).

Many other scholars, including economists and legal scholars alike, accept this negative point of view on linkage for various reasons. Jim Rollo and Alan Winters observe that enforcing higher labor and environmental standards via trade sanctions will result in not only the maladministration of those standards but also the loss of the traditional economic benefits of trade liberalization.[30] Frieder Roessler sides with this view by maintaining that linkage will fail to achieve both trade liberalization and regulatory objectives of linked subjects.[31] At a deeper level, Robert Stern trenchantly observes that the best way to achieve higher labor standards in developing countries is to open the markets of developed countries and encourage the economic development of developing countries.[32] Along similar lines, Gregory Shaffer offers the insight that such linkage efforts will eventually fail in the absence of material financial assistance to poor countries to help the latter meet the higher regulatory standards demanded by rich countries.[33]

In parallel with the critical views described in the preceding paragraph, most developing countries strongly reject the idea of linkage, mainly due to the fear of protectionism.[34] This allergic reaction by developing countries to any attempt to link nontrade regulatory issues to trade is in part attributable to the fact that the Uruguay Round has been implemented in a "strikingly asymmetrical manner" to the detriment of developing countries.[35] For instance, developed countries have done little to phase out quotas on textiles and clothing as mandated by the Agreement on Textiles and Clothing, while increasingly pressuring developing countries to implement the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs").[36]

Nonetheless, some scholars have highlighted the benign effects that linkage may deliver under certain circumstances. Here, one finds a varying degree of intensity of such linkage along a wide continuum of perspectives. A modest

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30 Jim Rollo and L. Alan Winters, *Subsidiarity and Governance Challenges for the WTO: Environmental and Labor Standards*, in Bernard Hoekman and Will Martin, eds, *Developing Countries and the WTO: A Pro-Active Agenda* 185, 198–99 (Blackwell 2001).

31 See Frieder Roessler, *Domestic Policy Objectives and the Multilateral Trade Order: Lessons from the Past*, 19 U Pa J Intl Econ L 513, 514 (1998).

32 Robert M. Stern, *Labor Standards and Trade*, in Marco Bronckers and Reinhard Quick, eds, *New Directions in International Economic Law: Essays in Honor of John H. Jackson* 425, 437 (Kluwer 2000).

33 Gregory Shaffer, *WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's Future*, 24 Fordham Intl L J 608, 647–48 (2000).

34 For a well-documented explanation of developing countries' concern in this issue, see Jose M. Salazar-Xirinachs, *The Trade-Labor Nexus: Developing Countries' Perspectives*, 3 J Intl Econ L 377 (2000).

35 Dunoff, 33 Geo Wash Intl L Rev at 981 (cited in note 29).

36 Id.

approach tends to espouse coexistence of trade and human rights obligations and acknowledge the need to sensitize the WTO in favor of human rights protection. Gabrielle Marceau argues that a good faith interpretation of the WTO treaties should take into account all relevant international law obligations including human rights, and that there exists a "soft presumption" against conflicts between trade and human rights obligations.[37] However, she opposes the idea of enforcing human rights obligations through the WTO dispute settlement mechanism on the grounds of the specificity of WTO rights and obligations, as well as the "limited jurisdiction" of the WTO panels and the Appellate Body.[38]

A more proactive approach endeavors to integrate certain core elements of human rights obligations within the domain of WTO norms. Sandra Polaski, for example, observes that developing countries, if they adopt certain minimum workers' rights such as the "right to organize unions and bargain over wages," can effectively alleviate their poverty and income inequality while improving their market access to those developed countries that condition market access upon compliance with minimum labor standards.[39] In a similar vein, Virginia Leary proposes a multilateral approach to the incorporation of social clauses, for example, fundamental workers' rights or minimum international labor standards, into the WTO. Leary's approach would involve entrusting the International Labor Organization ("ILO") with major competences covering the interpretation of fundamental or minimum international labor standards, and possible dispute resolution through "fact finding" and "moral persuasion."[40]

At the other end of the spectrum, a radical approach attempts to "constitutionalize" international trade law in the name of human rights. Ernst-Ulrich Petersmann identifies certain human rights functions in WTO rules, such as the nondiscrimination principle, and then constitutionalizes them in the broader terrain of "Global Integration Law."[41] Working from his unique understanding of EC integration law, Petersmann envisions a "worldwide integration law" that empowers WTO citizens to retain and exercise their

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37 Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 Eur J Intl L 753, 805 (2002).

38 Id at 767.

39 Sandra Polaski, *Trade and Labor Standards: A Strategy for Developing Countries* 4 (2003), available online at <http://www.ceip.org/files/Publications/Polaski_Trade.asp?from=pubdate> (visited Nov 10, 2004).

40 Virginia A. Leary, *Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)*, in Bhagwati and Hudec, eds, 2 *Fair Trade and Harmonization* 177, 223 (cited in note 13).

41 Ernst-Ulrich Petersmann, *Time for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration Law for Global Integration Law* 34–44 (2002) (Jean Monnet Working Paper No 7/01), available online at <http://www.jeanmonnetprogram.org/papers/02/021201.html> (visited Nov 10, 2004).

economic human rights such as freedom to trade, which are indivisible from other civil and political human rights, both in domestic and international arenas.[42] Furthermore, Petersmann argues for "express references" to human rights protection in WTO Ministerial Declarations or WTO jurisprudence in order to "enhance a more coherent constitutional discourse and more general awa reness of the complementary functions of human rights and of global integration law."[43] His approach has provoked significant criticism from many sides. For instance, Philip Alston observes that:

> this process of human rights-based (or more accurately human rights justified) 'constitutionalization' of the WTO is a highly contentious one. While it is true that some human rights, and many labour rights, proponents would like to see a significant role for the Organization in these respects, . . . they certainly do not see it as an Organization which is *designed*, structured, or suitable to operate in the way that one with major human rights responsibilities would. The Agreement Establishing the WTO is not a constitutional instrument in the sense of constituting a political or social community, and its mandate and objectives are narrowly focused around the goal of 'expanding the production of and trade in goods and services.'[44]

In sum, there is as yet no academic consensus on the desirability of linkage. With respect to human rights, in particular, the issue remains open to further debate and controversy.

3. Issue Areas (What to Link)

Inseparable from the foregoing discussions of "why to link" and "whether to link" is the question of "what to link." Inevitably, discussions surrounding the former two aspects of linkage are framed in terms of particular subject areas, such as labor or the environment, on a selective basis. Therefore, one should always bear in mind this interrelationship among three aspects of linkage when reviewing the literature on linkage, especially those studies that directly address the question of "what to link."

One detects a wide spectrum of opinion in the literature dealing with linkage in light of the WTO's accommodating stance on various issue areas. Making a bold case for a World Economic Organization ("WEO"), Marco Bronckers rejects the "mono-culture" view of the WTO while promoting a

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42 Id at 13, 30.

43 Id at 44.

44 Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann* 30 (2002) (Jean Monnet Working Paper No 12/02), available online at <http://www.jeanmonnetprogram.org/papers/02/021201-02.html> (visited Nov 10, 2004) (emphasis added). See also Robert Howse, *Human Rights in the WTO: Whose Rights, What Humanity?: Comment on Petersmann* (2002) (Jean Monnet Working Paper No 12/02), available online at <http://www.jeanmonnetprogram.org/papers/02/021201-01.html> (visited Nov 10, 2004).

much broader concept of its potential.[45] Working from the philosophical premise that the WTO could embrace other societal values, such as labor and environmental protection,[46] Bronckers proposes a number of institutional reforms aimed at achieving "[i]nternal coexistence" between the WTO and side agreements such as the General Agreement on Trade Services ("GATS") and TRIPs as well as "[e]xternal co-operation" with other institutional organizations such as the World Intellectual Property Organization ("WIPO") and ILO for the purpose of enabling the WTO to effectively address such societal values.[47]

Other scholars take a more selective approach. Focusing on market access issues, Kyle Bagwell, Petros Mavroidis, and Robert Staiger advocate broadening the linkage horizon only to the extent that it includes those regulatory issues that address "pecuniary externalities," such as "race-to-the bottom" and "regulatory-chill concerns."[48] From a more theoretical and analytical perspective, some scholars attempt to establish criteria for determining which issue areas should be brought within the WTO's domain through linkage. Philip Nichols, for example, suggests four attributes of a successful candidate for linkage: first, the issue lies "squarely within the legal competency" of the WTO; second, "the issue is significant"; third, the WTO is "capable of enforcing any guidelines it issues concerning the issue; and fourth, that the issue requires international coordination, and that the [WTO] will provide the optimal coordination."[49] Applying this checklist to the issue of "transnational bribery," Nichols contends that the WTO should disseminate guidelines for curbing it.[50] Along similar lines, Steve Charnovitz examines competing ideas and various assumptions about the rationale of the WTO in the process of formulating a set of criteria ("frames") for determining the proper content of the WTO.[51] Out of three different categories ("state-to-state relations," "domestic politics," and "international organization"), Charnovitz introduces eight possible "frames" for deciding which issues should properly be considered within the domain of the WTO. In this scheme, the eight "frames" are divided into those dealing with state-to-state relations ("Cooperative Openness," "Harmonization," "Fairness," and "Risk Reduction"), those dealing with domestic politics ("Self-Restraint" and

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45 See Marco C.E.J. Bronckers, *More Power to the WTO?*, 4 J Intl Econ L 41, 44 (2001).

46 Id at 53–56.

47 Id at 46, 49.

48 Kyle Bagwell, Petros C. Mavroidis, and Robert W. Staiger, *It's a Question of Market Access*, 96 Am J Intl L 56, 56–57 (2002).

49 Philip M. Nichols, *Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority*, 28 NYU J Intl L & Pol 711, 714 (1996).

50 Id.

51 Charnovitz, 96 Am J Intl L at 29–30 (cited in note 25).

"Coalition Building"), and those dealing with international organization ("Trade Functionalism" and "Comparative Institutionalism").[52]

Finally, a word of caution may be in order for the sake of clarification. The incorporation of certain areas, such as "services" and "intellectual property rights," into the WTO system has often been misconstrued as involving examples of linkage, as can be seen in the use of phrases such as "trade and services" or "trade and intellectual property rights." However, these subject areas constitute "trade" areas themselves and should be approached as "trade in services" and "trade in intellectual property rights," rather than as examples of linkage. At the same time, it should be understood that independent linkage problems can and do occur in these areas, for example in the case of "trade and environment" within the context of GATS.

C. CRITIQUE

This rich literature on linkage has made a major contribution to identifying this important problem and developing possible solutions. Yet many studies approach the issue from a "top-down" perspective and consequently fail to address the normative and institutional realities of the current global trading system.[53] As a result, insufficient attention is paid to microinstitutions that could be mobilized to address linkage issues. Similarly, normative obstacles to the realization of the institutional visions set forth in such studies are given short shrift. While these works may offer significant merits in terms of theorizing and conceptualizing the linkage issue, they are generally deficient in the area of practical advice for policymakers and trade negotiators. In this regard, John Jackson, Jagdish Bhagwati, and Debra Steger have all criticized such studies as lacking empirical, policy-oriented, and development-oriented perspectives.[54]

At the same time, a narrow focus on a particular issue area should not be confused with the kind of empirical, practical perspectives that scholars like Jackson, Baghwati, and Steger would seem to advocate. To be sure, most debates on linkage focus on particular issues, such as labor, environment, or human rights. Perhaps, as Robert Hudec observes, "each author's particular contribution inevitably reflects that authors' professional perspectives."[55]

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52 Id at 36–54.

53 See Leebron, 96 Am J Intl L at 5 (cited in note 17); Charnovitz, 96 Am J Intl L at 28 (cited in note 25); Philip M. Nichols, *Forgotten Linkages—Historical Institutionalism and Sociological Institutionalism and Analysis of the World Trade Organization*, 19 U Pa J Intl Econ L 461 (1998).

54 Jackson, 96 Am J Intl L at 118–19 (cited in note 20); Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96 Am J Intl L 126 (2002); Steger, 96 Am J Intl L at 135 (cited in note 10).

55 Robert E. Hudec, *Introduction to the Legal Studies*, in Bhagwati and Hudec, eds, 2 *Fair Trade and Harmonization* 1, 14 (cited in note 13).

Although this tendency certainly enriches the debate by adding elements of specialization and professionalization, it also hinders the development of a coherent and consistent set of criteria capable of guiding the discussion on issues of linkage in productive directions. Such scattered narratives on linkage eventually fail to offer a more genuine understanding of the policy challenges lurking behind linkage debates. That is, they fail to explain the tension between trade and nontrade values, as well as its constitutional and evolutionary nature within the context of the current global trading community.[56] Yet a genuine understanding of these aspects of linkage would provide academics and the general public alike with a much clearer comprehension of the linkage phenomenon as a whole. In the absence of such general, policy-based understanding, it is difficult to explain why certain issues are easier to address than others under current circumstances. Like in the old saying, it is difficult to see the forest when one is preoccupied with individual trees.

Put differently, the intensive focus on particular regulatory subjects tends to push the studies in question toward increasingly extreme points on the ideological spectrum between laissez-faire and *dirigiste* economies. Free tradists tend to oppose the idea of linkage itself, fearing an inundation of regulatory barriers. By contrast, domestic regulators and certain NGOs tend to advocate linkage, desiring to capitalize on the high-caliber WTO machinery to further their particular regulatory visions. The uncompromising nature of the conventional linkage narratives thus tends to thwart the development of an eclectic matrix of solutions that would be more feasible in reality. Critically, linkage is always a matter of *degree*. The intensity of linkage need not necessarily be strong, as manifested through trade sanctions, but could be modest, as observed in various WTO Committees, such as the Committee on Trade and Environment,[57] which engage mainly in research and the exchange of information.

In theory, a variety of positions could be contrived in this wide spectrum to effectively reconcile the tension between trade and specific nontrade social issues. Yet much of the literature proposes solutions in a binary way as a question of bundled competence. That is, they ask whether the WTO can and should address labor or environmental issues in their entirety. Whatever their merits, binary solutions interfere with the development of more subtle methodologies. One such methodology explored in greater detail below involves

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56 For general discussion, see Sungjoon Cho, *Free Markets and Social Regulation: A Reform Agenda of the Global Trading System* 11–15 (Kluwer 2003).

57 See World Trade Organization, *Work in the Committee on Trade and Environment*, available online at <http://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm> (visited Nov 10, 2004).

approaching the WTO's institutional apparatus from a functional perspective in which the General Council, the Appellate Body, and the Committee on Trade and Environment are each examined in terms of their potential contributions to resolving the linkage dilemma.

In sum, to understand the true realities underlying the linkage phenomenon, we should move in a disciplined manner from posing appropriate questions to exploring a feasible set of solutions in response to those questions. In particular, it is crucial to recast the linkage question in terms of a tension between trade and nontrade social values and to contemplate solutions not only in terms of *what* to link but more importantly in terms of *how* to link. The next two sections will address these challenges in turn.

III. THE TRUE NATURE OF LINKAGE: TENSION BETWEEN FREE TRADE AND SOCIAL REGULATION

A. LINKAGE AS A SOURCE OF TENSION

As discussed above, the real question underlying all linkage issues—be they trade and health, trade and labor, trade and environment, or trade and human rights—is the tension between free markets and social regulation. A hypothetical case may illustrate this tension. Consider the following scenario.

Currently, even a small Mexican toy company can easily gain access to French consumers via e-commerce. Suppose, however, that the EU suddenly launches a new directive to ban the importation of products containing an allegedly toxic substance, which the small Mexican toy company happens to use. Suppose further that the substance in question is legal under both the Mexican regulatory regime and the North American Free Trade Agreement ("NAFTA") because no clear scientific evidence has been adduced to prove its potential harm to children. In this scenario, the global trading system would be caught in a dilemma. First, if the European ban is allowed to stand, not only Mexican toy companies, but also most North American toy factories, may lose access to the European markets. This is a trade failure. On the other hand, to strike the ban in the name of free trade would force citizens of European countries to endure fear and anxiety over their children's health despite the fact that the ban was not intended to protect certain European industries. Therefore, this is a regulatory failure. The tension between trade and regulatory failure, which leads to many such dilemmas, lies at the center of all linkage issues.

B. REGULATORY GRIEVANCE: REGULATORY FAILURE

As indicated by their respective appellations, both the GATT 1947 (General Agreement on Tariffs and *Trade*) and the new WTO (World *Trade* Organization) have located their primary institutional identity in the disposition

of trade issues. Thus, the priority of both institutions undoubtedly lies in the elimination of tariff and nontariff barriers and the improvement of market access. This is true despite the fact that they have taken into account, in various ways, social issues inevitably linked to international trade. The most conspicuous medium through which to address the subject of linkage can be found in the textual relationship between the General Obligations that represent traditional trade values, such as GATT Articles I (Most-Favored Nation) and III (National Treatment), and the General Exceptions that represent certain social values, such as Article XX. Yet the intensity of such linkage seems rather weak. In other words, an inherent pro-trade bias, which is evidenced by a dichotomy between general obligations and exceptions, tends to prevent social values from prevailing over trade values in practice. Social regulations, such as health and safety measures, are investigated at an inferior stage as *exceptions* only after those measures turn out to be *violations* of general obligations.

Evidence of this pro-trade bias abounds. First, most social regulations are easily struck down as violations of the National Treatment obligation because the regulatory distinction that these regulations create tends inevitably to discriminate between "like" domestic and foreign products. For example, if the EU prohibits all production, distribution and marketing of genetically modified ("GM") food and accordingly bans foreign imports of GM soybeans, the EU measure may be found to violate GATT Article III on the theory that it discriminates between domestic nonGM soybeans and foreign GM soybeans despite their similar physical characteristics as soybeans. Here, one might argue that the existence of a different production methodology based on regulatory compliance should result in a finding of dissimilarity, or "unlikeness," to the EU nonGM soybeans. However, the GATT/WTO jurisprudence still maintains a *product-oriented* as opposed to *process-oriented* perspective on the National Treatment obligation. In other words, soybeans are soybeans no matter how they are manufactured or processed. To discriminate between these like products is a violation of the National Treatment obligation.[58] In sum, any disparate impact of a social regulation on domestic and foreign "like products," even impact due to legitimate regulatory distinction, results in a violation of GATT Article III.

Second, the scope of general obligations such as Article III is quite far-reaching. Article III:4 is applied to "*all laws, regulations and requirements affecting*

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[58] See GATT, Report of the Panel, *United States—Restrictions on Imports of Tuna* ¶¶ 5.9, 5.11–5.12, DS21/R–39 S/155 (Sept 3, 1991) (cited in note 2). The *Tuna* panel observed that even an equally indistinguishable measure, which applies both to imported and like domestic *products* in an origin-neutral way, should be *product*-related in order to be subject to the interpretive note and thus Article III:4.

their internal sale, offering for sale, purchase, transportation, distribution or use."[59] Such sweeping language as "all" and "affecting" tends to subject almost all social regulations to the discipline of Article III. The resulting situation is broadly analogous to that implicated by the affecting test in US Commerce Clause jurisprudence.[60]

Third, the general exception clause in Article XX, which represents various social regulations, such as protection of human health and environment, is incomplete. It is obsolete and deficient because it has not been amended since its creation in the 1940s. Indeed, certain social policy parameters articulated in the clause are even "anachronistically narrow," reflecting the regulatory sensitivities of the era in which it was drafted,[61] rather than those of the twenty-first century.

Fourth, based on the principle that exceptions should be interpreted "narrowly,"[62] GATT panels have traditionally maintained interpretive rigor when addressing exceptions. Moreover, in construing whether such exceptions are "necessary" to achieve putative domestic regulatory goals, panels have devised draconian tests such as the "least trade restrictive" test, according to which a defendant (regulating state) must demonstrate that the measure in question is the *least* trade restrictive alternative imaginable. This exacting interpretive stance has undoubtedly discouraged the social concerns embedded in such exceptions from actually being embraced through GATT jurisprudence. Not surprisingly, not a single GATT report rendered an affirmative ruling on exceptions.[63]

Nevertheless, such a sweeping pro-trade bias could not be sustained against the recent winds of change. First, domestic regulations have begun to receive greater attention. A great many domestic regulations have been issued in response to the popular demands of the welfare state and the novel risks associated with the creation of modern technology. Second, traditional trade policy measures—such as tariffs and quotas—have begun to vanish partly

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59 GATT 1947, art III:4 at 490 (cited in note 1).

60 *Gibbons v Ogden*, 22 US 1, 195 (1824). See Norman R. Williams, *Gibbons*, 79 NYU L Rev 1398, 1415 (2004).

61 I owe this insight to Professor Joseph H. H. Weiler. See also Mike Meier, *GATT, WTO, and the Environment: To What Extent Do GATT/WTO Rules Permit Member Nations to Protect the Environment When Doing So Adversely Affects Trade?*, 8 Colo J Intl Envir L & Poly 241, 281 (1997) (contending that the old GATT is a "relic of 1947, when economic development was the priority").

62 See G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 Duke L J 829, 906 n 349 (1995).

63 See Robert Howse, *Managing the Interface between International Trade Law and the Regulatory State: What Lessons Should (and Should Not) Be Drawn from the Jurisprudence of the United States Dormant Commerce Clause*, in Thomas Cottier, Petros C. Mavroidis and Patrick Blatter, eds, *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* 139, 142 (Michigan 2000).

because tariffs have already been lowered dramatically, and partly because governments have realized that the protection of certain domestic industries tends to be very costly, often harming the economic interests of their own citizens. Under these new circumstances, the original pro-trade bias, if left unchanged, would have failed to properly address the new status quo, thereby delegitimating the global trading system.

In this connection, numerous critics have raised their voices against the current inability of the WTO to tackle these contemporary problems. Philip Nichols, for example, criticizes the deficiency of GATT Article XX exceptions and warns that the failure to represent the "fundamental nature of societal values," such as labor, environment, and cultural identity, deprives the WTO of legitimacy.[64] Nichols goes on to argue for creating an exception, in addition to Article XX, to embrace such societal values.[65] From a slightly different perspective, Jeffrey Dunoff contends that WTO panels should not engage in any "trade and . . ." issues by exercising judicial caution because their decisions risk delegitimating the WTO as a whole due to its embedded pro-trade bias.[66] Some scholars view the WTO as an improper venue for the arbitration of social regulations because it lacks necessary resources such as institutional and technical expertise.[67] In a parallel line, Michael Trebilcock and Robert Howse argue that "substantial national political autonomy" should be ensured in the domestic regulatory process even if those regulations will affect trade flows.[68]

In sum, the ever increasing magnitude of social regulations in the modern welfare state tends to result in a perpetual cycle of angst and grievance in the face of the inherent pro-trade bias of the WTO and consequent incapacity of the WTO system to treat social regulations in an appropriate way. In the absence of serious efforts to incorporate due "sensitivity" to legitimate social regulatory concerns, the legitimacy of the WTO cannot be ensured.[69]

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64 See Philip M. Nichols, *Trade without Values*, 90 Nw U L Rev 658, 660 (1996).

65 Id.

66 See Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 Eur J Intl L 733, 754–57 (1999). But see Hannes L. Schloemann and Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 Am J Intl L 424, 451 (1999) (arguing that the WTO's ability to overcome a "protrade bias" through the incorporation of necessary policy elements will be critical to its constitutionalization).

67 See David A. Wirth, *International Trade Agreements: Vehicles for Regulatory Reform?*, 1997 U Chi Legal F 331; David A. Wirth, *The Role of Science in the Uruguay Round and NAFTA Trade Disciplines*, 27 Cornell Intl L J 817, 859 (1994) (maintaining that the WTO panels should be "highly deferential" to the scientific determinations of national regulatory agencies).

68 Michael J. Trebilcock and Robert Howse, *Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics*, 6 Eur J L & Econ 5, 28 (1998).

69 See Daniel C. Esty, *The World Trade Organization's Legitimacy Crisis*, 1 World Trade Rev 7, 19 (2002).

C. THE DEMISE OF FREE TRADE:[70] TRADE FAILURE

When confronting a legitimate regulatory concern, one might reasonably posit that domestic governments should be able to maintain their own regulatory autonomy and diversity. In other words, domestic regulations should be fully respected as long as they stand for legitimate objectives and are not protectionist. An intransigent adherence to one's own national standards, however, particularly when they are unique or idiosyncratic, often gives rise to a de facto form of protectionism. Where national standards have been established for a long time or were developed in an atmosphere of consultation with affected domestic companies, those companies are naturally at an advantage vis-à-vis competing foreign exporters in terms of compliance with those standards. Yet it is difficult to distinguish in practice between the unavoidable advantages accruing to domestic industries with respect to national standards and deliberately-designed, disguised forms of protectionism.[71]

Accordingly, unless regulatory diversity or regulatory heterogeneity is tolerated by importing countries[72] or endorsed between importing and exporting countries through relevant legal instruments such as mutual recognition, importing countries would ban the import of those products that fail to comply with their own national standards. Under such circumstances, regulatory

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70 For the purpose of this article, free trade can be defined as *nondiscrimination* including not only *antiprotectionism* but also a status without any unjustifiable disparate impact. David Driesen warns that the lack of a clear legal conceptualization of "free trade" can undermine the legitimacy of the global trading system, and identifies three different notions of free trade: "non-discrimination," "international non-coercion," and "principle of laissez-faire government." David M. Driesen, *What Is Free Trade?: The Real Issue Lurking behind the Trade and Environment Debate*, 41 Va J Intl L 279, 285 (2001). Driesen observes that because of the different nuances, ramifications, and "normative attractiveness" that these three notions of free trade deliver in different contexts, defining free trade seems to be a fluid task—a task akin to the "Rorschach" test. Id at 285.

71 See Jackson, 96 Am J Intl L at 125 (cited in note 20); WTO Agreement, Annex 1A, General Agreement on Trade in Services, art XVII, ¶ 1 n 10, in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* 325, 342 (cited in note 1) (stating that "inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers").

72 Bhagwati comprehensively surveyed the demands to reduce regulatory diversity among trading nations. Jagdish Bhagwati, *The Demands to Reduce Domestic Diversity among Trading Nations,* in Bhagwati and Hudec, eds, 1 *Fair Trade and Harmonization* at 9 (cited in note 24). From a philosophical viewpoint, he offered three explanations: "transborder obligations," "distributive justice," and "fairness." Id at 9–20. Structurally speaking, "diminished giant syndrome" and "globalization" are factors that he considers. Id at 20–23. From an economic viewpoint, he highlighted that most preeminent economists observe that mutual gains from trade can still occur without harmonization of social regulation. Id at 23–31. From a political viewpoint, he found such demands in the law of "constant protection" clad with the "unfair trade" argument which emerged after the decline of traditional protectionist devices such as tariffs and quotas. Id at 31–35.

diversity or regulatory heterogeneity is itself a source of trade barriers in the global dimension. Moreover, the trade-restrictive nature of domestic regulations tends only to intensify as national economies become more interdependent. To be sure, certain large multinational enterprises might be able to survive such regulatory heterogeneity by using economies of scale flowing from a vast global market share to implement multiple production lines. Yet most small and medium-sized enterprises cannot afford such luxuries. From the perspective of these smaller players, the above scenario eventuates a high degree of economic concentration and a corresponding massive income disparity on a global scale.

This situation becomes more vivid still if the exporters are developing countries and the importers are developed countries with higher regulatory standards. Developing countries suffer from these higher standards mainly because they lack the financial and technical capability to meet highly sophisticated standards. Under these circumstances, nothing is gained from saddling developing countries with rich country standards. Still, some may argue for "fair" trade or a "level playing field" from the perspective of domestic industries in rich countries that claim to be unfairly disadvantaged when forced to comply with domestic standards from which foreign competitors are exempt.[73] Similarly, some may warn against a theoretical "race to the bottom" or "social dumping" by which noncompliant products from developing countries trigger a downward competition for lower production costs among industries that eventually results in a deterioration of the general quality of regulatory protection.[74] Yet to this date no significant empirical evidence has been produced to prove the existence of such theoretical phenomena.[75]

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73 But see Jagdish Bhagwati, *A Stream of Windows: Unsettling Reflections on Trade, Immigration and Democracy* 247–68 (MIT 1998) (discussing why leveling the field is unfair in terms of comparative advantage).

74 See Philip M. Nichols, *GATT Doctrine*, Va J Intl L 379, 464 (1996) (observing that "[t]o the extent the World Trade Organization translates GATT doctrine into a rigidity that consistently exalts trade above all other societal values, it could seriously undermine the free trade regime's popular acceptance").

75 See, for example, John Douglas Wilson, *Capital Mobility and Environmental Standards: Is There a Theoretical Basis for a Race to the Bottom?*, in Bhagwati and Hudec, eds, 1 *Fair Trade and Harmonization* 393, 423 (cited in note 24) (observing that a "race" is not a representative word depicting behaviors of independent governments and that this race model fails to explain the absence of more direct means to attract foreign firms such as subsidies or lower tax rate on capital gains); Arik Levinson, *Environmental Regulations and Industrial Location: International and Domestic Evidence*, in Bhagwati and Hudec, eds, 1 *Fair Trade and Harmonization* 429, 453 (cited in note 24) (emphasizing the lack of economic evidence to support that "environmental regulations harm competit[ion]"). See also Bhagwati, 96 Am J Intl L at 130–31 (cited in note 54); Adrienne Héritier, Christoph Knill, and Susanne Mingers, *Ringing the Changes in Europe: Regulatory Competition and the Transformation of the State. Britain, France, Germany* 1 (Walter de Gruyter 1996) (finding that "European clean-air policy is the product of regulative contest between leading member states"); David Vogel, *Trading*

Moreover, under the principle of comparative advantage, producers in rich countries have a much easier time complying with higher regulatory standards than do their counterparts in poor countries since the former enjoy higher levels of technology. At the same time, a perennial grievance of companies in developed countries—cheap imports—is less a function of the relatively higher compliance costs borne by producers in rich countries than of the lower labor costs enjoyed by producers in poor countries. This, too, seems natural according to the principle of comparative advantage.[76] To resolve this dilemma, serious and sustained efforts to build the capacity of poor countries to effectively comply with higher social standards are required. This can be accomplished via financial and technical assistance from rich countries. In the absence of such intervention, regulatory unilateralism works to undermine free trade in the form of either further protectionism[77] or development failure.

D. BEYOND THE ENTROPIC DILEMMA

At first glance, the foregoing tension between regulatory grievances (regulatory failure) and free trade concerns (trade failure) inevitably poses a profound dilemma: if one value is promoted too forcefully, any resulting benefits are likely to come at the expense of the other value. Indeed, the conventional approach to linkage has been *negative*, as symbolized by the use of such terms as "clash" or "conflict."[78] This negative perspective often leads to a "dialogue of the deaf" framed in terms such as "[f]ree trade versus labor standards" or "growth versus the environment."[79] The predictable result is at best a zero-sum reconciliation in which trade and nontrade values cancel or

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Up: Consumer and Environmental Regulation in a Global Economy 6 (Harvard 1995) (discussing the so-called "California effect," which is an example of a "race to the top").

76 See David W. Leebron, *Lying Down with Procrustes: An Analysis of Harmonization Claims*, in Bhagwati and Hudec, eds, 1 *Fair Trade and Harmonization* 41, 71 (cited in note 24) (observing that "[d]ifferences in legal and policy regimes that result from differences in preferences, endowments, or technologies reflect differences in the optimal regime" and that "[a]ny claim of unfairness would seem fundamentally at odds with not only with the theory of comparative advantage, but also with a minimalist notion of sovereignty that allowed each nation to adopt policies that are best for it").

77 Regarding the so-called "green protectionism," see World Trade Organization, *Environment: History 1, Early Years: emerging environment debate in GATT/WTO*, available online at <http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm> (visited Nov 10, 2004).

78 See Cho, *Free Markets and Social Regulation* at 44–45 (cited in note 56) (discussing a dilemma of "dual crisis").

79 Renato Ruggiero, *A Shared Responsibility: Global Policy Coherence for Our Global Age, Address to the Conference on "Globalization as a Challenge for German Business; export opportunities for small and medium-sized companies in the environmental field* (Dec 9, 1997), available online at <http://www.wto.org/english/news_e/sprr_e/bonn_e.htm> (visited Nov 10, 2004).

offset each other under clashing or conflicting circumstances. Against the backdrop of expanding interdependency upon the contemporary international trade landscape, such zero-sum effects, if allowed to become widespread, will undermine the global trading system by greatly reducing the net value added.

It follows that the global trading community should take the more constructive step of adopting a *positive* perspective on linkage in order to transform international trade into a positive sum game. As the former WTO Director-General Renato Ruggiero maintains, economic growth powered by international trade leads to better social conditions.[80] On the other hand, regulatory improvement tends to boost international trade through the economy of standardization or better "market contestability."[81]

In this regard, the global trading system has come to require a new *telos* capable of transcending the narrow purpose of antiprotection while at the same time connoting a much broader ideal of "integration" that ensures that both trade values and social values are upheld in a coherent and synergetic, rather than competing fashion.[82] Reflecting this new teleology, the Preamble of the WTO Charter expresses the ideals of an "integrated, more viable and durable multilateral trading system" and "sustainable development,"[83] which certainly go beyond the narrow antiprotectionist motto that was embedded in the old GATT. In the same context, the Doha Ministerial Declaration recently reaffirmed the Members' commitment to the objective of "sustainable development" under which a dual goal of open markets and adequate social regulation must be "mutually supportive."[84]

Naturally, this new *telos* necessitates strengthening the free trade/social regulation linkage, which has hitherto been limited by the inherent pro-trade bias of the key structures and institutions, and mandates the development of more practical problem-solving attitudes in pursuit of the dual goals of free markets and desired social regulation. This daunting task must rely for its achievement not only on jurisprudence but also on institutional instruments including, but

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80 Renato Ruggiero, *Beyond the Multilateral Trading System, Address to the 20th Seminar on International Security, Politics and Economics Institut pour les Hautes Etudes Internationales* (Apr 12, 1999), available online at <http://www.wto.org/english/news_e/sprr_e/ih_e.htm> (visited Nov 10, 2004).

81 Compare Organization of Economic Cooperation and Development, *The International Contestability of Market–Economic Perspective: Issue Paper*, TD/TC(96)5 (1996), with Geza Feketekuty, *The Scope, Implication and Economic Rationale of a Competition-Oriented Approach to Future Multilateral Trade Negotiations*, in Organization of Economic Cooperation and Development, TD/TC(96)9, 2–4 (1996).

82 See Cho, *Free Markets and Social Regulation* at 13–14 (cited in note 56).

83 WTO Agreement, preamble, at 6 (cited in note 4).

84 World Trade Organization, *Ministerial Declaration: The Fourth WTO Ministerial Meeting* ¶ 6, WT/MIN(01)/DEC/1 (Nov 20, 2001).

not limited, to the WTO.[85] Inevitably, this process will involve a complicated mix of law, politics, and policies as well as the subtle allocation of powers exercised by different entities, including national governments and international institutions such as the WTO.[86] This "trade constitution,"[87] which is embedded in the very concept of linkage, also reveals a new horizon in the field of international trade: "distributional issues."[88] As seen in the experience of the EU, the effective implementation of a common social policy in a given polity, while minimizing any negative effect to trade, requires some kind of financial assistance mechanism, such as a "structural fund," to aid less developed members to equip themselves with higher regulatory standards.[89]

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85 But see Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?*, 49 Wash & Lee L Rev 1407, 1421–38, 1441–50 (1992) (arguing that scholars should first focus on conflicting *interests*, such as "economic efficiency," "sovereignty" and "political harmony," underlying the trade and environment linkage before contemplating any institutional solution, and presenting a set of legal doctrines balancing these interests, such as "non-discrimination," "proportionality," and "relatedness").

86 Jackson, 96 Am J Intl L at 118 (cited in note 20). Compare Joel P. Trachtman, *Institutional Linkage: Transcending "Trade and . . .",* 96 Am J Intl L 77, 80 (2002) (discussing "allocation of jurisdiction").

87 John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* 339 (MIT 2d ed 1997); John H. Jackson, *The World Trade Organization: Constitution and Jurisprudence* 101–04 (Royal Inst Intl Aff 1998); John H. Jackson, *Reflections on International Economic Law*, 17 U Pa J Intl Econ L 17, 25–28 (1996); John H. Jackson, *Perspectives on Regionalism in Trade Relations*, 27 L & Pol in Intl Bus 873 (1996). See also Antonio F. Perez, *WTO and U.N. Law: Institutional Comity in National Security*, 23 Yale J Intl L 301, 316–24 (1998) (discussing Professor Jackson's constitutional premise of international trade law). Compare Eleanor M. Fox, *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 Pac Rim L & Poly J 1, 32, 35 (1995) (submitting a "targeted constitutional approach" in the trade/competition linkage under which nations retain the rights to "formulate and interpret" their own anticompetition laws but are subject to a certain international dispute resolution system when disputes "cannot be resolved in national courts or by the nations themselves"); James Thuo Gathii, *Re-Characterizing the Social in the Constitutionalization of the WTO: A Preliminary Analysis*, 7 Widener L Symp J 137 (2001). Although Gathii succeeds to "characterize" nontrade, social values as coexisting with trade values, his "preliminary analysis" fails to deliver further details on how to achieve this coexistence. Id at 173. Furthermore, he makes a fatal flaw in his analysis by equating protectionism embedded in the antidumping mechanism or the voluntary export restraints with avenues through which social issues can be addressed. See id at 170–72. Safeguard measures are the only legitimate trade-restricting avenue to address, temporarily and exceptionally, any social instability (dislocation and bankruptcy) caused by free trade in an unforeseeable way. Otherwise, it is each government's job to cushion the impact of free trade using domestic, not trade, policies such as tax or adjustment programs.

88 See Dunoff, 33 Geo Wash Intl L Rev at 1008 (cited in note 29).

89 See William P. Alford, *Introduction: The North American Free Trade Agreement and the Need for Candor*, 34 Harv Intl L J 293, 297 (1993) (observing that "substantial transfer payments" from developed to developing countries are necessary for the latter to implement higher regulatory standards). Compare Frank J. Garcia, *Trade and Justice: Linking the Trade Linkage Debates*, 19 U Pa J Intl Econ L 391, 414–15 (1998) (observing, based on the premise that all linkage issues are "inescapably moral questions" since they are questions of "justice," that solutions to the linkage issues depend on the "allocation of social goods and social burdens").

Importantly, just as no constitution is static, this "trade constitution" is not limited in its operation by *a priori* restraints or predetermined competence limits of the type that would oblige the WTO to avoid engagement in certain issue areas.[90] In fact, the "boundaries" of international organizations have always been flexible.[91] This is especially so wherever one encounters an international organization with an evolving *telos*. Taken to an extreme, emphasis on flexibility could lead some to conclude that the mandate of the WTO should be expanded to cover such areas as labor and the environment, thereby institutionalizing an inseparable relationship between trade and social values.[92] Following this line of thought, some scholars argue for greater horizontality and seamlessness in rule design in international economic law.[93] Yet, the WTO is a *trade* organization, and it should reconcile and manage the tension between free markets and social regulations from the standpoint of a trade organization. Of course, this premise is by no means to maintain or revive the pro-trade bias in terms of reconciliation or management of the tension. Rather, it means that the WTO should contribute to the constructive harmonization of trade and social values without losing its institutional identity and capacity as a trade organization, while leaving adequate room for cooperation with other sector-specific international regulatory agencies such as the International Labor Organization ("ILO") and the United Nations Environmental Program ("UNEP").[94]

In sum, international trade law defines linkage as "trade and labor" or "trade and environment," not as "labor and trade" or "environment and trade," respectively.[95] International trade law cannot share the same basis with the

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90 Jackson, 96 Am J Intl L at 120–22 (cited in note 20).

91 Alvarez, 96 Am J Intl L at 149 (cited in note 16). Compare Peter M. Haas and Ernst B. Haas, *Learning to Learn: Some Thoughts on Improving International Governance of the Global Problematique*, in Ingvar Carlsson and Shridath Rampal, *Issues in Global Governance: Papers Written for the Commission on Global Governance* 295, 314 (Kluwer 1995) (introducing the concept of the "learning" international organization, which "redefine[s] [its] missions in light of new interdependencies"); Charnovitz, 96 Am J Intl L at 53 (cited in note 25).

92 See Garcia, 19 U Pa J Intl Econ L at 425 (cited in note 89) (discussing "Integrated View"); Gathii, 7 Widener L Symp J at 137–38 (cited in note 87); Bronckers, 4 J Intl Econ L at 53–56 (cited in note 45).

93 See Pierre Sauvé and Americo Beviglia Zampetti, *Subsidiarity Perspectives on the New Trade Agenda*, 3 J Intl Econ L 83, 104 (2000).

94 See Bronckers, 4 J Intl Econ L at 49–53 (cited in note 45) (discussing "external co-operation" between the WTO and specialized international regulatory agencies such as the ILO). Compare Georg Schwarzenberger, *The Frontiers of International Law* 306 (Stevens and Sons 1962) (insightfully observing that international cooperation in diverse economic and social issues tends to necessitate an "expansion in existing international institutions and the creation of new agencies").

95 But see Jeffrey L. Dunoff, *From Green to Global: Toward the Transformation of International Environmental Law*, 19 Harv Envtl L Rev 241, 281–88 (1995) (exploring various linkage issues from the standpoint of international environmental law).

UNEP or ILO even when the WTO addresses putative linkage issues. To ignore its own institutional identity would be politically fatal and practically ineffective. After all, the WTO is not, and should not try to become, a form of World Government of the sort that might arguably be in a better position to fully federalize linkage issues.

IV. TOWARD A SYNERGISTIC LINKAGE: A MULTIFACETED APPROACH

A. LINKAGE CONTINUUM

Any credible attempt to achieve a synergistic linkage from the standpoint of the WTO must proceed from the realization that the linkage phenomenon is in most cases a matter of *degree* and that the way in which it is addressed should accordingly be understood not as a binary choice but as a *spectrum* of options. As discussed above, an antinomian stance toward either extreme, in other words, free trade versus regulatory unilateralism, would continue to create unnecessary tensions out of linkage, instead of mitigating or eliminating them.

Linkage can be achieved in many different ways, as circumstances merit. For instance, although GM food has recently commanded enormous legal and political attention within the global trading system, this linkage of trade and human health (or the environment) can be handled from totally different perspectives with totally different results. As the US has recently sued the EU for the latter's highly controversial moratorium on the approval of GM food, this controversy may end up being adjudicated in the WTO dispute settlement system.[96] Alternatively, under a more constructive atmosphere a certain guideline as to administration and marketing of GM food could be issued to Members as a result of a joint effort by the Committee on Trade and Environment and the Committee on Sanitary and Phytosanitary Measures. Similarly, this issue could be discussed and deliberated in a functional and professional fashion under a surveillance mechanism such as the Trade Policy Review Mechanism ("TPRM").[97] Or, in a much bolder though as yet implausible move, the WTO Members could agree on a new side agreement concerning this issue in cooperation with the World Health Organization or the United Nation Environmental Program. In each scenario, one can perceive a wide spectrum of options yielding varying degrees of trade and environmental protection.

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[96] See Response of the United States to the Questions by the Panel Pertaining to the Request of the European Communities for a Preliminary Ruling, *European Communities–Measures Affecting the Approval and Marketing of Biotech Products*, WTO Doc No WT/DS291/23 (Mar 29, 2003).

[97] See WTO Agreement, Annex 3, Trade Policy Review Mechanism, in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* 434 (cited in note 1) (hereinafter TPRM).

Critically, a different matrix of legal, political, and institutional stakes is employed in each scenario, and it is this subtle matrix of interests that ultimately determines the final destiny of the linkage in each particular scenario.

Admittedly, political stakes rank very high in any linkage matrix.[98] Joel Trachtman, for example, regards the decision to link trade to other issues as essentially political.[99] According to this view, law or economics should play supplementary roles in demonstrating various possibilities and consequences that each linkage might bring.[100] In the final stage, individuals and states should decide the issue through a political process consisting of the assessment of different scenarios and the expression of competing preferences.[101] According to this view, linkage problems should ultimately be addressed through such legislative measures as treaties or agreements.[102] At the same time, however, many other tools and fora exist in the global trading system that are not necessarily political in themselves but are nonetheless capable of providing practical and functional solutions to linkage-related issues. For example, certain aspects of trade and environment linkage have been addressed via the GATT/WTO dispute settlement mechanism not in a political but in a (quasi-) *judicial* manner.[103] Or, a variety of epistemic committees and similar avenues under the auspices of international institutions could explore linkage issues in an apolitical and functional fashion, thereby providing policymakers whose everyday regulatory decisions are based on linkage considerations with opportunities for the exchange of information and professional deliberation.[104]

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98 See Steger, 96 Am J Intl L at 135 (cited in note 10); Robert Howse, *From Politics to Technocracy—And Back Again: The Fate of the Multilateral Trading Regime*, 96 Am J Intl L 94, 116–17 (2002); Charnovitz, 96 Am J Intl L at 30 (cited in note 25); Andrew T. Guzman, *Global Governance and the WTO*, 45 Harv Intl L J 303, 307–08 (2004); Chantal Thomas, *Should the World Trade Organization Incorporate Labor and Environmental Standards?*, 61 Wash & Lee L Rev 347, 388–91 (2004).

99 Trachtman, 96 Am J Intl L at 77 (cited in note 86).

100 Id.

101 Id.

102 See, for example, Daniel C. Esty, *Greening the GATT: Trade, Environment, and the Future* (Inst for Intl Econ 1994) (arguing for the establishment of a new international environmental organization); Dunoff, 19 Harv Envir L Rev at 257 (cited in note 95) (espousing such organization for different reasons). But see Gregory C. Shaffer, *The World Trade Organization under Challenge: Democracy and the Law and Politics and of the WTO's Treatment of Trade and Environment Matters*, 25 Harv Envir L Rev 1, 84–93 (2001) (viewing the creation of such organization as ineffective on the ground that it would still fail to address disparities between and within the US and the EU).

103 See GATT Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS21/R - 39 S/155 (Sept 3, 1991) (cited in note 2); World Trade Organization, Report of the Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc No WT/DS2/AB/R (Apr 29, 1996); World Trade Organization, Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc No WT/DS58/AB/R (Oct 12, 1998).

104 See Subsection IV.A.4 in this Article.

B. MULTIFACETED LIST OF OPTIONS

1. Jurisprudence

The well-developed dispute settlement mechanism that has been operating since the birth of the old GATT 1947 is one of the main engines for addressing linkages. As Daniel Farber and Robert Hudec observe, GATT can offer fairly "workable" solutions in reconciling the tension between trade and social concerns such as environmental protection by distinguishing "bona fide regulation" from "protectionism."[105] Panels and the Appellate Body have engaged in the adjudication of numerous cases at the intersection of trade and social regulations. Most of these cases involve various social regulations relating to health or environmental concerns that result in some type of incidental restriction on international trade. Therefore, the analysis of panels (or the Appellate Body) centers on the interpretation of general obligations that enshrine free trade, such as Articles I (Most-Favored Nation), III (National Treatment) and XI (Market Access), as well as exceptions that represent certain overriding social values, such as Article XX (General Exception).

Yet in the old GATT era, when a pro-trade bias was clearly evident, panels focused on the "content" of a given domestic regulation in their judicial review. This often resulted in a presumptive conclusion that the measure in question was not "necessary" or even rationally "related" to the attainment of the social values of the regulating state. This second-guessing or negation of legitimate policy objectives often infuriated domestic policymakers and thus diminished their perception of GATT's legitimacy. For instance, a panel struck down the Thai government's ban on the importation of foreign cigarettes despite its legitimate health concerns, which even the WHO supported, on the sole ground that a more trade-friendly solution *theoretically could have* been found.[106]

However, under the new WTO system the Appellate Body has directed its interpretive focus to the "manner" in which a given domestic regulation is applied, and not to the regulation's substance. In its jurisprudence, the Appellate Body has tried to scrutinize on a case-by-case basis whether a given domestic regulation was applied consistently and evenhandedly or whether it respected fundamental principles of law, rather than reinvestigating, on its own accord, whether the regulation's substance was necessary or related to the achievement

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105 Daniel A. Farber and Robert E. Hudec, *GATT Legal Restraints on Domestic Environmental Regulations*, in Bhagwati and Hudec, eds, 2 *Fair Trade and Harmonization* 59, 80–85 (cited in note 13).

106 GATT, Report of the Panel, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes* ¶¶ 52–53, 55–56, GATT BISD DS10/R–37S/200 (Nov 7, 1990). See David P. Fidler, *Neither Science Nor Shamans: Globalization of Markets and Health in the Developing World*, 7 Ind J Global Legal Studies 191, 200–01 (1999) (criticizing the *Thai Cigarette* panel report).

of the regulating state's social policy goals. In fact, Farber and Hudec predicted with brilliant insight that future debates on linkage should prioritize regulatory *processes* over substantive regulations themselves because a "clean doctrinal solution" tends to be hard to achieve in the face of sophisticated regulations positioned along a wide spectrum of legitimate and protectionist objectives.[107]

Thus, in *United States—Standards for Reformulated and Conventional Gasoline* ("*Gasoline*"), the Appellate Body upheld the legitimacy of the US environmental policy toward clean air, but condemned its lack of effort during the regulatory process to reduce administrative requirements that resulted in a heavier compliance burden for foreign refiners.[108] Likewise, in the famed *United States—Import Prohibition of Certain Shrimp and Shrimp Products* ("*Shrimp-Turtle*") case, the Appellate Body sympathized with the regulatory goals of US Section 609[109] (in other words, protection of endangered species such as sea turtles), but criticized flaws in its implementation process, such as the denial of due process, that ultimately hurt foreign shrimpers.[110] The result of this new test was to safeguard the Members' regulatory autonomy by providing ample regulatory leeway for domestic regulators. Under this new test, even if a measure turned out to be a violation, the outcome was not catastrophic but merely suspensive or provisional, demanding only a change of application, rather than repeal of the offending statute. When the US lost the *Shrimp-Turtle* case, for example, it was not forced to change its domestic statute, Section 609, but only its application.[111]

This invention of a new doctrinal test, which constitutes further evidence of the transformation of the *telos* of the global trading system,[112] is premised on the *chapeau* of Article XX. The text of the *chapeau* is vague, consisting of nonspecific terms such as "arbitrary or unjustifiable discrimination" and "disguised restriction." Under the old GATT, this preambular text attracted little attention, resulting in a minimal amount of case law that was limited to

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107 Farber and Hudec, *GATT Legal Restraints on Domestic Environmental Regulations* at 85 (cited in note 105).

108 World Trade Organization, Report of the Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline* 27, WTO Doc No WT/DS2/9 (May 20, 1996).

109 Pub L No 101-161, codified at 16 USC § 1537 (1994).

110 World Trade Organization, Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products* ¶ 181, WTO Doc No WT/DS58/AB/R (Oct 12, 1998) (cited in note 103).

111 USTR, *Press Release: WTO Appellate Body Found US Sea Turtle Law Meets WTO Criteria But Faults US Implementation* (Oct 12, 1998) (emphasizing that the US law (Section 609) had been left intact by the Report).

112 Cho, *Free Markets and Social Regulation* at 12–15 (cited in note 56).

expounding its lexicographical meaning.[113] Yet the Appellate Body, through its teleological creation of a new doctrinal test, managed to invest the text with new meaning. This judicial innovation holds significant implications for the linkage debate. Most importantly, its "process-oriented" hermeneutics results in the creation of a synergistic space in which both trade and social values can be simultaneously upheld.[114]

As significant as it may be from the perspective of linkage theory, the Appellate Body's teleological interpretation is applicable only when a particular domestic regulation falls within the rubric of the "exhaustive" list contained in Article XX. As mentioned above, this list is incomplete and even anachronistic. A number of significant modern regulatory concerns such as consumer protection, labor, or anticompetition do not appear on the list. Consequently, the question is whether panels or the Appellate Body should accept for review cases involving regulations not expressly covered by the GATT/WTO, such as those regarding labor and consumer protection. From a judicial standpoint, certain methods can be conceived whereby interventions in such cases can be justified.

The first method involves returning to Article III and *redeeming* legitimate social regulations before they are *justified* under Article XX. In other words, if a certain regulation is nonprotectionist and thus legitimate, it can be deemed consistent with Article III in the first instance. This approach, which is dubbed the "aim and effect" test,[115] was implicated in the recent debate on PPMs.[116] The

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113 Under the GATT, very few cases involved the *chapeau*. See General Agreement on Tariffs and Trade (Organization), *Guide to GATT Law and Practice: Analytical Index* 563–65 (Geneva 6th ed 1994).

114 McGinnis and Movsesian also advocate the use of "procedure-oriented" jurisprudence highlighting "transparency," "performance-orientation," and "consistency" but only to the extent that it strikes down covertly protectionist measures and eventually realizes a Madisonian vision of democracy. John O. McGinnis and Mark L. Movsesian, *The World Trade Constitution*, 114 Harv L Rev 511, 573–83 (2000). See also Deborah Z. Cass, *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 Eur J Intl L 39 (2001) (arguing that the WTO tribunal engages in "judicial constitutionalization" by generating in its jurisprudence "constitutional-type norms and structures").

115 See Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test*, 32 Intl Law 619 (1998). See also GATT, Report of the Panel, *United States—Taxes on Automobiles* ¶ 5.10, WTO Doc No DS31/R (Oct 11, 1994); GATT, Report of the Panel, *United States—Measures Affecting Alcoholic and Malt Beverage* ¶¶ 5.71–5.72, WTO Doc No DS23/R, GATT BISD (39S/206) (June 19, 1992); World Trade Organization, Report of the Appellate Body, *European Communities—Regime for the Importation, Sale and Distribution of Bananas* ¶ 216, WTO Doc No WT/DS27/AB/R (Sept 9, 1997) (ruling against the "aim and effect" test).

116 See, for example, Steve Charnovitz, *The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality*, 27 Yale J Intl L 59 (2002); Robert Howse and Donald Regan, *The Product/Process Distinction—An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, 11 Eur J Intl L 249 (2000);

term PPM, for "Processes and Production Method," stands for a variety of regulations concerning the way in which products are manufactured or processed.[117] Under conventional trade rules, most PPMs constitute *prima facie* violations of Article III because they discriminate between similar products on the basis of regulatory compliance. For example, a domestic regulation banning the importation of pelts from animals caught in leg-hold traps—which could be regarded as cruel—would constitute a violation of the National Treatment obligation because the ban discriminates between foreign leg-hold pelts and domestic non-leg-hold pelts.[118] Because the protection of animal welfare is not found in Article XX, such regulations cannot be justified under a strict reading of Article XX. Even if such a regulation were justified under Article XX, critics argue that such a justification doctrine would impose an "unwarranted legal burden" on the achievement of legitimate social values, since the regulation in question was justified only after being condemned as a violation of Article III. Therefore, such critics contend that regulatory distinctions grounded in legitimate policy objectives should be found to be consistent with Article III without any further need for Exception Clause analysis.

Admittedly, advocates of PPMs may earn plaudits among certain constituencies for defying the pro-trade bias resulting from the dichotomy between the general obligations and exceptions embedded in GATT. To them, any legitimate social concern should be accorded a status equal to that of trade concerns by being redeemed in the first instance—at the level of Article III analysis—without the stigma associated with violation and redemption at the inferior stage of exceptionization. Yet the flaw in this argument is that if PPMs are allowed to go unchecked, the proliferation of regulatory protectionism and unilateralism is likely to follow.[119] Put simply, it is far too easy for idiosyncratic regulations, even where they are nonprotectionist in intent, to create trade barriers, unless they are subjected to the doctrinal discipline of Article XX.[120]

John H. Jackson, *Comments on Shrimp/Turtle and the Product/Process Distinction*, 11 Eur J Intl L 303 (2000).

117 See OECD, *Processes and Production Methods (PPMs): Conceptual Framework and Considerations on Use of PPM-Based Trade Measures*, available online at <http://www.olis.oecd.org/olis/1997doc.nsf/linkto/ocde-gd(97)137> (visited Nov 10, 2004).

118 For a general discussion, see Christoph T. Feddersen, *Focusing on Substantive Law in International Economic Relations: The* Public Morals *of GATT's Article XX(a) and "Conventional" Rules of Interpretation*, 7 Minn J Global Trade 75 (1998).

119 See Bhagwati, 96 Am J Intl L at 133 (cited in note 54) (maintaining that *Tuna's* anti-PPM tradition should be respected because to allow countries to exclude products on PPM grounds, in particular *moral* grounds, would be "opening a real Pandora's box").

120 See Charnovitz, 27 Yale J Intl Law at 62–63 (cited in note 116) (raising the possibility of "eco-imperialism").

McGinnis and Movsesian's "antidiscrimination model" comes close to the above position. This model advocates adjudication over legislation in addressing linkage issues on the grounds that the former secures regulatory autonomy and diversity and that it is less vulnerable to regulatory capture.[121] Its central concern is "antiprotectionism," and it focuses particularly on disguised patterns of discrimination such as "covert protectionism," which are expressly aimed at legitimate policy objectives, such as protection of health or the environment, but which in practice impose burdens on competing importers.[122] Since protectionism is, according to McGinnis and Movsesian, the only evil that the WTO should be concerned with expelling, they argue that the WTO should leave intact all other scopes of regulations such as those serving "bona fide public welfare function" regulations.[123] According to this view, the WTO should tolerate any kind of trade-restrictive regulation as long as it is nonprotectionist. No matter what kind of disparate impact such regulation may have on free trade, it is not the WTO's business to remedy it.

The flaws in this approach are readily apparent because most of today's nontariff barriers tend to be based in arguably legitimate policy objectives. In fact, the current WTO jurisprudence concerns mainly nonprotectionist, yet still trade-restrictive regulations. In both the *Gasoline* (1996) and *Shrimp-Turtle* (1998) cases, for example, the Appellate Body explicitly endorsed the legitimacy of the US's environmental regulations. Where the US encountered trouble was with respect to the "*chapeau* test," under which the regulation as applied was found to jeopardize the interests of trading partners by omitting certain important procedural steps including hearing or consultation. This was so despite its legitimate, nonprotectionist environmental objectives. Not surprisingly, McGinnis and Movsesian neglect to take the "*chapeau* test" seriously in documenting the WTO's early jurisprudential record.[124] As a corollary, they fault the Appellate Body's emphasis on the "duty to negotiate" as a departure from their antiprotectionist model.[125] This narrow stance would not only exempt most contemporary nontariff barriers from scrutiny, but also neglect an important opportunity to build the very "world trade constitution" that they advocate for this increasingly interdependent global economic setting.

A second method for justifying panel or Appellate Body intervention with respect to social regulations not traditionally covered by Article XX is to expand the interpretive reach of those provisions so as to accommodate social concerns

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121 McGinnis and Movsesian, 114 Harv L Rev at 566–72 (cited in note 114).

122 Id at 549–50.

123 Id at 573.

124 Id at 589–94.

125 Id.

beyond those explicitly enumerated. The meaning of Paragraph (a), which protects "public morals," is extensive and considerably inferential. The above example of leg-hold traps could potentially be addressed under this paragraph.[126] Similarly, Paragraph (d) recognizes an exception to secure compliance with or enforce *any* domestic regulation as long as its objectives are consistent with the WTO rules. Nonetheless, some would argue that a panel or the Appellate Body should, upon encountering a case linking trade to regulatory issues not covered by Article XX, simply refuse to adjudicate such cases because there is no relevant substantive law. Therefore, the argument is that a panel or the Appellate Body should avoid such cases in the first place by casting the *non liquet* excuse. Yet others might offer the counterargument that such a narrow and positivistic stance amounts to a "denial of justice" because it advocates the effective abdication of an adjudicative body's basic duty to resolve disputes and render justice.[127] This opposing view argues for the use of "general principles of law" to fill in or supplement such lacunae.[128] Indeed, most international law scholars claim that "there is no room for *non liquet* in international adjudication because there are no lacunae in international law."[129]

In a departure from these positivistic or naturalistic understandings of international law, Joel Trachtman contends that the general exception clause of GATT Article XX should be employed to address such *non liquet* situations.[130] He maintains that the provisions of Article XX should be deemed "standards"—which are stipulated intentionally in a flexible way that permits broad room for interpretation under the premise of "incomplete contracts"—rather than "rule[s],"—which are specified a priori in a manner that leaves little room for interpretation.[131] Accordingly, Trachtman contends that tensions arising from linkage issues should be resolved through these standards under Article XX.[132] Yet other scholars, including Debra Steger, oppose the stretching of Article XX language on the ground that it would give too much power to

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126 See Feddersen, 7 Minn J Global Trade at 75 (cited in note 118).

127 See H. Lauterpacht, *Private Law Sources and Analogies of International Law* 68–69 (Longmans, Green 1927).

128 Id.

129 Joel P. Trachtman, *The Domain of WTO Dispute Settlement Resolution*, 40 Harv Intl L J 333, 341 (1999), quoting Prosper Weil, *"The Court Cannot Conclude Definitively . . .":* Non Liquet *Revisited*, 36 Colum J Transnatl L 109, 110 (1997).

130 See Trachtman, 40 Harv Intl L J at 346–69 (cited in note 129).

131 Id. Regarding more discussions on rules and standards within the context of international trade law, see Joel P. Trachtman, *International Trade as a Vector in Domestic Regulatory Reform: Discrimination, Cost-Benefit Analysis, and Negotiations*, 24 Fordham Intl L J 726 (2000).

132 Trachtman, 40 Harv Intl L J at 376 (cited in note 129).

quasi-judicial bodies.[133] Based on her belief that linkage issues should be addressed only in political terms, she prefers the amendment of Article XX to accommodate contemporary regulatory concerns.[134]

A third method is for panels and the Appellate Body to refer to other bodies of international law, such as multilateral environmental agreements or labor conventions, in adjudicating linkage issues not covered by Article XX. This approach is based on the proposition that the WTO should be an open system rather than one that is closed and "self-contained."[135] WTO law should be exposed to other disciplines of international law because WTO law is an "important part of the larger system of public international law."[136] David Palmeter and Petros Mavroidis contend that the WTO tribunal's terms of reference under the Dispute Settlement Understanding ("DSU") Article 7[137] should be interpreted to permit panels and the Appellate Body to employ general sources of public international law, such as custom and general principles of law, under Article 38 of the Statute of International Court of Justice ("ICJ").[138] Furthermore, they take the view that the WTO tribunal should embrace, as sources of law, non-WTO international agreements when they are referred to or incorporated in the WTO's covered agreements.[139]

In a similar context, Hudec focuses on a number of multilateral environmental agreements ("MEAs") that contain explicit or implicit trade restrictions to achieve putative goals such as protection of endangered species or regulation of substances that deplete the ozone layer, and that could consequently be regarded to be in conflict with GATT/WTO rules.[140] Hudec argues that if all disputants are signatories of such MEAs, then any trade

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133 Steger, 96 Am J Intl L at 144 (cited in note 10).

134 Id at 140, 144.

135 José Alvarez argues that to define the WTO as a "self-contained regime" is unsustainable because such an attempt would eventually undermine the legitimacy of the WTO. Alvarez, 7 Widener L Symp J at 4 (cited in note 26). See also P.J. Kuyper, *The Law of GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-Contained System of International Law?*, 25 Neth YB Intl L 227, 228 (1994).

136 David Palmeter and Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 Am J Intl L 398, 413 (1998).

137 WTO Agreement, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, art 7, in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* 404, 410 (cited in note 1) (hereinafter DSU).

138 Palmeter and Mavroidis, 92 Am J Intl L at 399 (cited in note 136).

139 Id at 409–13. See also Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* 456–72 (Cambridge 2003) (viewing that the applicable law before the WTO tribunal cannot be limited to the covered agreements).

140 Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures against Foreign Environmental Practices*, in Bhagwati and Hudec, eds, 2 *Fair Trade and Harmonization* 95, 121–22 (cited in note 13).

restrictions authorized thereunder can be interpreted as constituting a "waiver" of any inconsistent GATT obligations under the principle of *lex posterior* or *lex specialis*.[141] At the same time, Hudec acknowledges that a GATT violation is inevitable where those trade restrictions are imposed on a WTO Member that is not a signatory of the MEAs.[142] To remedy this situation, he proposes the establishment of an independent exception for such restrictions modeled after GATT Article XX(h), which endorses trade restrictions arising in pursuit of obligations set forth in certain international commodity agreements.[143] Nonetheless, the latter proposal seems difficult to achieve, at least for the time being, in view of the rather narrow scope of the relevant Doha agenda, which mandates that "[t]he negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question."[144]

By contrast, certain other scholars reject this approach on the ground that the WTO dispute settlement mechanism should be used only within the context of *covered* agreements explicitly incorporated in the WTO Agreement.[145] Trachtman, for example, maintains that the mandate of the WTO dispute settlement system is to *directly* apply "only WTO law."[146] He predicates this argument on several Dispute Settlement Understanding provisions, including Article 3(2) providing that "[r]ecommendations and rulings of the DSB [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements."[147] He also takes the view that this text would amount to an absurdity if rights and obligations from other international treaties were to be applied.[148] Nonetheless, Trachtman leaves the door open for the WTO to reference other bodies of international law either through adopting an interpretive method that avoids conflict with other treaties, as in the "Charming Betsy" doctrine,[149] or by incorporating them indirectly based on Article XX.[150]

The fourth method involves judicial restraint, which is analogous to the "political question" doctrine in certain domestic jurisdictions. For instance, a

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141 Id.

142 Id at 99, 125.

143 Id.

144 World Trade Organization, *Ministerial Declaration: The Fourth WTO Ministerial Meeting* ¶ 31(i), WT/MIN(01)/DEC/1 (Nov 20, 2001) (cited in note 84).

145 See, for example, Trachtman, 40 Harv Intl L J at 342–43 (cited in note 129).

146 Id at 342.

147 Id, quoting DSU, art 3(2) (cited in note 137).

148 Id.

149 *Murray v Schooner Charming Betsy*, 6 US 64, 118 (1804) (stating that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .").

150 See Trachtman, 40 Harv Intl L J at 343 (cited in note 129).

GATT panel report, albeit one that was unadopted, refused to adjudicate a case involving a regional trading agreement under GATT Article XXIV on the ground that the "examination—or re-examination—of Article XXIV agreements was the responsibility of the CONTRACTING PARTIES." [151] In a practical sense, it might be advisable to avoid certain highly "political" cases that could be addressed in an out-of-court setting or deferred to domestic governments. If highly controversial cases of this type were to be overadjudicated under the WTO, the inevitable political backlash could do severe damage to its still frail legal integrity. As Alvarez trenchantly observes, certain "fundamentally political issues" should not be simply turned over to the WTO jurisprudence without a "political consensus."[152] Reflecting similar concerns, the European Court of Justice has shown great deference in addressing certain domestic regulations marked by strong "socio-cultural characteristics." Admittedly, it would be difficult for a panel or the Appellate Body to refuse to adjudicate a case before it without a reason. To avoid needlessly placing it in this position, Members should exercise forbearance rather than testing the WTO dispute settlement system by filing highly politicized or scandalized cases.

These four methods possess both pros and cons, and it would be imprudent to apply any one of them mechanically without due regard to a particular linkage issue's specific circumstances. Overall, the first method—the "aim and effect" test—carries serious risks considering its potential for abuse or misuse, notwithstanding the fact that many scholars and government officials continue to embrace its logic, as seen in the recent *Asbestos* case.[153] Similarly, it seems that the fourth method—judicial restraint—would not only be difficult for a panel or the Appellate Body to accept but also risky considering the high potential for political backlash from governments and NGOs pursuing

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151 GATT, Report of the Panel, *European Community—Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region* ¶¶ 4.15–16, WTO Doc No L/5776, GATT BISD 260L/5776 (1985) (unadopted).

152 Alvarez, 7 Widener L Symp J at 19 (cited in note 26). But see C.W. Jenks, *Craftsmanship in International Law*, in Leo Gross, ed, *International Law in the Twentieth Century* 75, 80 (Appleton-Century-Crofts 1969) (maintaining that "[a] jurisprudence which . . . ignores or belittles the limitations with which the rule of law operates in practice in international affairs in the present stage of development of the law, and a jurisprudence which rationalizes, defends and even idealizes these limitations, are equally unhelpful and unserviceable").

153 See Cho, *Free Markets and Social Regulation* at 26 (cited in note 56) (criticizing the Appellate Body's problematic revival of the "aim and effect" test in the *Asbestos* case). See also World Trade Organization, Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 172, WTO Doc No WT/DS135/AB/R (Mar 12, 2001); World Trade Organization, Report of the Panel, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc No WT/DS135/R (Sept 18, 2000).

regulatory goals that may be characterized by a strongly moralistic streak. In contrast, the second and third methods—expanding the interpretive reach of provisions and drawing on other bodies of international law—are practicable if employed with due caution. Given the extreme difficulty associated with mobilizing sufficient political capital to actually amend GATT Article XX, reliance upon some type of judicial innovation seems inevitable. For instance, in *Shrimp-Turtle*, the Appellate Body succeeded in enhancing its adjudicative credibility by formulating a teleological, evolutionary approach to interpreting "exhaustible natural resources" under GATT Article XX(g) to include endangered species such as sea turtles.[154] Yet the main challenge to continued judicial innovation lies in the question of whether subtle and nuanced panels and the Appellate Body will prove both willing and able to move in this direction to address the linkage cases that come before them. Only time and experience will tell.

Notwithstanding the potential availability of these four methods, the bottom line is that the development of a synergistic solution to the linkage problem within the traditional GATT framework will require still other resources and innovations, due partly to the inherent pro-trade dichotomy discussed above, and partly to the *lacunae* of Article XX, among other concerns. Accordingly, our task requires us to look beyond GATT jurisprudence to discover additional resources in other parts of the WTO system, such as in the side agreements: for example, the Agreement on Sanitary and Phytosanitary Measures ("SPS") and the Agreement on Technical Barriers on Trade ("TBT").

2. Harmonization

A number of scholars have sought to tackle linkage issues more directly and systematically than through jurisprudence. These scholars advocate the use of legislation (treaty making) for the purpose of harmonizing diverse sector-specific social regulations. In a rather bold example of this general approach, Andrew Guzman proposes to use the legislative process to address linkage issues—in other words, to accommodate nontrade issues such as labor and competition—within the WTO. First, Guzman proposes that a number of separate "departments" for major linkage areas be created within the existing structure of the WTO. These departments, an example of which might be a so-called "trade and labor departments," would conduct specialized negotiations in the form of "departmental rounds."[155] These would, in turn, be followed by

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154 World Trade Organization, Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products* ¶ 129, WTO Doc No WT/DS58/AB/R (Oct 12, 1998) (cited in note 103).

155 Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 Cal L Rev 885, 889–90 (2003).

"Mega-Rounds" in which cross-departmental bargains could be made.[156] Through this process Guzman envisions the emergence of WTO agreements on labor or competition policy that would be patterned after the TRIPs Agreement.[157] In its maximal form, Guzman's expansionist vision would effect the transformation of the WTO into a "World Economic Organization."[158]

Yet Guzman's ambitious proposal is vulnerable to a number of criticisms. First is the issue of money. Even if one assumes that Members will be able to secure the necessary political capital, will they be able to afford the huge financial and human resources needed to establish such departments? The budget forecast on this point seems especially gloomy when one considers that the WTO's *total* budget is currently less than the *travel* budget of the IMF.[159]

Second, Guzman seems to rely heavily on the success of the Uruguay Round, especially on the creation of TRIPs. However, it should be remembered that the Uruguay Round's "single package" deal was possible mainly because it reflected the principle of "comparative advantage" between the North and the South. In other words, the South was willing to tolerate new accords relating to services and intellectual property, areas in which the North holds a comparative advantage, in exhange for further liberalization in the area of agriculture and textiles, in which the South holds its own comparative advantage. By contrast, Guzman's regulatory bargaining scheme is based not on such a principled trajectory but on blatant *quid pro quo* deals that tend to favor politically powerful countries. Yet what if a Member has nothing to offer? Is it realistic to assume that such a Member would actually be excluded from the bargaining process, as Guzman's approach would seem to suggest? Would that be a desirable result? And what about the reality that small, poor countries have very few personnel and other resources to devote to these complicated bargains?[160]

Third, the "regulatory model," which attempts to harmonize or universalize regulatory standards within the WTO, has proven vulnerable to attack on many fronts. In addressing the problem of covert protectionism, for example, McGinnis and Movsesian reject the regulatory model on the following grounds: universal regulatory standards do not fit all countries, it is vulnerable to capture by powerful interest groups, regulatory competition is desirable, universal standards are likely to result in a race to the bottom, and international

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156 Guzman, 45 Harv Intl L J at 307–08 (cited in note 98).

157 Id; Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 NYU L Rev 1142 (2001); Andrew T. Guzman, *Is International Antitrust Possible?*, 73 NYU L Rev 1501 (1998).

158 Guzman, 45 Harv Intl L J at 309 (cited in note 98).

159 Bhagwati, 96 Am J Intl L at 132 (cited in note 54).

160 See John O. McGinnis and Mark L. Movsesian, *Against Global Governance in the WTO*, 45 Harv Intl L J 353, 357 (2004).

spillover disputes exceed the institutional capacity as well as the legitimacy of the WTO.[161] McGinnis and Movsesian do view reciprocal bargaining as the "engine" of the WTO regime in that it yields incentives for free trade supporters to counteract protectionist groups in the domestic political dynamics.[162] Moreover, they attribute the success of the Uruguay Round to its structure as a single undertaking in which North and South were able to engage in such reciprocal bargaining.[163] Yet in contrast to "political bargaining," they object to "regulatory bargains" in the context of regulatory models such as that proposed by Guzman on the ground that it is too vulnerable to interest group capture, among other concerns.[164]

Fourth, Guzman's approach seeks to take advantage of the well-functioning WTO dispute settlement system in order to enhance the level of compliance with regulatory agreements. Yet apart from the daunting logistical challenges associated with finding qualified experts, Guzman's approach would inundate the WTO system with a category of disputes highly resistant to settlement. For instance, what if certain poor countries repeatedly violated regulatory agreements due to a lack of financial and technical capability? It does not seem realistic or even prudent to resolve such cases in an adjudicative mode. Indeed, if Member countries anticipate the prospect of adjudication in the future, their levels of commitment to and concessions in the negotiating process are likely to be low.

Chantal Thomas takes a rather eclectic position vis-à-vis Guzman's approach. Although he also prioritizes legislation over adjudication in addressing linkage issues, particularly labor and environmental protection, Thomas acknowledges that legislation in the form of separate, stand-alone agreements carries in its negotiation process certain costs and risks—including "specification costs" incurred in determining "core" labor or environmental standards as well as "capture" and "strategic holdout."[165] Thomas's response to these problems is a softer form of legislation: an amendment of the list of general exceptions under GATT Article XX to incorporate certain international labor and environmental principles.[166] Notwithstanding its comparatively modest dimensions, Thomas' approach still seems unworkable considering that it is nearly as difficult to secure an amendment under the WTO system as it is to

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161 McGinnis and Movsesian, 114 Harv L Rev at 553–66 (cited in note 114).

162 Id at 545.

163 Id at 545–46.

164 McGinnis and Movsesian, 45 Harv Intl L J at 355–56 (cited in note 160).

165 Thomas, 61 Wash & Lee L Rev at 374–88 (cited in note 98).

166 Id at 388–91.

produce new legislation.[167] Moreover, an amendment carries the same costs and risks as stand-alone legislative agreements in that WTO Members would still need to agree on which principles should be referenced in Article XX. The devil is always in the details.

By contrast, harmonization under the WTO can be achieved more effectively through preexisting built-in legislative arrangements than through the creation of new ones. The WTO system has already launched two important side agreements, the SPS[168] and the TBT,[169] in order to supplement and complement GATT—particularly Article XX. The Preamble of SPS states that it desires to "elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)."[170] Likewise, the Preamble of TBT states that it desires to "further the objectives of GATT 1994."[171] The most distinctive feature in these two agreements vis-à-vis GATT is an absence of the type of dichotomy that characterized GATT's pro-trade bias. The preambles of both agreements emphasize that no Members should be prevented from taking necessary measures to protect social values such as human health or the environment. Moreover, these legitimate regulatory concerns are no longer marginalized as mere "exceptions," but have been redefined as "rights." For instance, SPS Article 2 specifies that Members have the right to take sanitary measures necessary for the protection of human health. At the same time, both agreements overcome the *lacunae* in GATT Article XX by providing for an extensive and flexible clause dealing with legitimate regulatory objectives. In other words, SPS applies to *all* sanitary and phytosanitary measures, which are defined broadly in Annex A of the WTO Agreement. In the same context, TBT covers technical regulations adopted pursuant to *any* legitimate policy objective.

Although they grant enhanced status to social regulatory concerns, it cannot be argued that these agreements are biased in favor of them. Rather, they prudently provide many obligations related to free trade considerations in order to avoid such bias. Therefore, while they emphasize the rights of Members to take necessary regulations to achieve their legitimate policy objectives, the

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167 WTO Agreement, art IX ("Decision-Making"), art X ("Amendments") at 11, 12 (cited in note 4).

168 WTO Agreement, Annex 1A, Agreement on the Application of Sanitary and Phytosanitary Measures, in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* 69 (cited in note 1) (hereinafter SPS).

169 WTO Agreement, Annex 1A, Agreement on Technical Barriers to Trade, in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* 138 (cited in note 1) (hereinafter TBT).

170 SPS, preamble at 70 (cited in note 168).

171 TBT, preamble at 138 (cited in note 169).

agreements also stipulate that such regulations "do not create unnecessary obstacles to international trade"[172] and that they remain "subject to the requirement that [they] are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination."[173] In addition, both agreements contain numerous provisions, many of which are similar to those of GATT. The subtle equilibrium between trade and social concerns featured in these agreements constitutes a major improvement over GATT, which to this day retains a lingering pro-trade bias due to the structural dichotomy discussed above.

Harmonization, which is the basic approach that both SPS and TBT employ in dealing with linkage, is a positive prescription. In this sense it contrasts with the negative prescription observed in the jurisprudence related to GATT Articles III and XX. Whereas the latter focuses on negative obligations that prohibit discrimination and other market access restrictions, the former concerns positive obligations that aim at the assimilation or convergence of substantive or procedural aspects of different domestic regulations. Normally, harmonization connotes legislative initiatives on substantive regulations or standards.[174] In this respect, both SPS and TBT encourage Members to align their domestic regulations in various ways to internationally recognized standards. Because these international standards, no matter how representative they may be in certain specific regulatory sectors, are adopted outside the WTO, they are nonbinding. Nonetheless, both agreements offer legal incentives to Members in order to further voluntary compliance with nonbinding norms. For example, under SPS, if a Member bases its sanitary regulation on the Codex Alimentarius, one of the international standards that SPS endorses, it is presumed to comply with the relevant provisions of both SPS and GATT. International standards will be discussed below in greater detail.

Yet both SPS and TBT give much more weight to circumstances in which Members do not rely on international standards than those in which Members do. There are a couple of reasons for this situation. First, the use of international standards is nonbinding and voluntary because they are not formal treaties legislated under the banner of the WTO. Therefore, Members retain the *right* to take any necessary measures, whether based on the relevant international

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172 TBT, preamble at 138 (cited in note 169).

173 SPS, preamble at 69 (cited in note 168).

174 Leebron found justifications of harmonization on two main grounds: first, "[j]urisdictional interface" in the face of which nations tend to reduce transaction costs of international commerce by "achieving economies of scale"; and second, "externalities" that legitimate the protection of international public goods. Leebron, *An Analysis of Harmonization Claims* at 52–55 (cited in note 76). Yet he also warns that harmonization is a "complex and difficult" matter. Id at 94.

standards or not, to achieve other legitimate objectives such as protection of human health and safety. Second, in many cases these standards are nonexistent. Even where they do exist, they tend still to be evolving, often taking the form of a lowest common denominator, and thus fall short of the regulatory expectations of Members accustomed to exercising a higher level of regulatory protection in similar situations encountered at the domestic level. These circumstances tend to lead both SPS and TBT to focus on "process-oriented" disciplines, rather than on substantive disciplines involving international standards. In other words, these agreements concern "*how* to regulate," rather than "*what* to regulate." This "manner-oriented" approach parallels the "*chapeau* test" recently found in the WTO jurisprudence and constitutes a keystone in addressing linkage problems within the context of SPS and TBT because the approach enables Members to retain their regulatory autonomy while minimizing the trade-restrictive effects of their regulations. It does so by ensuring administrative due process in such areas as risk assessment, consistency, transparency, and reason giving. Therefore, as David Victor observes, these due process disciplines focus on "convergence in *procedures*" but not necessarily "convergence in particular regulatory *outcomes*."[175] In this sense, both SPS and TBT constitute a form of quasi-harmonization.

3. Surveillance

Trade disputes are not brewed overnight. Rather, trade frictions usually precede the outbreak of full-fledged disputes. Once a dispute is announced, registered, and adjudicated, it is very easy for it to escalate beyond the control of the parties. Therefore, if frictions can be diffused before they reach the level of disputes, much time, energy and expense will be saved. Trade disputes related to linkage issues are no exception. This is why a surveillance and monitoring mechanism such as the Trade Policy Review Mechanism is required.[176]

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175 David G. Victor, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment after Five Years*, 32 NYU J Intl L & Pol 865, 872 (2000).

176 See TPRM, ¶ A at 434 (cited in note 97). See also World Trade Organization, *Trade Policy Reviews: ensuring transparency*, available online at <http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm> (visited Nov 10, 2004).

> "Individuals and companies involved in trade have to know as much as possible about the conditions of trade. It is therefore fundamentally important that regulations and policies are transparent. In the WTO, this is achieved in two ways: governments have to inform the WTO and fellow-members of specific measures, policies or laws through regular 'notifications'; and the WTO conducts regular reviews of individual countries' trade policies—the trade policy reviews."

Id.

The TPRM periodically reviews Member countries' trade policies and trade-related regulatory policies for the "improved adherence by all Members to rules, disciplines and commitments"[177] under the WTO system. For this purpose, each Member is required to report its trade policies and practices on a regular basis to the Trade Policy Review Body, which is another name for the WTO General Council.[178] The TPRM is basically a "peer review" process,[179] rather than an enforcement mechanism. Thanks to the managerial nature of this process, Members can fine-tune both their trade and trade-related regulatory policies to address the interface between free trade and state regulation in an inconspicuous yet effective fashion. This may be accomplished through informal discussion and deliberation free from undue escalation and politicization.[180]

4. International Standards and Government Networks

As discussed above, harmonization through international standards, no matter how *soft* those standards may be from the perspective of legal force, could be a way of addressing linkage issues in certain areas since it would enable adopting Members to achieve the dual goals of free trade and regulatory protection. In fact, both TBT and SBS expressly *require* Member States to use international standards to the maximum extent possible, as well as to participate vigorously in standard-setting activities.[181] In addition, both TBT and SBS give a burden of proof incentive to any Member State that bases its regulation on

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177 TPRM, ¶ A at 434 (cited in note 97).

178 Id, ¶ D at 436 (requiring "each Member [to] report regularly" to the TPRB).

179 WTO, *Trade Policy Reviews* (cited in note 176). See also TPRM, ¶ A ("It is not, however, intended to serve as a basis for the *enforcement* of specific obligations under the Agreements . . .") (cited in note 97) (emphasis added).

180 See Cho, *Free Markets and Social Regulation* at 160–61 (cited in note 56).

181 TBT, art 2.4 at 140 (cited in note 169) ("Where technical regulations are required and relevant international standards exist or their completion is imminent, Members *shall* use them, or the relevant parts of them, as a basis for their technical regulations . . .") (emphasis added); id, art 2.6 ("With a view to harmonizing technical regulations on as wide a basis as possible, Members *shall* play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations") (emphasis added); SPS, art 3 ¶ 1 at 71 (cited in note 168) ("To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members *shall* base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist. . .") (emphasis added); id, art 3 ¶ 4 ("Members *shall* play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention, to promote within these organizations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures") (emphasis added).

international standards.[182] Furthermore, as an obvious indication of their role in encouraging transgovernmental cooperation for regulatory harmonization, both TBT and SBS co-opt certain international regulatory institutions including the International Organization for Standardization ("ISO"),[183] the International Electrotechnical Commission ("IEC"),[184] and the "Codex Alimentarius Commission."[185] These co-opted regulatory institutions serve as *shells* for transgovernmental cooperation under the auspices of TBT and SPS.

Nevertheless, the effectiveness of the standards set forth in such agreements has often been questioned. While international standards may reflect certain professional values since they are crafted by qualified experts, the domestic administrative and political procedures involved in actually recognizing, accrediting, and finally adopting these standards tend to be more complicated than they first appear. We often see that political anxiety surrounding a certain regulatory area is allowed to trump scientific evidence. The public tends to react emotionally and excessively to a scandalous event such as an outbreak of mad cow disease. When confronting such situations, governments usually respond by pandering to public concern and strengthening regulations, rather than by educating the public in a manner that reduces excessive fear. Moreover, as human health and safety command greater political attention, consensus becomes harder than ever to achieve, even among the professionals charged with developing the standards.[186]

Notwithstanding these misgivings about international standards, the importance of close cooperation and communication among epistemic, like-minded regulators, which many scholars define as "networking,"[187] should not

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182 TBT, art 2.5 at 140 (cited in note 169) ("Whenever a technical regulation is, . . . in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade."); SPS, art 3, ¶ 2 at 71 (cited in note 168) ("Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.").

183 The International Organization for Standardization, *Introduction*, available online at <http://ww.iso.org/iso/en/aboutiso/introduction/index.html> (visited Nov 10, 2004).

184 The International Electrotechnical Commission, *Mission and Objectives*, available online at <http://www.iec.ch/about/mission-e.htm> (visited Nov 10, 2004).

185 The Codex Alimentarius Commission, *Welcome*, available online at <http://www.codexalimentarius.net/web/index_en.jsp> (visited Nov 10, 2004).

186 See Terence P. Stewart and David S. Johanson, *The SPS Agreement of the World Trade Organization and International Organizations: The Roles of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics*, 26 Syracuse J Intl L & Comm 27, 52 (1998).

187 For general discussion, see Anne-Marie Slaughter, *A New World Order* 166–215 (Princeton 2004); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 Eur J Intl L 503, 535 (1995);

be trivialized. Although very few government networks produce visible regulations in the form of standards or guidelines, networking itself tends to contribute to the achievement of regulatory objectives because regulators learn from and enlighten one another in the process of communicating and exchanging views. In particular, if regulatory networking is conducted under the auspices of the WTO, in a manner that takes into account the subtle interface between regulatory and trade issues, it could potentially provide a reliable way of addressing some linkage issues. Admittedly, networking does not deliver a ready-made solution to the linkage problem as a whole. Yet networking certainly can ease the tension arising from linkage phenomena on an incremental basis because everyday regulators who are educated in the networking process can modify and adapt their regulatory behaviors—again, on an incremental scale—toward a better approach to reconciling the tension. Even if such networking is obstructed by complicated political processes, whether between North and South or within North or South, its forum-making function will at least contribute to increasing transparency in the WTO's policy-making process as well as to enhancing the level of policy coordination among states, as seen in the example of the WTO Committee on Trade and Environment ("CTE").[188]

The case for the aforementioned "soft" approach, vis-à-vis the "hard" approach represented by formal negotiations and legislation, becomes stronger in light of the reality of current WTO negotiations. First, developing countries have already officially "de-link[ed]" labor from trade by nailing down a firm statement in Ministerial Declarations that the International Labor Organization ("ILO") is the competent body for handling this issue, and that the use of labor

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Anne-Marie Slaughter, *The Real New World Order*, 76 Foreign Aff 183, 184 (Sept–Oct 1997); Anne-Marie Slaughter, *Governing the Global Economy through Government Networks*, in Michael Byers, ed, *The Role of Law in International Politics: Essays in International Relations and International Law* 177 (Oxford 2000). This networking phenomenon can be understood as one of "multiperspectival institutional form" which offers a plausible explanation about international transformation today, including the "global system of transnationalized microeconomic links" that create a "nonterritorial '*region*' in the world economy—a decentered yet integrated space-of-flows, operating in real time, which exists alongside the spaces-of-places that we call national economies." John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 Intl Org 139, 172 (1993). See also Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemma of Neo-Liberalism*, 17 Nw J Intl L & Bus 1014, 1018 (1996–97) (observing a conspicuous trend within states towards "disintegration of government and an increased delegation of regulatory authority and normative competence to professionals and specialists, such as lawyers, accountants, economists, scientific experts"); Renaud Dehousse, *Regulation by Networks in the European Community: The Role of European Agencies*, 4 J Eur Pub Poly 246, 248 (1997).

188 See Shaffer, 25 Harv Envtl L Rev at 74–81 (cited in note 102). See also Gregory C. Shaffer, *The Nexus of Law and Politics: The WTO's Committee on Trade and Environment*, in Richard H. Steinberg, ed, *The Greening of Trade Law: International Trade Organizations and Environmental Issues* 81 (Rowman & Littlefield 2002). Compare Trachtman, 40 Harv Intl L J at 365–67 (cited in note 129) (highlighting the Committee on Trade and Environment's role of cooperation with dispute resolution).

standards for protectionist purposes should be prohibited.[189] Moreover, it seems unlikely that linkage issues would be addressed within the WTO through hard mechanisms such as legislation (treaty making) or amendment, at least in the near future. The fact that developed countries finally agreed, albeit reluctantly, to drop three of four "Singapore issues" from the Doha Round negotiation supports such a forecast.[190] Singapore issues—in other words, competition, investment, government procurement, and trade facilitation—were originally tabled and accepted as a potential negotiation agenda by developed countries in the first WTO Ministerial Conference in 1996.[191] Since that time they have haunted subsequent WTO negotiations. Frequently invoked by developed countries as red herrings to counteract the demands of developing countries to repeal agricultural subsidies, the Singapore Issues eventually sunk the fifth Ministerial Conference in Cancún in 2003.[192] Yet during negotiations conducted under the Doha Round—which is often dubbed the "development round"—rich countries finally agreed to jettison competition and investment issues while at the same time repealing or reducing agricultural subsidies. Based on this case, it seems strategic linkages are not likely to happen, at least in the foreseeable future. Under these circumstances, a calm, modest yet incrementally effective approach to linkage, using soft law and cooperative networking, seems to be more suitable than a hard, politically driven approach involving formal negotiations and legislation.

Importantly, networking need not be conducted solely within the WTO. The WTO is still a *trade* organization. The fact that the WTO should faithfully listen and respond to legitimate demands of linkage does not mean that it should metamorphose into something other than a *trade* organization. No matter how successful it has been as a trade organization, the WTO should not become a victim of its own success by seeking to accommodate all other nontrade issues under its own roof. Moreover, the WTO is not an island in the international community.[193] Diverse international institutional arrangements may lend the

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189 Sungjoon Cho, *A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancún and the Future of Trade Constitution*, 7 J Intl Econ L 219, 221–22 (2004); *Singapore Ministerial Declaration: Adopted on 13 December 1996* at ¶ 4, available online at <http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm> (visited Nov 7, 2004).

190 International Centre for Trade and Sustainable Development, *WTO: July Framework Agreed at Eleventh Hour*, Bridges Weekly Trade News Digest, Vol 8, No 27, (Aug 3, 2004), available online at <http://www.ictsd.org/weekly/04-08-03/story1.htm> (visited Nov 10, 2004).

191 Cho, 7 J Intl Econ L at 222 (cited in note 189).

192 Id at 230–31.

193 For general discussion, see Sungjoon Cho, *Breaking the Barrier between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 Harv Intl L J 419, 464 (2001) (envisioning a "federalistic" and "pluralistic" coexistence among the WTO and other regional trading entities).

WTO their more flexible, yet focused hands to address linkages issues in a variety of ways, degrees, and contexts.

Indeed, regulatory networking often takes place in *softer* institutional settings than the WTO, such as the Organization of Economic Cooperation and Development ("OECD") or Asia Pacific Economic Cooperation ("APEC"). The institutional flexibility represented by the informality and nonbinding nature of these organizations can encourage participants to explore solutions to various linkage scenarios through the application of soft law (recommendations, standards, and guidelines), without the burden of legal commitments and the associated practice of strategic filibustering.[194] In fact, both organizations are currently devoting considerable resources to addressing various linkage issues. Under APEC, both regulators (public) and regulatees (private) engage in close epistemic networking with one another on sector-specific linkage issues such as trade and human safety, thereby producing realistic guidelines and arrangements.[195] Empirical confirmation of this process exists in such forms as the Guidelines for the Preparation, Adoption, and Review of Technical Regulations and APEC Food Mutual Recognition Agreements ("MRA").[196]

Under the OECD, linkage issues are addressed in the context of "regulatory reform."[197] This project is a policy response to the belief that modern governments should secure better regulations while not yielding to trade barriers.[198] A comprehensive 1997 Report on Regulatory Reform strongly recommended the use of soft law, in the form of "internationally harmoni[z]ed standards," to solve the linkage dilemma.[199] In parallel with this Report, the

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194 Compare Charles Lipson, *Why Are Some International Agreements Informal*, 45 Intl Org 495, 537–38 (1991) (expounding the merits of "informal" agreements vis-à-vis formal agreements).

195 For general discussion, see Sungjoon Cho, *Rethinking APEC: A New Experiment for a Post-Modern Institutional Arrangement*, in Mitsuo Matsushita and Dukgeun Ahn, eds, *WTO and East Asia: New Perspectives* 381 (Cameron May 2004). See also Thomas C. Fischer, *A Commentary on Regional Institutions in the Pacific Rim: Do APEC and ASEAN Still Matter?*, 13 Duke J Comp & Intl L 337, 342–52 (2003) (emphasizing APEC's role as an agenda setter and a laboratory for the WTO thanks to the technical expertise of its participants and their ability to communicate in a candid and frank matter, free from the political pressure of a WTO trade round).

196 See Asian Pacific Economic Cooperation, *Guidelines for the preparation, adoption and review of technical regulations*, available online at <http://tyr.apecsec.org.sg/loadall.htm?http://tyr.apecsec.org.sg/committee/standards.html> (visited Nov 10, 2004). See also John S. Wilson, *Standards and APEC: An Action Agenda* 3 (Inst for Intl Econ 1995) (proposing the establishment of an "APEC Laboratory Recognition Center" that would grant "pan-APEC approvals" of testing laboratories).

197 Organization of Economic Cooperation and Development, *The OECD Report on Regulatory Reform*, available online at <http://www.oecd.org/dataoecd/17/25/2391768.pdf> (visited Nov 10, 2004).

198 Id at 5.

199 Id at 35.

OECD Program on Public Management and Governance ("PUMA") has been hosting the Regulatory Management and Reform Network that consists of government officials responsible for regulatory management and reform activities in Member countries.[200]

In a propitious move, an APEC-OECD Agreement on Joint Work on Regulatory Reform was initiated in 2000. The Joint Work aims to implement OECD and APEC principles by elaborating an APEC-OECD "Integrated Checklist" for self-assessment on linkage issues, such as "regulatory, competition and market openness policies."[201]

In sum, this softer approach to linkage tends to emphasize that linkage issues are better "managed" than "solved." After countries have built up sufficient confidence and consensus following a lengthy rehearsal process, they may ratchet up to a harder, more official forum such as the WTO. Put differently, current circumstances suggest that osmosis seems to work better than compulsion.

5. Interinstitutional Cooperation

The WTO's institutional identity as a *trade* organization naturally leads it to addressing various linkage issues by cooperating in various ways with sector-specific international regulatory organizations. Scholars acknowledge the importance of this interinstitutional relationship. Robert Howse argues that we should try to shape the trade rules and their interpretations to capture the "interaction[s]" of the trading system with other institutions, rather than attempt to decide what should be "in" or "out of" the mandate of the WTO.[202] This argument reflects David Leebron's idea of "regime linkage," which describes possible interactions between regimes that are created to govern specific regulatory issues.[203]

The intensity of such interinstitutional cooperation varies according to the circumstances presented by each linkage phenomenon. One encounters both mild and intense interinstitutional relationships between the WTO and other international regulatory agencies. In terms of mild institutional relationships, which call to mind the aforementioned patterns of networking, the Doha Declaration explicitly set a negotiation agenda for "regular information

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200 Organization of Economic Cooperation and Development, *Organization of PUMA's Regulatory Management and Reform Work*, available online at <http://www.oecd.org/puma/regref/work.htm> (visited Nov 10, 2004).

201 Organization of Economic Cooperation and Development, *The APEC-OECD Co-operative Initiative on Regulatory Reform, 2001–2004*, available online at <http://www.oecd.org/document/25/0,2340,en_2649_34141_2397017_1_1_1_37421,00.html> (visited Nov 10, 2004).

202 Howse, 96 Am J Intl L at 112 (cited in note 98).

203 Leebron, 96 Am J Intl L at 10–11 (cited in note 17).

exchange" between the MEAs' secretariats and the CTE as well as the MEAs' "observer status" in the CTE.[204] In implementing this agenda, Members have recently agreed on the observer status, albeit on an ad hoc basis, of the United Nations Environmental Program ("UNEP") and the following six MEAs: the Basel Convention on Transboundary Movement of Hazardous Waste, the Convention on International Trade in Endangered Species of Wild Flora and Fauna ("CITES"), the Convention on Biodiversity ("CBD"), the Montreal Protocol on Ozone-depleting Substances, the International Tropical Timber Organization ("ITTO"), and the UN Framework Convention on Climate Change ("UNFCCC").[205] This institutional cooperation between the WTO's CTE and MEAs can make a major contribution to ensuring "coherence" between trade and environmental policies,[206] thereby mitigating the tension between free trade and environmental protection in the long run.

Yet it is difficult in practice to forge robust relationships among organizations. Although the WTO has several "cooperation agreements" with other international organizations such as the IMF,[207] the practical value of such agreements has been questionable because the level of involvement of these organizations in the WTO, at least in terms of regulatory cooperation, has not been impressive. Several factors may explain this lack of cooperation. First, the WTO's scant budget tends to discourage serious interinstitutional engagement, which inevitably requires considerable resources and investment. Second, networks linking domestic and international bureaucrats working in trade and other social policy areas are not well developed. Because bureaucrats or policymakers from each trade sector or nontrade social policy area tend to represent their own values, a coherent forum to bring these disparate views together in one place is unlikely to emerge on its own. Rather, such a forum

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204 World Trade Organization, *Ministerial Declaration: The Fourth WTO Ministerial Meeting* ¶ 31(ii), WT/MIN(01)/DEC/1 (Nov 20, 2001) (cited in note 84).

205 International Centre for Trade and Sustainable Development, *WTO Environment Committee Allows Ad Hoc Attendance to the MEA Secretariats*, Bridges Weekly Trade News Digest, Vol 7, No 6, (Feb 19, 2003), available online at <http://www.ictsd.org/weekly/03-02-19/story4.htm> (visited Nov 10, 2004).

206 Id.

207 See, for example, Agreement Between the International Monetary Fund and the World Trade Organization (Dec 9, 1996), preamble, ¶ 1, reprinted in 27 Selected Decisions and Selected Documents of the International Monetary Fund 748–53 (June 30, 2003), available online at <http://www.imf.org/external/pubs/ft/sd/index.asp?decision=11381-(96/105)> (visited Nov 7, 2004) (stating that both the IMF and WTO "recogniz[e] the increasing linkages between the various aspects of economic policymaking that fall within [their] respective mandates," and so "shall cooperate in the discharge of their respective mandates"). See also Deborah E. Siegel, *Legal Aspects of the IMF/WTO Relationship: The Fund's Articles of Agreement and the WTO Agreements*, 96 Am J Intl L 561 (2002).

must be created, which inevitably involves the commitment of considerable institutional resources. Finally, difficult problems of jurisdiction and competence are likely to cloud any serious effort at resolving the linkage dilemma. Indeed, the question of what institution should be the final arbiter as to a particular subject matter extends well beyond the terrain of cooperation to the constitutional dimension.

It could be the case that the WTO's "unilateral" adoption of certain regulatory decisions by other international agencies, in the form of "co-optation," will work better than the infeasible forms of institutional cooperation discussed above. Originally, the concept of co-optation derives from the field of corporations. Co-optation represents a process of incorporating new elements into the policymaking structure of an organization in order to overcome challenges to its stability.[208] Considering the mounting tension between trade and social values, which has the potential to undermine the legitimacy of the global trading system, it seems not only plausible but also necessary for the WTO to absorb certain sector-specific regulatory elements into its operation. In this connection, it is worthwhile to note that the WTO's two important linkage agreements, SPS and TBT, were modeled after the EU's harmonization rules and practices, in particular the New Approach and the Global Approach.[209]

Another interesting channel of co-optation is the WTO tribunal. As a matter of fact, a panel organized under the old GATT sought a regulatory opinion from other international regulatory institutions in adjudicating a trade case before it. Specifically, the panel in the *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes* case referred to the World Health Organization ("WHO") the question of whether the Thai government's ban on Western cigarettes could be justified to protect *human health*. Although the panel eventually dismissed the WHO's professional regulatory opinion, this case provides a strong precedent for future judicial co-optation within the context of the GATT dispute settlement procedure. The DSU subsequently provided a textual ground for such judicial co-optation in the form of the stipulation that "[p]anels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter."[210] It is not difficult for

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208 Ronald S. Burt, *Corporate Profits and Cooptation: Networks of Market Constraints and Directorate Ties in the American Economy* 5 (Academic 1983).

209 Stephen Woolcock, *Regional Integration and the Multilateral Trading System,* in Till Geiger and Dennis Kennedy, eds, *Regional Trade Blocs, Multilateralism, and the GATT: Complementary Paths to Free Trade* 115, 120 (Pinter 1996). See also European Commission, *Guide to the Implementation of directives based on the New Approach and the Global Approach*, available online at <http://europa.eu.int/comm/enterprise/newapproach/legislation/guide/document/1999_1282_en.pdf> (visited Nov 10, 2004).

210 DSU, art 13.2 (cited in note 137).

international regulatory institutions to be interpreted as falling under the rubric of "any relevant source." At the same time, regulatory decisions co-opted by panels and the Appellate Body from other international agencies need not bind them.

V. CONCLUSION

This Article highlights the potentially perilous tension between free trade and social regulation, and suggests a multifaceted list of solutions based on institutional feasibility. The global trading system has come to require a new *telos* capable of transcending the narrow purpose of antiprotection while at the same time connoting a much broader ideal of "integration" that ensures that both trade values and social values are upheld not in a competing, but in a coherent and synergetic fashion. This constitutional vision, which is embedded in the concept of linkage itself, inevitably touches on the profound issue of "legitimacy." The global trading system is "composed not only of States but also, indeed mostly, of individual economic operators," such as producers, importers, and consumers.[211] There is an inseparable connection between the ever growing quantity of international business transactions and the discipline provided by international trade law. If the dual goal of free markets and social regulation is achieved in a coherent way within the far reaching field of international economic law, it will make the global trading system operate in a more stable and predictable way,[212] and thus enhance its general acceptability not only among governments, but also among ordinary people.

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211 World Trade Organization, Report of the Panel, *United States—Sections 301–310 of the Trade Act of 1974*, ¶ 7.76, WTO Doc No WT/DS152/R (Jan 27, 2000).

212 See John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 Am J Intl L 782, 793 (2003) (observing that a "rule system" providing "security [and] predictability" is highly important in the international economic arena which involves "decentralized decision making" by countless entrepreneurs).