

TRADE WITHOUT VALUES

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From relative obscurity, international regulation of trade has recently experienced an uncomfortable transition into the forefront of legal, political, and social discourse. At the same time and perhaps as a partial cause, sweeping changes are being made in the regime that regulates the conduct of international trade. As a result of the conclusion of the Uruguay Round of Multilateral Trade Negotiations, the General Agreement on Tariffs and Trade¹ will be absorbed into the charter of the new World Trade Organization.² The World Trade Or-

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¹ General Agreement on Tariffs and Trade [hereinafter General Agreement], Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 188. The General Agreement is neither a treaty nor an institution, yet it has developed attributes of both. "As an institution, the General Agreement on Tariffs and Trade (GATT) is a complex and untidy thing. There is not even a consensus as to what it should be called." Gardner Patterson & Eliza Patterson, *The Road from GATT to WTO*, 3 MINN. J. GLOBAL TRADE 35, 35 (1994).

This Article will follow common usage, and refer to the document as amended and supplemented as the General Agreement or the Agreement, and the quasi-institution that has evolved to administer that document and related agreements as the GATT.

The General Agreement is neither a treaty nor an institution because the United States Congress, in 1947, refused to ratify the charter of a proposed International Trade Organization, and also refused to grant the executive branch power to enter into trade negotiations that would alter U.S. laws. Negotiators hastily pieced together what they believed to be a temporary agreement by chopping out those portions of the International Trade Organization charter that referred to an organization. The United States and other nations acceded to this agreement by means of a Provisional Protocol of Application, which grandfathered existing national laws and did not require Senate ratification. For excellent descriptions of this convoluted history, see ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (2d ed. 1990); JOHN H. JACKSON, *THE GATT SYSTEM* (1969).

² Although calls for an international organization date back to the collapse of the originally proposed International Trade Organization, the seed for the World Trade Organization was planted in an influential study by John H. Jackson that was sponsored by the Royal Institute of International Affairs. Patterson & Patterson, *supra* note 1, at 41; see JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 91-103 (1990). Following Jackson's study, Canada and the European Community each proposed the creation of an international organization. Patterson & Patterson, *supra* note 1, at 41-42. The Dunkel Draft, which was the document that pushed negotiating parties to a final agreement, provided for a Multilateral Trade Organization. *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* 91-101,

ganization came into existence on January 1, 1995.³ Its mandate extends beyond simple trade, and touches several types of economic relationships. In addition to acquiescing to coordination of these economic relationships, the members of the World Trade Organization have also agreed to submit their disputes concerning those economic relationships to a tribunal whose holdings will be binding and will become final unless overturned by a vote of every member.

For the most part, these changes are beneficial. A forum for continuous negotiations, which will be at least one function of the World Trade Organization, will allow member countries to fine-tune trade policy and to adapt quickly to changing world conditions. In a very limited way, the World Trade Organization will also allow trading nations to coordinate policies on issues of global concern that are not necessarily trade issues but that do relate to trade.

The new rigidity of the dispute resolution system is also largely beneficial. Stricter enforcement will allow members to realize the benefits of agreements for which they have bargained, and will enhance the ability of businesses to predict the outcomes of disputes. The new rigidity should also facilitate the development of a coherent system of "GATT law."⁴

Unfortunately, the rigidity of this new dispute settlement system may have a darker aspect: it may become so inflexible as to actually hinder the prospects for free trade. Disputes arise when a country's laws or administration of laws interferes with the ability of another member to enjoy the benefits of a trade agreement.⁵ Often these laws are protectionist in nature, designed and intended principally to shelter a domestic industry or market from international competition. Some laws, however, are enacted not on the basis of opening or clos-

GATT Doc. MTN.TNC/W/FA (Dec. 20, 1991) [hereinafter 3 *Dunkel Draft*], reprinted in 3 *THE GATT URUGUAY ROUND: NEGOTIATING HISTORY* 457-902 (Terence P. Stewart ed., 1993) [hereinafter Stewart]. When U.S. Senator Daniel Moynihan was consulted regarding the proposed international organization, he requested that its name be changed to the World Trade Organization. Comments of GATT Official, Comments at ABA Briefing on the Development of the World Trade Organization and the Functioning of the GATT System, Geneva, Switzerland (May 2, 1994). The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN/FA Part I, reprinted in 33 *I.L.M.* 1 (1994), which was signed in Marrakesh on December 15, 1993, consists of the charter for the World Trade Organization, to which various trade agreements, understandings, and interpretations are annexed. See *Marrakesh Agreement Establishing the World Trade Organization*, GATT Doc. MTN/FA, reprinted in 33 *I.L.M.* 13 (1994) [hereinafter the *Charter*].

³ Guy de Jonquières, *Dreams Behind the Scenes*, *FIN. TIMES*, Jan. 5, 1995, at 11.

⁴ Cf. John H. Jackson, *Strengthening the International Framework of the GATT-MTN System: Reform Proposals for the New GATT Round*, in *THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS* 3, 12 (Ernst-Ulrich Petersmann & Meinhard Hilf eds., 1988) (currently, "GATT law" is what a GATT panel process will say it is").

⁵ See *infra* notes 75-77 and accompanying text.

ing markets, but instead as reflective of underlying societal values.⁶ These laws may also affect trade, and thus may also become the subject of a dispute. The World Trade Organization system, as currently envisioned, fails to take into account the fundamental nature of societal values, and creates little or no space in which such laws can exist. This intemperance may diminish the already fragile support for the international trade regime, which in turn may hinder the ability of member countries to support the World Trade Organization.

Indeed, much of the popular attention recently given to trade regulation has been quite critical. Ross Perot's "giant sucking sound" of one million jobs heading for Mexico caught the imagination of millions of U.S. citizens. Euroskeptics captured significant numbers of seats in the European Parliament. Farmers, from France to Japan, have erected road blocks and burned tires in protest.⁷ While it is true that a great deal of criticism comes from constituencies who wish to protect pecuniary interests that might be damaged by the competition inherent to free trade, it is also true that some criticism is different. Some commentators do question the impact of unbridled trade upon the values and social goals of a society.⁸

These criticisms cannot be lightly dismissed. Societal values are fundamental building blocks used by individuals and societies to make order of the world. Unfortunately—perhaps as a result of confusion with the trendy but pedagogically empty phrase "social values"⁹—there has been little treatment of the relationship between societal values and international trade. A strong relationship does exist, however, and can be ignored only at the risk of the international trade regime.

International trade is far too important to risk in such a way. This Article suggests that the World Trade Organization must create an exception that would allow certain laws or actions to exist even if they violate the rules of the World Trade Organization. The exception would apply only if the law or action in question satisfies two criteria: first, the impediment to trade must be incidental, and second, it must be enacted or undertaken for the purpose of reflecting an underlying societal value. This exception would best be adopted by amending the organic documents of the World Trade Organization or through an

⁶ See *infra* notes 79-82. The term "social values" has acquired a vernacular meaning, particularly in the political context, which unfortunately makes its use problematic. See, e.g., Lisa M. Krieger, *Huffington Finds a Pedestal Can Become a Shaky Perch*, S.F. CHRON., Oct. 30, 1994, at A1 (discussing role of "social values" in politics). This Article uses the term "societal values," explained *infra* notes 56-71, which is used as a positive rather than normative term.

⁷ See 1 Stewart, *supra* note 2, at 5 (discussing popular reaction to trade talks).

⁸ See, e.g., *GATT Implementation Legislation: Hearings on S. 2467 Before the Senate Comm. on Commerce, Science, and Transportation*, 103d Cong., 2d Sess. 350 (1994) (statement of Ralph Nader, Consumer Advocate, Public Citizen).

⁹ See *supra* note 6.

interpretation adopted by its members. In the short term, however, the tribunals that will settle disputes among World Trade Organization members can adopt this exception as doctrine.

This Article begins by examining the rationale for free trade and the many benefits that accrue from trade liberalization.¹⁰ It next examines the nature of societal values and the critical role they play in organizing human relations.¹¹ Three examples—societal values relating to the environment,¹² labor,¹³ and cultural identity¹⁴—are used to show how societal values may conflict with the goal of free trade. The Article next demonstrates the inability of the World Trade Organization to deal with these conflicts¹⁵ and, more importantly, how that inability will undermine popular and sovereign support for the free trade regime.¹⁶ Finally, this Article proposes an exception to the obligations created by the various trade agreements that accompany the charter of the World Trade Organization,¹⁷ and explains how that exception would operate in the context of trade regulation.¹⁸

I. INTERNATIONAL TRADE BENEFITS INDIVIDUALS AND SOCIETY

Because this Article could be misconstrued as an attack on the principle of free trade, a brief review of the benefits of free trade is in order. International trade increases global wealth. Although it is possible to find economists who disagree,¹⁹ this axiom is the backbone of orthodox international economics.²⁰

¹⁰ See *infra* notes 19-55 and accompanying text.

¹¹ See *infra* notes 56-82 and accompanying text.

¹² See *infra* notes 85-126 and accompanying text.

¹³ See *infra* notes 127-70 and accompanying text.

¹⁴ See *infra* notes 171-200 and accompanying text.

¹⁵ See *infra* notes 206-96 and accompanying text.

¹⁶ See *infra* notes 297-338 and accompanying text.

¹⁷ See *infra* notes 339-61 and accompanying text.

¹⁸ See *infra* notes 362-88 and accompanying text.

¹⁹ See, e.g., RAVI BATRA, *THE MYTH OF FREE TRADE: A PLAN FOR AMERICA'S ECONOMIC REVIVAL* 35 (1993) (“[T]he real cause of America’s unprecedented economic debacle is the policy of free trade.”). Persons who are not economists have also argued that free trade is harmful. See, e.g., FRANCES M. LAPPÉ & JOSEPH COLLINS, *FOOD FIRST: BEYOND THE MYTH OF SCARCITY 197-200* (1977) (trade can be harmful to majority in developing countries, who live on marginal terms); Alfred C. Aman, Jr., *The Earth As Eggshell Victim: A Global Perspective on Domestic Regulation*, 102 *YALE L.J.* 2107, 2112 (1993) (“Not all forms of economic growth are to be applauded.”); Robert F. Housman & Durwood J. Zaelke, *Making Trade and Environmental Policies Mutually Reinforcing: Forging Competitive Sustainability*, 23 *ENVTL. L.* 545, 550 (1993) (“[I]f . . . economic activities decrease human well-being, trade actually makes economic activity more efficient at diminishing the overall standard of living.”). Others argue that beneficial trade exists only as a theoretical construct, with little relationship to the real world. See, e.g., John M. Culbertson, *The Folly of Free Trade*, *HARV. BUS. REV.*, Sept.-Oct. 1986, at 122.

²⁰ FRANKLIN R. ROOT, *INTERNATIONAL TRADE AND INVESTMENT* 38 (7th ed. 1994); see Richard H. Steinberg, *Antidotes to Regionalism: Responses to Trade Diversion Effects of the North American Free Trade Agreement*, 29 *STAN. J. INT’L L.* 315, 318-19 (1993) (“No economic

The theoretical underpinnings of the generation of wealth by trade is a concept labeled "comparative advantage."²¹ The concept of comparative advantage observes that every country produces some goods or services more efficiently than it produces other goods or services.²² For example, with any one unit of resources, country *A* may be able to produce four automobiles or twelve computers, while country *B* may be able to produce one automobile or eight computers. Country *A* is more efficient at producing both automobiles and computers, but—comparing its production of automobiles and computers to each other—it is *much* more efficient at producing automobiles.²³ Thus country *A* has a comparative advantage in the production of automobiles,²⁴ and the world's output of automobiles and computers will increase if country *A* specializes in automobile production while country *B* specializes in computer production. This can be illustrated arithmetically. If country *A* shifts one unit of resources from the production of computers to automobiles, there will be four more automobiles and twelve fewer computers. If country *B* shifts two units of resources from the production of automobiles to computers, there will be sixteen more computers and two fewer automobiles. The

theory of trade has been more dominant in the last two centuries than David Ricardo's theory of comparative advantage." The General Agreement is premised on the concept of comparative advantage. See John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1231 (1992) ("The basic policy underlying the GATT [is] . . . to pursue the benefits described in economic theory as 'comparative advantage.'").

²¹ Root, *supra* note 20, at 38.

²² Comparative advantage must be distinguished from absolute advantage, which occurs when a country produces a good or service more efficiently than does another country. "According to Ricardian economics, the simple divergence among different countries of absolute production costs says nothing about the comparative cost advantages that determine the utility of trade." Daniel K. Tarullo, *Law and Politics in Twentieth Century Tariff History*, 34 UCLA L. REV. 285, 328 (1986). Adam Smith used the concept of absolute advantage to further the cause of international trade with his famous admonition:

The taylor does not attempt to make his own shoes, but buys them of the shoemaker. The shoemaker does not attempt to make his own clothes, but employs a taylor. The farmer attempts to make neither the one nor the other, but employs those different artificers. All of them find it for their interest to employ their whole industry in a way in which they have some advantage over their neighbours, and to purchase with a part of its produce, or what is the same thing, with the price of a part of it, whatever else they have occasion for.

What is prudent in the conduct of every private family can scarce be folly in that of a great kingdom.

ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 424 (Edwin Cannan ed., Random House 1937) (1776); see SAMUEL HOLLANDER, THE ECONOMICS OF ADAM SMITH 273-76 (1973) (discussing Smith's treatment of international trade).

²³ Country *A* is four times more efficient at producing automobiles but only one-third more efficient at producing computers.

²⁴ See EDWIN MANSFIELD, ECONOMICS: PRINCIPLES, PROBLEMS, DECISIONS 358 (7th ed. 1992) ("A nation has a comparative advantage in those products where its efficiency relative to other nations is highest.") (emphasis omitted).

net increase in worldwide production is two automobiles and four computers.²⁵

International trade allows countries to specialize in the production of goods and services in which they have a comparative advantage and import those goods in which they do not.²⁶ Country *A* can produce automobiles and import computers, while country *B* can produce computers and import automobiles. This illustration, of course, represents an extremely simple model; in the real world there are dozens of trading nations exchanging thousands of goods and services.²⁷

The increase in wealth attributable to trade is difficult to quantify. Studies estimate that the gain to the world economy from implementing the Uruguay Round of Multinational Trade Organizations will be from 212 billion U.S. dollars per year to over 274 billion U.S. dollars per year by the year 2002.²⁸ These numbers, as large as they are, represent only about one percent of the gross world product,²⁹ and thus may call into question the emphasis placed on free trade.

Such questioning is based on the wrong premise. The increase in global wealth due to a slight liberalization of trade rules does not indicate the amount of present global wealth that is attributable to trade.³⁰ Empirical observation indicates that much of the global prosperity since the 1940s can be attributed to liberalization of trade rules;³¹ current data sustain this observation. The nominal value of world merchandise trade in 1994 was 4.0 trillion U.S. dollars.³² The nominal value of trade in commercial services was 960 billion U.S. dollars.³³ The value of trade as a percentage of the value of the world

²⁵ *Id.* at 357-58.

²⁶ Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199, 199 (1989).

²⁷ See JOHN C. POOL & STEPHEN C. STAMOS, JR., *INTERNATIONAL ECONOMICS: THEORY, POLICY AND PRACTICE* 28 n.* (1990) (discussing assumption of simple model and application in real world).

²⁸ INTERNATIONAL MONETARY FUND, *WORLD ECONOMIC OUTLOOK: MAY 1994*, at 86-87 (1994). Three of the four studies set forth by the International Monetary Fund were sponsored by the GATT Secretariat (US\$230 billion), the World Bank (US\$213 billion), and the Organization for Economic Cooperation and Development (US\$274.1 billion); the fourth is a "lower-bound estimate" by three economists (US\$212.1 billion). *Id.* at 87, tbl. 18 nn.2-5; see Trien Nguyen et al., *An Evaluation of the Draft Final Act of the Uruguay Round*, 103 ECON. J. 1540, 1548 (1993) (stating estimates are "lower-bound" and explaining assumptions for the model).

²⁹ INTERNATIONAL MONETARY FUND, *supra* note 28, at 83.

³⁰ Cf. Nguyen et al., *supra* note 28, at 1548 (speculating that "our comparison should have been between the [Uruguay Round Final Act] and increased trade barriers" rather than extant trade conditions).

³¹ JAGDISH BHAGWATI, *PROTECTIONISM* 7-9 (1988); ANNE O. KRUEGER, *PERSPECTIVES ON TRADE AND DEVELOPMENT* 206-12 (1990).

³² UNITED STATES INTERNATIONAL TRADE COMMISSION, *THE YEAR IN TRADE 1994: OPERATION OF THE TRADE AGREEMENTS PROGRAM*, 46TH REPORT at xx (1995).

³³ *Id.*

gross domestic product reached sixty percent in 1994.³⁴ The United States exported merchandise in 1994 valued at 503 billion U.S. dollars, while exports of services were valued at 195.3 billion U.S. dollars.³⁵ In 1992, the European Union exported 1.46 trillion U.S. dollars worth of merchandise, Canada exported 138 billion U.S. dollars worth of goods and services, Japan exported 330.9 billion U.S. dollars worth of merchandise, and China exported 86 billion U.S. dollars worth of goods.³⁶ Clearly, international trade plays a significant role in the global economy.³⁷

Paul Romer has recently identified an error in conventional theory that may explain a serious underestimation of the importance of easing trade restrictions.

Most economic theory starts from an implicit assumption that policy interventions do not affect the set of goods available in the economy. Recent theoretical work shows that this assumption severely restricts our analysis of growth in advanced economies. . . . [A] theoretical perspective implicitly based on the idea that no new goods can ever be introduced leads to a substantial underestimate of the welfare costs of trade restrictions.³⁸

The assumption that no new goods will be introduced into an economy³⁹ ignores the possibilities and opportunity costs of introduction of

³⁴ Ronald E. Yates, *Going Global Keeps Midwest Firms Alive*, CHI. TRIB., May 15, 1994, "Chicago's Top 100 Companies," at 3.

³⁵ UNITED STATES INTERNATIONAL TRADE COMMISSION, *supra* note 32, at xx. Twenty percent of U.S. corporate profits are related to international activities. Yates, *supra* note 34. The number of jobs in the United States "related to exports of goods and services" is "well over 10 million." UNITED STATES TRADE REPRESENTATIVE, 1995 TRADE POLICY AGENDA AND 1994 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 8 (1995).

³⁶ UNITED STATES INTERNATIONAL TRADE COMMISSION, *THE YEAR IN TRADE 1992: OPERATION OF THE TRADE AGREEMENTS PROGRAM*, 44TH REPORT at xvi-xx (1993).

³⁷ The numbers themselves do not reveal the pervasiveness of trade in the global economy. Trade has been described as no longer a matter of arms-length transactions, but instead as a "global web" of people who "deal repeatedly with each other across borders." ROBERT B. REICH, *THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST-CENTURY CAPITALISM* 113 (1991).

³⁸ Paul Romer, *New Goods, Old Theory, and the Welfare Costs of Trade Restrictions*, 43 J. DEV. ECON. 5, 5-6 (1994). Romer notes that the assumption that no new goods will be introduced also leads to an underestimate of the value of trade in developing countries. *Id.* at 6. The International Monetary Fund also acknowledges that studies underestimate the gains of easing trade restrictions. The reason is four-fold: the studies concentrate on tariff reductions and do not take into account reductions in nontariff barriers; the studies tend to focus on agriculture and aggregate various manufacturing and service sectors, leading to a downward bias; the computable general equilibrium models used by the studies omit important gains such as economies of scale and increased capital flows; and the studies use extant trade conditions as a baseline, which would deteriorate if the Uruguay Round failed. INTERNATIONAL MONETARY FUND, *supra* note 28, at 84-85.

³⁹ Romer provides an interesting explanation of how this assumption worked its way into mainstream theoretical thought. He begins by showing how the use of general equilibrium the-

or failure to introduce new goods.⁴⁰ International trade facilitates the introduction and exploitation of new goods and therefore substantially increases the size of an economy.⁴¹ Conversely, Romer shows (in a very theoretical model) that a ten percent increase in tariffs can *decrease* national income by twenty percent.⁴² If, therefore, one assumes that in the real world it is possible to invent or import new goods, then traditional models used to calculate the benefits of trade liberalization probably fall quite short of the mark. Indeed, the GATT Secretariat has revised its own estimates of the increase in global income to over 500 billion U.S. dollars per year by the year 2005.⁴³

To say, however, that trade increases wealth is to stop short of telling the complete story. International trade has a variety of positive secondary effects on economies and societies, induced by the greater variety of goods that result from trade and the increased efficiencies that result from competition. Junichi Goto summarizes the empirical and theoretical observations regarding the effects of increased international trade:

1. greater consumer satisfaction due to an increase in the variety of goods;
2. a decrease in the monopolistic power of domestic firms;
3. increased technical efficiency due to a decrease in the average production costs;
4. a decrease in unemployment due to reduced imperfections in the labor market;
5. a contribution to economic growth through a release of capital resources from the distorted sector.⁴⁴

ory to compare choices and possibilities at any point or differing points of time lead to a habit of thought that did not contemplate disequilibria through the possibility of new goods or the opportunity costs of goods not introduced into the economy. Romer, *supra* note 38, at 10-14. He augments his argument by showing how economists have implicitly adopted the principle of plenitude, which "states that the world is full: every conceivable entity already exists." *Id.* at 17 (citing ARTHUR O. LOVEJOY, *THE GREAT CHAIN OF BEING* (1933)). This principle greatly eases the economist's burden in explaining and predicting phenomena, but, as Romer explains, it also leads to an inaccurate depiction of the real world. *Id.* at 16-21.

⁴⁰ *Id.* at 7.

⁴¹ Romer refers to "magnitudes." *Id.* at 27.

⁴² *Id.*

⁴³ *WTO to Boost Global Income by \$500 Billion*, FOCUS: GATT NEWSLETTER, Oct. 1994, at 1. A uniform system of transactional efficiencies that is being contemplated by the United Nations Conference on Trade and Development could increase that amount by another US\$100 billion per year. Frances Williams, *Taking the Paper Out of Trade*, FIN. TIMES, Oct. 13, 1994, at 4.

⁴⁴ JUNICHI GOTO, *LABOR IN INTERNATIONAL TRADE THEORY: A NEW PERSPECTIVE ON JAPANESE-AMERICAN ISSUES* 82 (1990). Robert McGee argues that "free trade . . . benefits the masses." Robert W. McGee, *An Economic Analysis of Protectionism in the United States with Implications for International Trade in Europe*, 26 GEO. WASH. J. INT'L L. & ECON. 539, 550 (1993). In particular, "[p]rotectionism raises prices, entrenches inefficiency and destroys more jobs than it saves." *Id.*

Additionally, the wealth that is generated by international trade may⁴⁵ be translated into advancements for a society: there is evidence that increases in wealth lead to longer and healthier lives,⁴⁶ and many argue that wealth also leads to an increased desire and ability to care for the environment.⁴⁷

The process of trading is itself beneficial. Trade increases contact and promotes cooperation: "Countries that trade with each other are less likely to go to war than are countries that erect trade barriers to prevent foreign goods from crossing their borders."⁴⁸ The relationship between free trade and peace has been noted for centuries by

⁴⁵ Distributional inefficiencies sometimes preclude the translation of wealth into societal advancements. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 16 (1989) (explaining how distributional inefficiencies dilute benefits of free trade); ARTHUR M. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADE-OFF* (1975) (arguing that efficiency often translates into inequality due to maldistribution); Michael S. Knoll, *Perchance to Dream: The Global Economy and the American Dream*, 66 S. CAL. L. REV. 1599, 1600 (1993) (attributing the increasing inequality in incomes among Americans to globalization of economy); Robin P. Malloy, *Invisible Hand or Sleight of Hand? Adam Smith, Richard Posner and the Philosophy of Law and Economics*, 36 KAN. L. REV. 209, 245 (1988) (arguing that Posner's framework favors the economically advantaged); Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592 (1985); Barbara White, *Coase and the Courts: Economics for the Common Man*, 72 IOWA L. REV. 577, 595-99 (1987) (arguing that Coase's framework redistributes wealth to the economically advantaged).

⁴⁶ See Tord Kjellstrom et al., *Current and Future Determinants of Adult Ill-Health, in THE HEALTH OF ADULTS IN THE DEVELOPING WORLD* 209, 211-13 (Richard G.A. Feacham et al. eds., 1992) (discussing relationship between poverty and ill health and concluding: "Improved adult health in developing countries requires action against poverty itself as well as action against specific determinants."); Christopher J.L. Murray et al., *Adult Mortality: Levels, Patterns and Causes, in THE HEALTH OF ADULTS IN THE DEVELOPING WORLD, supra*, at 23, 50 (finding "statistically significant" correlation between higher income and education and lower mortality in adults and children). Alan Sorkin noted several years ago that "poor countries must spread their very limited revenues among many different kinds of public programs. Thus, the absolute amount available for government health expenditures is quite low." ALAN L. SORKIN, *HEALTH ECONOMICS IN DEVELOPING COUNTRIES* 18 (1976); see also Morris D. Morris, Book Review, 39 ECON. DEV. & CULTURAL CHANGE 667, 668-69 (1991) ("Although cautions occasionally are noted, there is a general acceptance of the correlation between declining economic growth rates and deteriorating social conditions."). The correlation between income and health exists in developed countries as well. See George D. Smith & Matthias Egger, *Socioeconomic Differentials in Wealth and Health*, 307 BRIT. MED. J. 1085, 1085 (1993) (finding much evidence to support "association between poorer material circumstances and higher mortality").

⁴⁷ "A commonly held viewpoint among trade specialists is that there is no conflict between the environment and trade because trade stimulates efficiency and economic growth, generating wealth essential to environmental protection and restoration." Steve Charnovitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 ENVTL. L. 475, 476 (1993); see Patrick Low, *Trade and the Environment: What Worries the Developing Countries?*, 23 ENVTL. L. 705, 706 (1993) ("[I]f poor societies fail to improve the living standards of their people, persistent poverty may turn out to be the most aggravating and destructive of all environmental problems.").

⁴⁸ McGee, *supra* note 44, at 551.

observers such as Immanuel Kant,⁴⁹ Charles Montesquieu,⁵⁰ and John Stuart Mill.⁵¹ Peace is not the only byproduct of trade. Trade also accelerates diffusion of knowledge and technical innovation, thus accelerating the pace of the world's technological growth.⁵²

Finally, free trade may help emerging or underdeveloped economies to develop. There is some dispute as to how trade helps an economy to develop. Strict neoclassical orthodoxy suggests that the link between trade and development is indirect. Trade allows countries to be more efficient, which allows them to accumulate savings that can be invested in development.⁵³ Development theorists suggest a more direct link. On the one hand, some suggest that trade allows developing countries to obtain foreign exchange, which in turn allows them to purchase foreign technology, which in turn can be used to increase labor and capital productivity.⁵⁴ On the other hand, others argue that trade absorbs surplus labor, thus allowing developing countries to break a cycle of poverty inherent to subsistence economies.⁵⁵ In either case, trade is the lever that allows an economy to develop.

In short, international trade is of incalculable importance to the world economy and is a significant contributor to human well-being. International trade increases the possibilities of production and promotes an efficient allocation of resources. International trade increases the variety of goods available to the consumer and lowers the prices of those goods. International trade facilitates better world citizenship by facilitating peaceful cooperation and exchange.

International trade, then, should be encouraged whenever possible. The promotion of free international trade is a useful tool for a society, and can in and of itself be a worthwhile goal for a society. It should be recognized, however, that societies will at any point in time have a number of values and goals, and that some of these may come into conflict with the pursuit of unfettered international trade.

⁴⁹ IMMANUEL KANT, *To Perpetual Peace: A Philosophical Sketch*, in PERPETUAL PEACE AND OTHER ESSAYS 107, 125 (Ted Humphrey trans., 1983) (1795) ("The spirit of trade cannot coexist with war.").

⁵⁰ ROBERT GILPEN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* 56 (1987) (quoting Montesquieu: "peace is the natural effect of trade").

⁵¹ JOHN S. MILL, *Principles of Political Economy*, in 3 COLLECTED WORKS OF JOHN STUART MILL 594 (John M. Robson ed., 1965) (1884) (trade is "the principal guarantee of the peace of the world").

⁵² Anne O. Krueger, *Trade Policy as an Input to Development*, AM. ECON. REV., May 1980, at 288, 290.

⁵³ James Riedel, *Trade as an Engine of Growth: Theory and Evidence*, in ECONOMIC DEVELOPMENT AND INTERNATIONAL TRADE 25, 26-27 (David Greenaway ed., 1988).

⁵⁴ *Id.* at 28-29 (characterizing this school of thought as "supply-oriented version").

⁵⁵ *Id.* at 29 (characterizing this school of thought as "demand-oriented model").

II. THE TENSION BETWEEN FREE TRADE AND SOCIETAL VALUES

A. Societal Values

Although the term "societal values" is often used by legal scholars, it is rarely analyzed. "A value is an enduring belief that a specific mode of conduct or end state is personally or socially preferable relative to an opposite or converse mode of conduct or end state of existence."⁵⁶ Goals and motives are conceptually similar to values.⁵⁷

Values, as used in this context, are subjective: they are the values actually held by a society. Thus, although the word "norm" is sometimes used by social scientists when describing values,⁵⁸ it is important not to confuse subjective societal values with an objective, moral judgement as to whether those values are right or good.⁵⁹ Confusion arises because values often are interrelated with a society's notions of good, either as a reflection of those notions or as a means of achieving what is right.⁶⁰ However, a societal value need not coincide with an objective moral imperative. A well-worn example is the national so-

⁵⁶ MILTON ROKEACH, *THE NATURE OF HUMAN VALUES* 5 (1973); cf. Yvette M. Barksdale, *The Presidency and Administrative Value Selection*, 42 AM. U. L. REV. 273, 312 (1993) ("Governmental value choices are fundamental decisions that help to define a society's ideas, goals and self-image and, by influencing a society's policies, can determine its future."); Seymour Epstein, *Values from the Perspective of Cognitive-Experiential Self-Theory*, in SOCIAL AND MORAL VALUES: INDIVIDUAL AND SOCIETAL PERSPECTIVES 3, 4 (Nancy Eisenberg et al. eds., 1989) ("Values are beliefs about desirability that organize experience and direct behavior with respect to certain broad classes of events.").

⁵⁷ Epstein, *supra* note 56, at 4.

It is important to distinguish values from commodification. Some legal scholars of the economic school argue that a price can be placed on anything, including values. See, e.g., Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119 (1979). This monetarizing process is commodification, and should not be confused with the term value as it is used in this Article. Cf. Christopher H. Schroeder, *In the Regulation of Manmade Carcinogens, If Feasibility Analysis is the Answer, What is the Question?*, 88 MICH. L. REV. 1483, 1500-01 (1990) (book review) (distinguishing and criticizing commodification). Raymond Belliotti finds commodification of values particularly odious. He argues that adopting the value of wealth maximization

leads to a commodification obsession: virtually anything can be traded in a wealth maximizing fashion. But this mindset may be criticized for demeaning important attributes constitutive of self. . . . Human flourishing may well be impaired as persons internalize the message that self and constitutive attributes can be separated when economically expedient.

RAYMOND A. BELLIOTTI, *JUSTIFYING LAW: THE DEBATES OVER FOUNDATIONS, GOALS, AND METHODS* 124-25 (1992).

⁵⁸ Abraham Edel, *The Concept of Value and Its Travels in Twentieth-Century America*, in VALUES AND VALUE THEORY IN TWENTIETH-CENTURY AMERICA 12, 27 (Murray G. Murphey & Ivar Berg eds., 1989).

⁵⁹ "The relevant distinction here was drawn neatly by Bentham and Austin, who talked of the distinction between 'positive' and 'critical' morality, positive morality being those social conventions created by man, and critical morality being the standard by which those social conventions should be judged." STEPHEN GUEST, RONALD DWORKIN 151 (1991).

⁶⁰ See ARCHIE J. BAHM, *AXIOLOGY: THE SCIENCE OF VALUES* (1993) (discussing distinction between good and bad, and instrumental and intrinsic values).

cialist government of Germany in the 1930s and 1940s, which held a discernible value that certain categories of people were abominations that should be exterminated⁶¹—a value that is abhorrent to any objective ethical framework.⁶²

How societal values are formed, what gives them validity, and how they may be discerned is an area of much theoretical contentiousness.⁶³ Contractarians argue for the existence of “social contracts embodying actual behavioral norms which derive from shared goals, beliefs and attitudes of groups or communities of people.”⁶⁴ Utilitarians argue that values promote self or societal interests.⁶⁵ Skeptics argue that values are a matter of personal taste, while universalists believe they are founded in a universal truth.⁶⁶ One axiologist refuses to distinguish between values and other discernible objects: “Values are known in the same ways that other objects are known, that is, by intuition and inference.”⁶⁷ Other theories abound.⁶⁸

⁶¹ RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* 55 (2d ed. 1985) (Genocide “was not so much a product of laws and commands as it was a matter of spirit, of shared comprehension, of consonance and synchronization.”).

⁶² See Thomas Morawetz, *Ethics and Style: The Lessons of Literature for Law*, 45 *STAN. L. REV.* 497, 512 (1993) (book review) (“certain forms of conduct, such as genocide, are universally held to be ethically unacceptable”). Kenneth Randall speaks of genocide as violative of “values to which the global community is committed.” Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 *TEX. L. REV.* 785, 785 (1988) (emphasis added).

⁶³ NICHOLAS RESCHER, *INTRODUCTION TO VALUE THEORY* 1 (1969) (“In the English language the word [value] is used in a somewhat loose and fluctuating way. Philosophers and social scientists concerned with value questions have long recognized the need for a more precise value terminology to facilitate the exact formulations needed in scholarly and scientific contexts. . . . No proposal for a delineation of value terminology has been able to generate any significant degree of concurrence, let alone become a focus of settled consensus.”); R.G. Frey & Christopher W. Morris, *Value, Welfare, and Morality*, in *VALUE, WELFARE, AND MORALITY* 1, 1 (R.G. Frey & Christopher W. Morris eds., 1993) (“[I]t often seems that there is as much disagreement about the nature of value and its relationships to welfare and morality as there is about the substantive issues on which our normative theories are supposed to pronounce.”).

The inquiry into values is known as axiology. For a comprehensive and comprehensible defense of axiology as a science, see BAHM, *supra* note 60.

⁶⁴ Thomas W. Dunfee, *Business Ethics and Extant Social Contracts*, 1 *BUS. ETHICS Q.* 23, 32 (1991). Although difficult, see *id.* at 35, the process of discovering these social contracts is not the main thrust of the contractarian school; contractarians are more concerned with developing these contracts into a moral or ethical scheme. See *id.* at 33; Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 *ACAD. MGMT. REV.* 252 (1994).

⁶⁵ JOHN DEWEY, *EXPERIENCE AND NATURE* 396 (1925) (“Values are values, things immediately having certain intrinsic qualities. Of them as values there is accordingly nothing to be said; they are what they are. All that can be said of them concerns their generative conditions and the consequences to which they give rise.”); CLARENCE I. LEWIS, *AN ANALYSIS OF KNOWLEDGE AND VALUATION* 392 (1946).

⁶⁶ MICHAEL PHILIPS, *BETWEEN UNIVERSALISM AND SKEPTICISM* 3-4 (1994). Philips advocates a middle-of-the-road position. *Id.*

⁶⁷ BAHM, *supra* note 60, at 86.

Fortunately, for the purpose of this Article only two concepts need be drawn from the maelstrom of theory, both of which are generally accepted by all schools of thought. First, societies do in fact have sets of values.⁶⁹ Second, the legal regimes of a country sometime reflect, however imperfectly, the values of that country.⁷⁰ "Law is contextual: it cannot be separated from society, its values, and its socioeconomic structure."⁷¹

The term "legal regimes" is used in the preceding paragraph for two reasons. First, it is clear that laws in and of themselves are not the sum of society's expression of its values. "Enactment of a statute represents the beginning of a journey, not the end. The statute 'means' nothing until it takes its place in the legal system, until it begins to interact with judges, lawyers, administrators, and lay people."⁷² Moreover, in some countries, bureaucracies have supplanted legislative bodies as the primary creator of rules. In the United States, for example, there are more regulations imposed by administrative agen-

⁶⁸ See, e.g., Simon Blackburn, *The Land of Lost Content*, in VALUE, WELFARE AND MORALITY 13 (R.G. Frey & Christopher W. Morris eds., 1993) (articulating "projective theory" of determining values); Epstein, *supra* note 56, at 7 (articulating cognitive-experiential theory). Interestingly, there is even debate over the extent of the debate. See, e.g., ABRAHAM EDEL, IN SEARCH OF THE ETHICAL: MORAL THEORY IN TWENTIETH CENTURY AMERICA 217-19 (1993) (characterizing dispute between Rawls and Nozick and utilitarians as a "family quarrel" and arguing that real differences lie with the idealist-Hegelian, the Marxian, and the social pragmatic philosophers).

⁶⁹ See Bryan Wilson, *Introduction to VALUES: A SYMPOSIUM 1*, 1-3 (Brenda Almond & Bryan Wilson eds., 1988).

⁷⁰ GRANT GILMORE, *THE AGES OF AMERICAN LAW* 110 (1977) ("Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law."); Jennifer L. Porges, *The Development of Korean Labor Law and the Impact of the American System*, 12 COMP. LAB. L.J. 335, 335 (1991) ("The legal rules of a society usually develop from, and are reactions to, the political, economic and cultural traditions within a nation. A society may promulgate laws to prevent situations which that society deems unacceptable, or to express that society's values regarding the type of behavior it wants to promote."). Alexander Aleinikoff characterizes law as "a tool for arranging today's social relations and expressing today's social values." T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 58 (1988).

⁷¹ William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 746 (1991); cf. Christopher Osakwe, *The Problems of the Comparability of Notions in Constitutional Law*, 59 TUL. L. REV. 875, 875 (1985) ("Law, like language or music, is an historically determined product of civilization and, as such, has its roots deep in the spirit of the people.").

⁷² Aleinikoff, *supra* note 70, at 57; cf. William H. Clune III, *A Political Model of Implementation and Implications of the Model for Public Policy, Research, and the Changing Roles of Law and Lawyers*, 69 IOWA L. REV. 47, 49 (1983) ("The implementation of social policy through law is an interactive process involving government agencies, regulated organizations, and interest groups.").

cies than laws passed by legislatures.⁷³ These administrative actions express values no less than do legislative acts.⁷⁴

Second, this Article is concerned with the resolution of conflicts between free trade and other societal values within the context of the World Trade Organization. Complaints may be brought to that body by a member when "any benefit accruing to it" pursuant to certain agreements "is being nullified or impaired."⁷⁵ The mere existence of a law that might appear violative of a trade agreement is not necessarily a nullification or impairment. For example, GATT dispute settlement panels have consistently found that discretionary legislation that might allow a country to act in violation of the Agreement is not a violation unless the country actually takes such action.⁷⁶ Similarly, actions are often brought not against a law but rather on the basis of actions taken pursuant to law.⁷⁷

These legal regimes reflect societal values. The importance of those values in ordering the human world cannot be overemphasized. "No aspect of human life is unrelated to values, valuations, and validations. Value orientation and value relations saturate our experiences and life practices from the smallest established microstructures of feeling, thought, and behavior to the largest established macrostructures of organizations and institutions."⁷⁸

Similarly, the importance of the relationship between law and social values cannot be overemphasized. To some, that relationship is what gives law legitimacy. "[M]ost forms of law are inevitably depen-

⁷³ BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* 168 (3d ed. 1991).

⁷⁴ See Barksdale, *supra* note 56, at 285 ("Frequently . . . Congress delegates value decisions to administrative agencies without deciding which values are significant.").

⁷⁵ See *infra* notes 276-84 and accompanying text (explaining dispute settlement in World Trade Organization).

⁷⁶ See, e.g., *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT Doc. DS10/R paras. 84-86 (Nov. 7, 1990), reprinted in *BASIC INSTRUMENTS AND SELECTED DOCUMENTS* 200, 227 (37th Supp. 1991); *EEC—Regulation on Imports of Parts and Components*, GATT Doc. L/6657 paras. 5.25-26 (May 16, 1990), reprinted in *BASIC INSTRUMENTS AND SELECTED DOCUMENTS* 132, 198-99 (37th Supp. 1991); *United States—Taxes on Petroleum and Certain Imported Substances*, GATT Doc. L/6175 para. 5.2.9 (June 17, 1987), reprinted in *BASIC INSTRUMENTS AND SELECTED DOCUMENTS* 136, 163-64 (34th Supp. 1988).

⁷⁷ See, e.g., *Japan—Restrictions on Imports of Certain Agricultural Products*, GATT Doc. L/6253 para. 5.4.1.4 (Mar. 22, 1988), reprinted in *BASIC INSTRUMENTS AND SELECTED DOCUMENTS* 163, 242 (35th Supp. 1989); see *United States—Definition of Industry Concerning Wine and Grape Products*, GATT Doc. SCM/71 para. 4.1 (Apr. 28 1992), reprinted in *BASIC INSTRUMENTS AND SELECTED DOCUMENTS* 436, 445-46 (39th Supp. 1993) ("The Panel was aware of the understanding of the Committee Chairman that it would, in its work, take into account any actual implementation of the legislation in question by the competent authorities of the United States.").

⁷⁸ John Fekete, *Introductory Note for a Postmodern Value Agenda*, in *LIFE AFTER POSTMODERNISM: ESSAYS ON VALUE AND CULTURE* at i, i (John Fekete ed., 1987). Even the great pragmatist John Dewey observed that everything is controlled by values. JOHN DEWEY, *THEORY OF VALUATION* 2 (1939).

dent to some extent for their context and justification on social facts and values external to law."⁷⁹ Even those who do not go so far as to argue that it legitimizes law,⁸⁰ however, generally agree that legal regimes that are not roughly congruent with prevalent societal values are either ineffective or short-lived.⁸¹ "If the law is at odds with the values of society, the law falls into disrepute and loses the force it needs to ensure conformity with its precepts."⁸²

In short, although there is much dispute over their nature, it is clear that societal values exist. Moreover, societal values play an important role in shaping both individuals and groups. Of most importance, however, is the relationship between law and societal values: in some fundamental way law must at least reflect somewhat the values of the society that created it. A law or legal regime may even be, one may surmise, a primary means chosen by a society to express a particular value.

B. Societal Values May Conflict With the Precepts of Free Trade

At any given point in time a society will possess more than one value.⁸³ These values may, in fact, conflict with one another. Thus, it is possible for a country to hold a value of enhancing wealth through international trade and at the same time hold values that conflict with

⁷⁹ Robert S. Summers, *On Identifying and Restructuring a General Legal Theory—Some Thoughts Prompted by Professor Moore's Critique*, 69 CORNELL L. REV. 1014, 1024 (1984). Perhaps the most well known proponent of this argument, although it is not the main thrust of his work, is Ronald Dworkin. See RONALD DWORKIN, *LAW'S EMPIRE* 206-15 (1986). H.L.A. Hart, of course, finds legitimacy not in a reflection of prevailing societal values but rather in the reflection of a broader moral scheme. See MICHAEL D. BAYLES, *HART'S LEGAL PHILOSOPHY: AN EXAMINATION 185-88* (1992) (outlining debate between Dworkin and Hart). See generally Tony Honoré, *The Dependence of Morality on Law*, 13 OXFORD J. LEGAL STUD. 1, 1-3 (1993) (posing questions raised by Hart's work).

⁸⁰ The criticism of this argument is that the underlying societal values themselves may not be legitimate.

⁸¹ GEOFFREY DE Q. WALKER, *THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY* 27-28 (1988); see John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233, 235 (1989) ("[A]n enduring and secure democratic regime, one not divided into contending doctrinal confessions and hostile social classes, must be willingly and freely supported by at least a substantial majority of its politically active citizens."). The same is true of bureaucratic action. Barksdale, *supra* note 56, at 313 ("Public acceptance is particularly important for administrative decisions that, unlike legislative decisions, lack the legitimacy of express constitutional sanctions.").

⁸² Hon. Sir Gerard Brennan, *Law in Search of a Principle*, 9 J. CONTEMP. HEALTH L. & POL'Y 259, 259 (1993); cf. OLIVER W. HOLMES, *THE COMMON LAW* 41 (1881) ("The first requirement of sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.").

⁸³ See Epstein, *supra* note 56, at 6 (diagramming different levels of values).

the precepts of free trade.⁸⁴ Examples of such conflicts include concerns over the environment, labor, and cultural identity.

1. *The Environment.*—To say that a society may have values pertaining to the relationship between persons and the environment is to state at once the very obvious and the extraordinarily complex. It is obvious because human beings live within the environment, and there are “reciprocal relationships between our physical and supraphysical environments and the varied patterns of beliefs, social practices and knowledge systems among mankind.”⁸⁵

The complexity of this statement derives from the use of the word “environment.” The environment encompasses virtually the entire context in which human beings maneuver, and thus virtually every action has some effect on the environment. Concomitantly, there can be no one value regarding the environment. To bundle all of the many values regarding environment into one cohesive scheme would be a monumental, and probably impossible, task.⁸⁶

The explosion of international agreements concerning environmental issues in the last twenty years⁸⁷ has focused attention on the relationship between environmental values and free trade.⁸⁸ There are currently nearly 900 international instruments that relate to environmental concerns.⁸⁹ For example, the Montreal Protocol on Sub-

⁸⁴ See, e.g., Walter F. Mondale, *The Legacy of the New Deal: The Role of Government in American Life*, 68 MINN. L. REV. 265, 268 (1983) (“The American people want a thriving economy, a fairer and more open regime of international trade, a clean and safe environment, a just society, and a strong defense that reduces the risk of nuclear war.”).

⁸⁵ Akinsola Akiwowo, *Human Social Relations and Environment Change: A Global Perspective*, in *ECOLOGY, SOCIETY & THE QUALITY OF SOCIAL LIFE* 185, 185 (William V. D’Antonio et al. eds., 1994).

⁸⁶ Cf. Michael J. Lacey, *The Environmental Revolution and the Growth of the State: Overview and Introduction*, in *GOVERNMENT AND ENVIRONMENTAL POLITICS* 1, 2 (Michael J. Lacey ed., 1991) (“While environmentalism represents just one department of American life of the postwar world, it is a very large department, indeed, and many have devoted their lives to working on the complexities of small parts of it. So vast and varied are its ideologically charged concerns, involving so many articulate groups contesting so many specific issues in so much technical argument, that no one person can hope to encompass the whole responsibly.”). Unfortunately, concern has not seemed to translate into success. “Just listing some of the many pressing environmental issues can lead to despondency: species extinction, deforestation, desertification, toxic waste, acid rain, global climate change, and severe air and water pollution in large cities and poor countries.” Eric Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1230 (1995).

⁸⁷ See Edith B. Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 675-84 (1993) (outlining explosion in international environmental agreements, particularly since 1972).

⁸⁸ See, e.g., *Report by Ambassador H. Ukawa (Japan), Chairman of the Group on Environmental Measures and International Trade, to the 49th Session of the Contracting Parties*, GATT Doc. L/7402, at 3 (1994) (reporting concern over conflict between multilateral environmental agreements and GATT principles and provisions).

⁸⁹ EDITH B. WEISS ET AL., *INTERNATIONAL ENVIRONMENTAL LAW: BASIC INSTRUMENTS AND REFERENCES* at ix (1992).

stances that Deplete the Ozone Layer⁹⁰ has been acceded to by seventy-nine countries,⁹¹ including virtually every major trading country. Similarly, global agreements have been negotiated to preserve endangered species of plants and animals,⁹² prevent pollution in oceans,⁹³ and protect the Antarctic.⁹⁴ This, of course, is only a partial list; moreover, the rate at which such instruments are being agreed upon is increasing each year.⁹⁵

The potential for conflict between environmentally oriented action and free trade is enormous.⁹⁶ Broadly speaking, environmental values may conflict with free trade in that they mandate the ban of sales of certain goods or goods made in a certain way. In addition, environmental values are sometimes enforced through trade embargoes or other measures that directly affect trade. Indeed, many of the global agreements concerning the environment restrict trade in certain items⁹⁷ or contain enforcement provisions that include trade em-

⁹⁰ S. TREATY DOC. NO. 10, 100th Cong., 1st Sess. (1987), 26 I.L.M. 1550, *amended by* Adjustments and Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer, June 29, 1990, 30 I.L.M. 537 (1991) [hereinafter Montreal Protocol]; see Dale S. Bryk, *The Montreal Protocol and Recent Developments to Protect the Ozone Layer*, 15 HARV. ENVTL. L. REV. 275 (1991); Elizabeth P. Barratt-Brown, Note, *Building a Monitoring and Compliance Regime Under the Montreal Protocol*, 16 YALE J. INT'L L. 519 (1991).

⁹¹ Jackson, *supra* note 20, at 1245 n.50.

⁹² See Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

⁹³ Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120.

⁹⁴ The Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71; Protocol on Environmental Protection to the Antarctic Treaty, S. TREATY DOC. NO. 22, 102d Cong., 2d Sess. (1992), 30 I.L.M. 1455.

⁹⁵ Professor Weiss has noted the "increasing rapid development of international environmental law." Weiss, *supra* note 87, at 680. She demonstrates that countries are becoming more adept at negotiating large and complex agreements.

⁹⁶ Kym Anderson and Richard Blackhurst suggest three ways in which "[t]rade discussions are being coloured by environmental concerns": the effect of trade on consumption and production activities, the extraterritorial trade effects of national environmental policies, and the use of trade sanctions to enforce environmental treaties. Kym Anderson & Richard Blackhurst, *Trade, the Environment and Public Policy*, in THE GREENING OF WORLD TRADE ISSUES 3, 5 (Kym Anderson & Richard Blackhurst eds., 1992). Berlin and Lang outline five categories of conflict: product standards, production process standards, subsidies for pollution control, flora and fauna, and the impact of trade on patterns development and thus the environment. Kenneth Berlin & Jeffrey M. Lang, *Trade and the Environment*, WASH. Q., Autumn 1993, at 35, 36.

⁹⁷ CITES, *supra* note 92, arts. 3-5.

bargoes or restrictions.⁹⁸ Regional agreements contain similar provisions.⁹⁹

Some commentators have explained the explosion in the number of international environmental agreements as some sort of epiphanal realization by countries that "protection of the environment must be addressed on a global basis."¹⁰⁰ Few, if any, have attributed this proliferation of international instruments to a change in the domestic values held by the countries that entered into the agreements.

Psychologists and social scientists, however, have amassed a body of evidence that supports the notion that environmental concern stems from a "new"¹⁰¹ and very distinct set of values that has emerged in the past forty years.¹⁰² In 1978, Riley Dunlap and Kent Van Liere posited what they labeled the "New Environmental Paradigm," which encompasses nature-oriented values and rejects anthropocentrism.¹⁰³ This new paradigm dramatically "departs from our society's traditional world view or dominant social paradigm."¹⁰⁴ Using various surveys, Dunlap and Van Liere found that even in 1978, a majority of persons embraced certain of these environmental values, but that—not surprisingly—they were most closely held by those who would be considered environmentalists.¹⁰⁵ The discovery that persons who favor protecting the environment have different values than persons who do not has been empirically verified in specific environmental

⁹⁸ *Id.* art. 8; Montreal Protocol, *supra* note 90, art. 4, S. TREATY DOC. at 6, 26 I.L.M. at 1554. Janet McDonald suggests that the CITES and the Montreal Protocol, as well as several other environmental agreements, violate the General Agreement on Trade and Tariffs. Janet McDonald, *Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order*, 23 ENVTL. L. 397, 450-59 (1993).

⁹⁹ See, e.g., Agreement Concerning the Transboundary Movement of Hazardous Waste, Oct. 28, 1986, Can.-U.S., T.I.A.S. No. 11,099; Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, Oct. 20, 1990, 29 I.L.M. 1453.

¹⁰⁰ Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L L. 700, 717 (1992).

¹⁰¹ Anthropologists and others who study nonindustrial cultures would probably be amused by the notion that these are new values. As the prominent anthropologist David Maybury-Lewis has noted, "[t]ribal societies, by contrast [to industrial societies], have always had a strong sense of the interconnectedness of things on this earth and beyond." David Maybury-Lewis, *Tribal Wisdom*, UTNE READER, July-Aug. 1992, at 68, 73.

¹⁰² Paul C. Stern et al., *Value Orientations, Gender, and Environmental Concern*, 25 ENV'T & BEHAV. 322, 323 (1993).

¹⁰³ Riley E. Dunlap & Kent D. Van Liere, *The "New Environmental Paradigm"*, J. ENVTL. EDUC., Summer 1978, at 10, 10.

¹⁰⁴ *Id.* at 17.

¹⁰⁵ *Id.* at 13. Dunlap and Van Liere later tested the converse of their hypothesis and discovered that those who do not protect the environment generally adhere to the traditional value set, while those who do protect the environment vary from the traditional value set. Riley E. Dunlap & Kent D. Van Liere, *Commitment to the Dominant Social Paradigm and Concern for Environmental Quality*, 65 Soc. Sci. Q. 1013, 1023-24 (1984).

behaviors: for example, energy conservation,¹⁰⁶ use of lead-free gasoline,¹⁰⁷ and recycling.¹⁰⁸ What emerges quite clearly from the empirical data is that favoring environmental protection involves definable and discrete values.¹⁰⁹ Moreover, these values are deeply held: persons who favor environmental protection believe "that pollution is, to put it bluntly, morally wrong."¹¹⁰ Thus, when observers note that persons in the environmental community and persons in the trade community tend to have different "academic and experiential" backgrounds,¹¹¹ they are not offering a complete description. In fact, such persons operate with different sets of values and actually see the world differently from one another.¹¹²

While these values have found some expression at the international level, the lion's share of expression occurs through domestic legislation.¹¹³ Moreover, the most serious obstacles that international trade faces are not with international agreements but rather with these domestic laws. Domestic regulations often completely ban the sale of a product or prohibit certain processes in the manufacture of a product.¹¹⁴ Even when environmental regulations do not ban the sale

¹⁰⁶ J. Stanley Black et al., *Personal and Contextual Influences on Household Energy Adaptations*, 70 J. APPLIED PSYCHOL. 3, 17 (1985) ("Both economic self-interest and internalized personal norms affect behavioral responses to the energy situation . . .").

¹⁰⁷ Thomas A. Heberlein & J. Stanley Black, *Attitudinal Specificity and the Prediction of Behavior in a Field Setting*, 33 J. PERSONALITY & SOC. PSYCHOL. 474, 477-78 (1976) (specific personal values or attitudes identifiable among users of lead-free gasoline).

¹⁰⁸ Joseph R. Hopper & Joyce M. Nielsen, *Recycling as Altruistic Behavior: Normative and Behavioral Strategies to Expand Participation in a Community Recycling Program*, 23 ENV'T & BEHAV. 195, 215 (1991) (recyclers have altruistic value, but nonaltruists can be induced to recycle).

¹⁰⁹ One value that is apparent is altruism. *Id.* at 215. Paul Stern, Thomas Dietz, and Linda Kalof suggest three different value orientations that may support environmental protection: egoistic, social-altruistic, or biospheric. Stern et al., *supra* note 102, at 322.

¹¹⁰ Paul C. Stern et al., *Support for Environmental Protection: The Role of Moral Norms*, 8 POPULATION & ENV'T 204, 205 (1986).

¹¹¹ *E.g.*, Berlin & Lang, *supra* note 96, at 36.

¹¹² Thomas Dietz et al., *Definitions of Conflict and the Legitimation of Resources: The Case of Environmental Risk*, 4 SOC. FORUM 47 (1989); see Thomas A. Heberlein, *The Land Ethic Realized: Some Social Psychological Explanations for Changing Environmental Attitudes*, J. SOC. ISSUES, 1972 no. 4, at 79 (contrasting economic orientation to nature with moral orientation to nature). For critiques of the use of economic orientation in environmental regulation, see Robyn Eckersley, *Free Market Environmentalism: Friend or Foe?*, 2 ENVTL. POLITICS 1 (1993); James E. Krier, *The Tragedy of the Commons Part Two*, 15 HARV. J.L. & PUB. POL'Y 325, 332-33 (1992); Orts, *supra* note 86, at 1241-52.

¹¹³ See Orts, *supra* note 86, at 1240 ("The amount of environmental law and regulation in the United States alone is staggering.")

¹¹⁴ See, e.g., Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136(c) (1994) (regulating imports of pesticides); Toxic Substances Control Act, 15 U.S.C. § 2603 (1994) (regulating export of chemicals); Endangered Species Act, 16 U.S.C. § 1538(d) (1994) (restricting import and export of endangered species); Driftnet Impact Monitoring, Assessment, and Control Act, 16 U.S.C. § 1826 (1994) (authorizing trade measures against countries using driftnets that harm Pacific salmon or dolphins); African Elephant Conservation Act, 16 U.S.C. §§ 4201-4245

of a product but instead take the form of standards, there is a concern that “differing environmental standards frequently constitute nontariff barriers to free international trade; they also may amount to disguised protectionism.”¹¹⁵

An example of well-intentioned domestic legislation that has serious implications for trade is Germany’s Ordinance on the Avoidance of Packaging Waste.¹¹⁶ The law requires product manufacturers to take back and recycle transport packaging materials.¹¹⁷ While Germany’s law reflects a stolid, teutonic value—those who are responsible for a problem must solve it—it arguably creates a disadvantage for suppliers located outside of Germany, who will have higher costs when recovering the transport packaging. Indeed, Germany’s partners in the European Union have complained that Germany’s environmental stance impedes trade.¹¹⁸

The conflict that catapulted the relationship between trade and the environment into the public eye¹¹⁹ involved a domestic law that prohibited the use of a certain process. The GATT panel report on Restrictions on Import of Tuna¹²⁰—commonly referred to as the Tuna/Dolphin decision—touched off a dialogue previously unseen regarding free trade.¹²¹ The dispute arose when the United States im-

(1994) (banning import of elephant ivory); Solid Waste Disposal Act, 42 U.S.C. § 6928 (1994) (regulating export of hazardous waste).

¹¹⁵ Schoenbaum, *supra* note 100, at 703.

¹¹⁶ Verpackungsverordnung of June 12, 1991 BGBl.I; see *Abolishing Litter*, *ECONOMIST*, Aug. 22, 1992, at 59 (discussing German legislation); *Recycling in Germany: A Wall of Waste*, *ECONOMIST*, Nov. 30, 1991, at 75. For a coherent criticism of the law, see Susan Rose-Ackerman, *Environmental Policy and Federal Structures: A Comparison of the United States and Germany*, 47 *VAND. L. REV.* 1587, 1616 (1994).

¹¹⁷ Verpackungsverordnung, *supra* note 116, art. 4. Transport material includes items such as pallets, crates, and boxes. Local distributors are also required to recycle primary packaging, such as bottles, cans, and other containers. *Id.* art. 6.

¹¹⁸ *Bottled Up*, *ECONOMIST*, Dec. 17, 1994, at 69.

¹¹⁹ See Kevin C. Kennedy, *Reforming U.S. Trade Policy to Protect the Global Environment: A Multilateral Approach*, 18 *HARV. ENVTL. L. REV.* 185, 203 (1994) (characterizing Tuna/Dolphin decision as “most notorious GATT Panel decision involving environmental trade measures”).

¹²⁰ *United States Restrictions on Imports of Tuna*, GATT Doc. DS21/R (Aug. 16, 1991), reprinted in 30 *I.L.M.* 1594 (1991).

¹²¹ See Belina Anderson, *Unilateral Trade Measures and Environmental Protection Policy*, 66 *TEMPLE L. REV.* 751, 751 (1993) (“Environmental groups vigorously opposed the report’s adoption . . . and even called for reconsideration of the entire trade regime.”); Matthew H. Hurlock, Note, *The GATT, U.S. Law and the Environment: A Proposal to Amend the GATT in Light of the Tuna/Dolphin Decision*, 92 *COLUM. L. REV.* 2098, 2131 n.175 (1992) (President Bush received letter signed by 100 Representatives and letter signed by 64 Senators expressing concern with panel ruling and urging President to block adoption of the ruling.); Stuart Auerbach, *Raising a Roar Over a Ruling: Trade Pact Imperils Environmental Laws*, *WASH. POST*, Oct. 1, 1991, at D1 (noting that environmental groups raised public opinion against GATT due to panel ruling); Jessica Mathews, *Dolphins, Tuna and Free Trade: No Country Can Protect Its Own Smidgen of Air or Ocean*, *WASH. POST*, Oct. 18, 1991, at A21 (describing the decision as “legally sound” but “environmental nonsense”).

posed an embargo on Mexican tuna pursuant to the Marine Mammal Protection Act, which prohibits the sale in the United States of tuna caught by foreign fishing fleets if the number of dolphins or porpoises that are killed in the process of catching that tuna exceeds by twenty-five percent the number killed by U.S. fleets.¹²² The GATT dispute settlement panel determined that the embargo violated the United States's obligations under the General Agreement. Specifically, the panel declared that the General Agreement "obliges the United States to accord treatment to Mexican tuna no less favorable than that accorded to United States tuna, whether or not the incidental taking of dolphins by Mexican vessels corresponds to that of United States vessels."¹²³

Although the Marine Mammal Protection Act does affect trade, it clearly was enacted to express other values. A majority of U.S. citizens feel fondness and concern for porpoises and dolphins.¹²⁴ The killing of porpoises and dolphins in connection with tuna fishing is particularly gruesome: because dolphins or porpoises often swim above schools of tuna in the eastern tropical Pacific, tuna fisherman in those waters circle their nets around pods of those mammals. As the nets are drawn in, many of the porpoises or dolphins drown (a drawn-out process for aquatic mammals). Many of those that do not drown are caught in the net rigging and hauled into the gear of the winch, where they are literally ground to death. Those that are merely wounded or stunned are thrown back into the water, where they are

¹²² Pub. L. No. 92-522, 86 Stat. 1027 (1972), amended by Fishery Conservation Amendments of 1990, Pub. L. No. 101-627, 104 Stat. 4436, 4467 (1990) (codified at 16 U.S.C. § 1361 (1994)).

¹²³ 30 I.L.M. at 1618. Because the decision has been explicated so thoroughly elsewhere, it will not be described at great length in this Article. In short, a complaint was brought to the Council of the General Agreement on Tariff and Trade by Mexico, which requested that a panel consider U.S. restrictions on the import of tuna both from Mexico and through intermediaries. The panel found that the embargo constituted a quantitative restriction that violated Article 11 of the General Agreement. The exception of Article 20(b), which allows a nation to protect the life or health of humans, animals, or plants, was held not to be applicable extraterritorially. Similarly, the exception of Article 20(g), which allows conservation measures, was held not to apply extraterritorially. Although Mexico prevailed in the hearing, the GATT panel report has not been adopted as law by the GATT Council because Mexico, realizing the very serious political consequences of doing so, has not requested adoption. For more thorough discussions, see Hurlock, *supra* note 121, at 2120-32; Thomas E. Skilton, Note, *GATT and the Environment in Conflict: The Tuna-Dolphin Dispute and the Quest for an International Conservation Strategy*, 26 CORNELL INT'L L.J. 455, 467-70 (1993); Joel P. Trachtman, *GATT Dispute Settlement Panel*, 86 AM. J. INT'L L. 142 (1992).

¹²⁴ Roger Simon, *Animal Lovers' Bias is for the Birds*, CHI. TRIB., Jan. 11, 1988, at C5; see Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21 (1991) (arguing whales have right to life based on their intelligence and social structure).

almost immediately eaten alive by waiting sharks.¹²⁵ The Marine Mammal Protection Act was enacted to limit those killings.¹²⁶

Values concerning the environment in which humans exist constitute perhaps the most fundamental, abundant, and varied sets of human values. Such values often are expressed in a country's laws and legal regimes. Inevitably, these laws sometimes conflict with the principles of free trade. These are not, however, the only value-expressive laws that conflict with trade.

2. *Labor*.—A fundamental relationship exists between labor and international trade. David Ricardo, who developed¹²⁷ the concept of comparative advantage, implicitly found comparative advantage in the differentials among countries of the cost of labor.¹²⁸ Most of the theoretical¹²⁹ and empirical¹³⁰ work performed since Ricardo's time has been designed to elucidate other sources of comparative

¹²⁵ Kerry L. Holland, Note, *Exploitation on Porpoise: The Use of Purse Seine Nets by Commercial Tuna Fisherman in the Eastern Tropical Pacific Ocean*, 17 SYRACUSE J. INT'L L. & COM. 267, 269-70 (1991).

¹²⁶ H.R. REP. NO. 707, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 4144; see generally George C. Coggins, *Legal Protection for Marine Mammals: An Overview of Innovative Resource Conservation Legislation*, 6 ENVTL. L. 1 (1975); Ken Schoolcraft, Jr., Note, *Congress Amends the Marine Mammal Protection Act*, 62 OR. L. REV. 257 (1983). Carol Rose has described environmental ethics as "animated by a[n] . . . emotional sense of the 'gift' of our wild areas, and a sympathetic concern for their loss." Carol M. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 ENVTL. L. 1, 12 (1994).

¹²⁷ Samuel Hollander argues that Ricardo did not, in fact, discover the concept of comparative advantage. See SAMUEL HOLLANDER, *THE ECONOMICS OF DAVID RICARDO* 461-62 (1979) (attributing recognition of comparative advantage to Robert Torrens). To the extent that he did not in fact discover comparative advantage, Ricardo certainly introduced it into the mainstream of economic thought; most economists credit the concept to Ricardo. See, e.g., PETER J. BUCKLEY & MICHAEL E. BROOKE, *INTERNATIONAL BUSINESS STUDIES: AN OVERVIEW* 6 (1992).

¹²⁸ BUCKLEY & BROOKE, *supra* note 127, at 6.

¹²⁹ See, e.g., BERTIL OHLIN, *INTERREGIONAL AND INTERNATIONAL TRADE* (1933); Eli F. Heckscher, *The Effects of Foreign Trade on the Distribution of Income*, in *ECON. TIDSKRIFT* 50 (1919). The Heckscher-Ohlin model has become "the standard neoclassical approach to trade." BUCKLEY & BROOKE, *supra* note 127, at 6. It notes that different countries have different endowments of land, labor, and capital, and suggests that countries will specialize in the production of goods that require large amounts of a factor in which they are well endowed, and will import goods that require large amounts of a factor in which they are poorly endowed. *Id.* at 6-7.

¹³⁰ See, e.g., EDWARD E. LEAMER, *SOURCES OF INTERNATIONAL COMPARATIVE ADVANTAGE: THEORY AND EVIDENCE* (1984) (analyzing trade patterns of 59 countries in terms of amounts of 11 resources). The most famous empirical work, of course, was "Leontief's Paradox," in which Wassily Leontief purported to show that the United States—contrary to the Heckscher-Ohlin model—exported labor-intensive goods and imported capital intensive goods. See Wassily Leontief, *Domestic Production and Foreign Trade: The American Capital Position Re-Examined*, 97 PROC. AM. PHIL. SOC'Y 332 (1953); Wassily Leontief, *Factor Proportions and the Structure of American Trade: Further Theoretical and Empirical Analysis*, 38 REV. ECON. STATISTICS 386 (1956). Although the Leontief Paradox continues to be trotted out, see, e.g., POOL & STAMOS, *supra* note 27, at 33, it was substantially disproved by Edward Leamer in 1980, Edward E. Leamer, *The Leontief Paradox Reconsidered*, 88 J. POL. ECON. 495, 502 (1980).

advantage. Nonetheless, labor costs remain a primary source of comparative advantage. Thus, economists and trade policy makers become somewhat nervous when societal values concerning work¹³¹ are discussed.¹³²

Indeed, many of the concerns that are raised by those who profess to enunciate labor-related values sound suspiciously like protectionism. "Our members are registered voters, and they are political activists on things that are important to them, which are jobs and imports in the garment industry."¹³³

To some extent, these concerns are understandable. Incremental change in the freedom of international trade does change employment patterns; employment increases in some regions and decreases in others.¹³⁴ As more free trade increases specialization, those who work in less efficient industries will find their source of employment withering away.¹³⁵ This short term suffering is a serious problem that should not be ignored by policymakers; it is, however, the result of inefficient distribution of the gains of free trade and is not necessarily an indictment of trade itself. In the long run, free trade should increase overall employment.¹³⁶

To speak of the relationship between trade and work merely in terms of raw employment figures, however, exhibits a fairly unsophisticated view of the relationship between work and human society. Along with its economic implication, work is inextricably bound with social and personal values.¹³⁷ "Nothing is so native and intimate to

¹³¹ Whenever possible, this Article will use the broader concept of work rather than the economic term, "labor." "Work is the effort or activity of an individual performed for the purpose of providing goods or services of value to others; it is also considered to be work by the individual so involved." RICHARD C. HALL, *DIMENSIONS OF WORK* 13 (1986).

¹³² See, e.g., Michael B. Smith, *Trade and the Environment: GATT, Trade, and the Environment*, 23 ENVTL. L. 533, 533 (1993) (noting developing countries' suspicions of labor measures as protectionist).

¹³³ James Gerstenzang, *GATT May Not Be a Hot Issue Just Now, But It Will Be Soon*, L.A. TIMES, Nov. 7, 1994, at D1 (quoting a business agent of a garment worker's union). A letter to the editor of a midwestern newspaper spells out the worker's fears: "With GATT, Asian and other slave-wage countries can send products to the United States without any taxes. They will be able to use child labor, as it is not prohibited by GATT." William Pipher, *NAFTA, GATT Will Ruin U.S. Economy*, INDIANAPOLIS NEWS, Nov. 7, 1994, at A13 (letter to editor).

¹³⁴ See Robert C. Shelburne & Robert W. Bednarzik, *Geographic Concentration of Trade-Sensitive Employment*, MONTHLY LAB. REV., June 1993, at 3, 10.

¹³⁵ See ADRIAN WOOD, *NORTH-SOUTH TRADE, EMPLOYMENT AND INEQUALITY* 11 (1994) ("[U]p to 1990 the change in trade with the South has reduced the demand for unskilled relative to skilled labor in the North as a whole by something like 20 per cent."). But see ROBERT Z. LAWRENCE, *THE IMPACT OF TRADE ON OECD LABOR MARKETS* 17 (Group of Thirty, Occasional Papers No. 45, 1994) (arguing that trade has not played significant role in poor wage performance or growing wage inequality of developed countries).

¹³⁶ GOTO, *supra* note 44, at 103-04.

¹³⁷ See Craig R. Littler, *Introduction: The Texture of Work, in THE EXPERIENCE OF WORK* 1, 1 (Craig R. Littler ed., 1985) ("[W]ork has three levels of meaning: an economic, social and per-

[humans] as work, except perhaps the drive to reproduce and the rationality that impels and guides [their] laboring efforts."¹³⁸

Indeed, much of the social edifice is built upon or permeated by work. "Anthropology reminds us that in other cultures 'work' is embedded in a variety of structures from which it takes its organisation and meaning. This degree of connectedness with the spheres of kinship, religion, politics, and so on, is less marked in our own kind of society."¹³⁹ Nonetheless, work plays a critical role in ordering society in developed countries.¹⁴⁰ Emile Durkheim introduced the concept of division of labor into sociologists' vocabulary almost a century ago.¹⁴¹ In essence, this concept observes that human endeavors have become more efficient as people have specialized in their work, and that this specialization shapes many of the social institutions and mores of modern society. "[T]he more complex the material and social technology of a society, the more complex will be its division of labor."¹⁴² This insinuation of work into society in general makes it difficult for sociologists to separate work from other societal values.¹⁴³ "Generally, work has always been invested with moral qualities, and the eco-

sonal meaning . . ."). For an overview of recent sociological study of work, see Andrew Abbott, *The Sociology of Work and Occupations*, 19 ANN. REV. SOC. 187 (1993).

¹³⁸ DENNIS CLARK, *WORK AND THE HUMAN SPIRIT* 21 (1967). The eminent sociologist Max Weber noted, in a similar vein, that the impulse for acquisition "has been common to all sorts and conditions of men at all times and in all countries of the earth, wherever the objective possibility of it is or has been given." MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 17 (Talcott Parsons trans., 1930). Emile Durkheim describes the organization of work in grander terms: the division of labor "is no longer a mere social institution whose roots lie in the intelligence and the will of men, but a general biological phenomenon, the conditions for which must seemingly be sought in the essential properties of organised matter." EMILE DURKHEIM, *THE DIVISION OF LABOUR IN SOCIETY* 3 (W.D. Halls trans., 1984) (1898).

¹³⁹ Patrick Joyce, *The Historical Meanings of Work: An Introduction*, in *THE HISTORICAL MEANING OF WORK* 1, 2 (Patrick Joyce ed., 1987). One culture in which anthropologists point to work as a fundamental social structure is Morocco, which is where the Final Act Embodying the Results of the Uruguay Round was signed. See CLIFFORD GEERTZ ET AL., *MEANING AND ORDER IN MOROCCAN SOCIETY* 182 (1979). For an intriguing discussion of the interplay between work and ritual in a nonindustrialized society, see Bronislaw Malinowski, *The Primitive Economics of the Trobriand Islanders*, 31 ECON. J. 1, 5-7 (1921).

¹⁴⁰ See David Ziskind, *Labor Law in 143 Constitutions*, 1 COMP. LAB. L.J. 205, 211 (1976) ("Several [national] Constitutions proclaim work as the basis of the social order . . .").

¹⁴¹ LEE BRAUDE, *WORK AND WORKERS: A SOCIOLOGICAL ANALYSIS* 13 (1975).

¹⁴² *Id.* Rousseau also noted the specialization of human labor and the interdependence this creates. The fact that each is dependent on all led him to conclude that "work is therefore the indispensable duty for man in society." JEAN-JACQUES ROUSSEAU, *EMILE OU DE L'EDUCATION* 226 (Paris 1964), translated by and quoted in ALASDAIR CLAYRE, *WORK AND PLAY* 9 (1974).

¹⁴³ See BRAUDE, *supra* note 141, at 3 ("[I]t is not easy to divorce discussions of work from a moral or ethical perspective."); David Ziskind, *Cultural Bias in Labor Law Comparison*, 6 COMP. LAB. L.J. 275, 284 (1984) ("Secular philosophies have been . . . specific in their espousal or repudiation of labor laws; and the assessment of laws by comparatists unavoidably involves philosophical concepts.").

conomic meaning of work becomes intertwined with the social meaning."¹⁴⁴

Work also plays a significant role in shaping individuals. Perhaps the most telling indicium of the relationship between the individual and work is the nomenclature of work:

Labor derives from a Latin word signifying trouble, distress, difficulty. *Travail*, the French word, likewise is of Latin origin; it originally denoted the *tripalium*, a three-pronged instrument of torture employed by the Roman legions. Similarly, *occupation* emerges from the Latin *oscupare*, to seize hold of or grapple with. In Greek, work and trouble are synonymous, in Biblical Hebrew, work and slavery are identical.¹⁴⁵

There is also much to the old saw that the work makes the person. "[S]tudies uniformly support the proposition that the condition of work experienced by gainfully employed men and women affect their values, self-conceptions, orientations to social reality, and cognitive functioning."¹⁴⁶

Given the close relationship between work and societal values, it is not surprising that work finds its way into many legal regimes. As with environmental values, there is some coordination of these values at the international level. The International Labor Organization alone has generated over 300 conventions and recommendations, most of which concern work.¹⁴⁷ Treaties have been entered into dealing with matters ranging from the prohibition of forced labor¹⁴⁸ to equality of opportunity and treatment.¹⁴⁹

¹⁴⁴ Littler, *supra* note 137, at 1.

¹⁴⁵ BRAUDE, *supra* note 141, at 5.

¹⁴⁶ Melvin L. Kohn, *Unresolved Issues in the Relationship Between Work and Personality*, in *THE NATURE OF WORK: SOCIOLOGICAL PERSPECTIVES* 36, 40 (Kai Erikson & Steven P. Vallas eds., 1990); see also MELVIN L. KOHN & CARMİ SCHOOLER, *WORK AND PERSONALITY: AN INQUIRY INTO THE IMPACT OF SOCIAL STRATIFICATION* 55-81 (1983) (empirically verifying that work shapes personality). The prolific Hamilton Mabie put it much more prosaically: "The degree in which a man individualises [sic] his work and gives it the quality of his own mind and spirit is, therefore, the measure of his success in giving his nature free and full expression." HAMILTON W. MABIE, *ESSAYS ON WORK AND CULTURE* 27 (1898).

¹⁴⁷ VICTOR-YVES GHEBALI, *THE INTERNATIONAL LABOUR ORGANISATION: A CASE STUDY ON THE EVOLUTION OF U.N. SPECIALISED AGENCIES* 212 (1989). See generally ILO BUREAU OF PUBLIC INFORMATION, *THE INTERNATIONAL LABOR ORGANIZATION: BACKGROUNDER* (1994) (explaining history and operation of the International Labor Organization).

¹⁴⁸ ILO Convention No. 105 (1957). International Labor Organization conventions and recommendations are reprinted in *INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS* (R. Blanpain & C. Engels eds., 1977 and Supps.).

¹⁴⁹ ILO Convention No. 156 (1981); see Lance Compa, *International Labor Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies*, 9 AM. U. J. INT'L L. & POL'Y 117, 122-28 (1993) (among goals of international efforts are prohibition of child labor and discrimination and promotion of minimum wage, safe working conditions, and the right to organize). One of the most telling facts regarding the interplay between values and work is the blurred distinction between treaties regarding work and those regarding human rights. For example, does a prohibition against *exploitation* of workers deal with work or with more funda-

The most important expression of these values, however, occurs at the local level. Values relating to work are so fundamental that many countries actually enshrine them in their national constitutions.¹⁵⁰ Numerous constitutions prohibit slavery,¹⁵¹ forced labor,¹⁵² and child labor.¹⁵³ Guidelines for minimum wages¹⁵⁴ are set out in constitutions, as are limitations on the length of a work day or week¹⁵⁵ and the right to safe working conditions,¹⁵⁶ equal pay,¹⁵⁷ maternity benefits,¹⁵⁸ and even paid holidays.¹⁵⁹ The right to form unions,¹⁶⁰ to enter into collective bargaining,¹⁶¹ and to strike, if necessary,¹⁶² are all

mental rights of existence and dignity? Article 23 of the Universal Declaration of Human Rights deals explicitly with work:

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and join trade unions for the protection of his interests.

G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1, at 75, U.N. Doc. A/810 (1948); see Kent Källström, *Article 23, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY 357* (Asbjørn Eide et al. eds., 1992) (discussing Article 23).

¹⁵⁰ The constitution of Mongolia, for example, guarantees "[t]he right to free choice of employment, suitable conditions of work, remuneration, rest and private enterprise." MONG. CONST. art. 16(4). The constitution of the Congo characterizes work as "a sacred right and duty." CONGO CONST. art. 31.

¹⁵¹ See, e.g., U.S. CONST. amend. XIII; COLOM. CONST. art. 17; FIJI CONST. art. 7(1); SING. CONST. art. 10(1) (1963); TONGA CONST. art. 2.

¹⁵² See, e.g., ECUADOR CONST. art. 19(11); PAPUA N.G. CONST. art. 43. Interestingly, some constitutions permit forced labor. See, e.g., GRUNDGESETZ [Constitution] [GG] art. 12(3) (F.R.G.) ("Forced labor may be imposed only on persons deprived of their liberty by court sentence."); NAURU CONST. art. 6(2)(d) (excepting "labor reasonably required as part of reasonable and normal communal or other civic obligations" from definition of forced labor).

¹⁵³ See, e.g., CONGO CONST. art. 43; EL SAL. CONST. art. 38 para. 10.

¹⁵⁴ See, e.g., COSTA RICA CONST. art. 57; PAN. CONST. art. 61.

¹⁵⁵ See, e.g., COSTA RICA CONST. art. 58 (8 hours per day or 36 per week, with overtime wages fixed at 50% over stipulated wages); CONSTITUIÇÃO FEDERAL [Constitution] [C.F.] art. 7(XIII) & (XVI) (Brazil) (8 hours per day or 44 hours per week, with overtime wages fixed at 55% over regular wages).

¹⁵⁶ See, e.g., JORDAN CONST. art. 23(e); BUNDESVERFASSUNG, CONSTITUTION FÉDÉRALE, COSTITUZIONE FEDERALE [Constitution] [BV, CST, COST. FED.] art. 34 (Switzerland).

¹⁵⁷ See, e.g., CONGO CONST. art. 31; GREECE CONST. art. 22(1).

¹⁵⁸ See, e.g., CONSTITUIÇÃO FEDERAL [Constitution] [C.F.] art. 7(XVIII) (Brazil); GUAT. CONST. art. 102(k); COSTITUZIONE [Constitution] [COST.] art. 37 (Italy); BUNDESVERFASSUNG, CONSTITUTION FÉDÉRALE, COSTITUZIONE FEDERALE [Constitution] [BV, CST, COST. FED.] art. 34 quinquies para. 4 (Switzerland); see Paolo Wright-Carozza, *Organic Goods: Legal Understandings of Work, Parenthood, and Gender Equality in Comparative Perspective*, 81 CAL. L. REV. 531, 545-48 (1993) (discussing Italian law). The constitution of Brazil also provides for paternity leave. CONSTITUIÇÃO FEDERAL [Constitution] [C.F.] art. 7(XIX) (Brazil).

¹⁵⁹ See, e.g., MALTA CONST. art. 13(2); PAN. CONST. art. 66.

¹⁶⁰ See, e.g., BARB. CONST. art. 21(1); THAIL. CONST. § 40.

¹⁶¹ See, e.g., CONSTITUCIÓN ARGENTINA [Constitution] [CONST. ARG.] art. 14 (Argentina); KENPO [Constitution] art. 28 (Japan).

set forth in constitutions.¹⁶³ Clearly, work has a role in the organization of these societies: some constitutions explicitly declare work to be a basis of the social order.¹⁶⁴

In addition to constitutions, domestic legislation also reflects values that are related to work. This legislation often comes into conflict with the principles of free trade. In the United States, for example, the Caribbean Basin Economic Recovery Act,¹⁶⁵ the General System of Preferences,¹⁶⁶ and the organic legislation for the Overseas Private Investment Corporation¹⁶⁷ each contain provisions that condition the right to enter into trade with U.S. entities on workers' rights, workplace conditions, and the ability to organize collectively.¹⁶⁸

An example of a legal regime that expresses a value regarding work and also conflicts with the goal of free trade is not difficult to conjure—in fact, conjecture is not even required. The United States as a society believes that child labor, especially semi-involuntary child labor in dangerous conditions, is wrong. Nonetheless, hundreds of millions of children are forced into labor around the world, often in the manufacture of products that are exported to the United States. As an expression of intolerance for this practice, legislation has been proposed that would prohibit the sale in the United States of goods made using child labor. Most analysts believe that such legislation would violate the General Agreement.¹⁶⁹

Clearly, the relationship between individuals, society, and work is far more complex than merely attempting to maintain high levels of employment. Work is a fundamentally defining aspect of human existence, and thus is deeply embedded in the value system of any society. It should be no surprise, then, that laws that deal with labor

¹⁶² See, e.g., COSTITUZIONE [Constitution] [COST.] art. 40 (Italy); SWED. CONST. ch. 2 art. 17.

¹⁶³ See Janice R. Bellace, *The State and Industrial Relations: A Strategic Choice Model*, 14 COMP. LAB. L.J. 249, 250 (1993) ("Obviously the state has a role in industrial relations, and this role reflects the government's ideological and political orientation.").

¹⁶⁴ See, e.g., BAHR. CONST. art. 9(a) ("Property, capital and work, in accordance with the principles of Islamic justice, shall be fundamental constituents of the social structure of the State and the national wealth.") (Bahrain); CONSTITUIÇÃO FEDERAL [Constitution] [C.F.] art. 1 (Brazil) (Brazil constituted on premise of, among other things, "social values of labor and free enterprise."). The constitution of Italy begins with the following sentence: "Italy is a democratic Republic founded on labor." COSTITUZIONE [Constitution] [COST.] art. 1 (Italy).

¹⁶⁵ 19 U.S.C. §§ 2701-2707 (1994).

¹⁶⁶ Trade Act of 1974, 19 U.S.C. § 2461 (1994).

¹⁶⁷ Foreign Assistance Act of 1969, 22 U.S.C. §§ 2192-2200(b) (1994).

¹⁶⁸ Jorge F. Perez-Lopez, *Conditioning Trade on Foreign Labor Law: The U.S. Approach*, 9 COMP. LAB. L.J. 253, 253-54 (1988).

¹⁶⁹ Mitchell Zuckoff, *Free Trade, Human Rights Clash Over GATT*, BOSTON GLOBE, Oct. 30, 1994, at 77.

sometimes reflect deeply-held underlying values associated with the relationship between humans and work.¹⁷⁰

3. *Cultural Identity*.—Cultural identity, just as is true of societal values, is a term that is often used by legal scholars without any real exploration of the meaning of the phrase. Indeed, what constitutes a cultural identity is probably incapable of precise definition.¹⁷¹ Nonetheless, there is consensus that cultural identity exists.¹⁷² Broadly defined, cultural identity

consists in the members of a given collectivity's sense of themselves; in a body of collective representations which express a shared understanding of their past, present and future, and which enables them to give unified answers to such questions as: who are we? what distinguishes us from others? what kind of life do we esteem? what kind of goals do we set for ourselves and mobilise our resources to achieve?¹⁷³

Cultural identity is important¹⁷⁴ for at least three reasons. First, cultural identity "provides patterns of values and standards in shaping motivational orientations and attributes, and consequently in personality formation."¹⁷⁵ Second, beyond personality formation, cultural identity guides and directs the behavior of individuals and societies.¹⁷⁶

¹⁷⁰ See David L. Gregory, *Working for a Living*, 58 BROOK. L. REV. 1355, 1356-57 (1993) (book review) ("In labor law, often times, the 'law' is the least important part of the equation . . . the law will have to take care of itself and will, as always, follow, rather than precede, the social and political realities . . .").

¹⁷¹ RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 76 (1976) ("Culture is one of the two or three most complicated words in the English language."); see Jørgen Selmer, "Cultural Groups" and the Study of Life-Styles and Cultural Identity, in *TRADITION AND CULTURAL IDENTITY* 47, 52 (Lauri Honko ed., 1988) (setting out two categories of definition of cultural identity: one "based on cultural phenomena that have some outward, objectively observable expression," the other "based on cultural phenomena as something which is seen subjectively, internally" or as "ideas").

¹⁷² See *The Concept of Identity: Editor's Introduction*, in *CULTURAL IDENTITY AND EDUCATIONAL POLICY* 1, 1 (Colin Brock & Witold Tulasiewicz eds., 1985) (disciplines using the term "cultural identity" include philosophy, psychology, sociology, and anthropology).

¹⁷³ Paul Keating, *European Cultural Identity: A Sociological Perspective on the Prospects and Problems*, 30 WORLD FUTURES 169, 170 (1991). "A people's cultural identity is related to three major factors—historical, linguistic and psychological (the last of which may include the people's specific forms of religious observance)." Cheikh A. Diop, *The Building Blocks of Culture*, UNESCO COURIER, May 1986, at 58. Language is particularly noted as tied to cultural identity. Clifford Fyle, *National Languages and Cultural Identity*, UNESCO COURIER, July 1983, at 6.

¹⁷⁴ In fact, Richard Kolm refers to cultural identity as the "most significant" reference point. RICHARD KOLM, *THE CHANGE OF CULTURAL IDENTITY* 121-22 (1980).

¹⁷⁵ *Id.* at 122; see Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 307 (1986) ("The individual's identification with cultural groups—ethnic, racial, religious, or language groups—plays a major part in the process of self-definition."); Gerald Torres & Kathryn Milun, *Translating Yonnonndio by Precedent and Evidence: The Mashpee Indian Case*, 39 DUKE L.J. 625, 658 ("[C]ultural identity [is] an irreducible component of personal identity . . .").

¹⁷⁶ Christian L. d'Épinay, *Time, Space and Socio-Cultural Identity: The Ethos of the Proletariat, Small Owners and Peasantry in an Aged Population*, 38 INT'L SOC. SCI. J. 89, 89-90 (1986).

Finally, cultural identity helps individuals organize the world: “[T]he fact that a group of people have a common culture means that they have common codes. With the aid of such a common system of codes it is possible to communicate group affiliation to the environment, to the group and to oneself.”¹⁷⁷

Cultural identity manifests itself not only in language and behavior, but also in tangible items, which are often spoken of as “cultural property.”¹⁷⁸ Cultural property is no less critical than are cultural intangibles: “The need for cultural identity, for a sense of significance, for reassurance about one’s place in the scheme of things, for a ‘legible’ past, for answers to the great existential questions about our nature and our fate—for all these things, cultural objects provide partial answers.”¹⁷⁹

The protection or preservation of cultural identity has been the subject of a surprising amount of international dialogue and agreement. To some extent, agreement has focused on regulating trade in cultural property¹⁸⁰ or the flow of information and ideas.¹⁸¹ Concerns have also been raised about the ability of indigenous cultures to withstand the onslaught of other cultures.¹⁸²

Of course, it is equally valid to argue that individual behavior has an effect on culture. See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 17 (1973) (“[I]t is through the flow of behavior—or, more precisely, social action—that cultural forms find articulation.”).

¹⁷⁷ Selmer, *supra* note 171, at 57; see Karst, *supra* note 175, at 309 (“We can trust the members of our own cultural group because we know the meanings of their behavior and know what to expect of them.”).

¹⁷⁸ See UNESCO Convention on the Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 234-36, 10 I.L.M. 289 [hereinafter UNESCO Convention] (defining cultural property).

¹⁷⁹ John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 349 (1989). Cultural property in which the public has a strong interest can range from the transcendent Elgin marbles to black and white films. John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1895 (1985); Craig A. Wagner, Note, *Motion Picture Colorization, Authenticity, and the Elusive Moral Right*, 64 N.Y.U. L. REV. 628, 649 (1989).

¹⁸⁰ UNESCO Convention, *supra* note 178; UNIDROIT SECRETARIAT, INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, PRELIMINARY DRAFT UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS, Study LXX - Doc. 40 (1993); see Claudia Fox, *The Unidroit Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U. J. INT’L L. & POL’Y 225 (1993).

¹⁸¹ The New International Information Order proposed by developing countries is based, among other things, on the “right of every nation . . . to protect . . . its cultural identity.” KAARLE NORDENSTRENG, *THE MASS MEDIA DECLARATION OF UNESCO* 70 (1984).

¹⁸² See UNITED NATIONS, COMMISSION ON HUMAN RIGHTS, REPORT OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES: DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, U.N. Doc. E/CN.4/1995/2; E/CN.4/Sub.2/1994/56 (1994); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World*, 39 DUKE L.J. 626, 688 (draft U.N. Universal Declaration on the Rights of Indigenous Peoples would protect indigenous persons from any act that deprives them of cultural identity).

However, just as is true of values relating to the environment and to work, values relating to cultural identity find their clearest expression in domestic law. Several countries regulate the type, source, or amount of information that enters their borders.¹⁸³ South Korea, for example, has banned satellite dishes capable of receiving television signals from outside Korea, and has asked the U.S. Army to stop broadcasting its television programs within Korea.¹⁸⁴ Similarly, Malaysia, Singapore, and the People's Republic of China forbid ownership or installation of satellite dishes capable of receiving television signals,¹⁸⁵ as do countries in the Middle East and Africa.¹⁸⁶

Just as countries actively regulate the flow of information into their borders, they also actively regulate the flow of cultural property out of their borders.¹⁸⁷ At least 140 countries have laws that in some manner control the export of cultural property.¹⁸⁸ In China, for example, objects of antiquity may not be sold to foreign persons on a private basis or, in most cases, exported on any basis.¹⁸⁹ Far more common is a licensing system that allows the government to control or prohibit the sale of cultural goods outside of its borders. France, for example, requires all works of art, furniture, or archeological materials to be inspected before export. Certain of these objects require a license for export, which will be denied if the object is of significance to France.¹⁹⁰

The tension between values related to cultural identity and the values related to free trade are fairly straightforward. Cultural property and services that relate to cultural identity have commercial value and thus are traded. As the European parliament recognized, in the case of television:

¹⁸³ See Dorine R. Seidman, *Transborder Data Flow: Regulation of International Information Flow and the Brazilian Example*, 1 J.L. & TECH. 31, 36 (1986) ("[S]ome governments have implemented programs to prevent the 'dilution of indigenous culture' that may result from the greater availability of foreign information and entertainment.").

¹⁸⁴ ROBERT STOREY ET AL., *NORTH-EAST ASIA ON A SHOESTRING* 364 (3d ed. 1992); Chris Bulloch, *Satellites Jostle for Slots over Asia*, INTERAVIA BUS. & TECH., April 1995, at 45.

¹⁸⁵ Kieran Cooker, *Upriver in Sarawak*, FIN. TIMES, June 18, 1994, at IX (Malaysia); Tony Walker, *World in a Box: The Explosive Growth in Television Viewing in China*, FIN. TIMES, Dec. 22, 1994, at 14 (China); *Aliens Invade Asia*, ECONOMIST, Oct. 8, 1994, at 33 (Singapore).

¹⁸⁶ See, e.g., Roula Khalaf, *Saudi Businessmen Reach for the Media Stars*, FIN. TIMES, Nov. 16, 1994, at 6. Ironically, the Islamic Republic of Iran appears to have repealed its law controlling satellite dish ownership. Geneive Abdo, *Iranian Revolution Yields to Pragmatism*, CHI. TRIB., July 8, 1994, at N1.

¹⁸⁷ See BONNIE BURNHAM, *THE PROTECTION OF CULTURAL PROPERTY: HANDBOOK OF NATIONAL LEGISLATIONS* (1974) (outlining domestic legislation); 3 LYNDEL V. PROTT & P.J. O'KEEFE, *LAW AND THE CULTURAL HERITAGE* 453-610 (1989) (outlining domestic export, transit and import controls).

¹⁸⁸ PROTT & O'KEEFE, *supra* note 187, at 453.

¹⁸⁹ Law of the PRC on the Protection of Monuments and Cultural Relics, arts. 25, 28 (1982).

¹⁹⁰ PAUL M. BATOR, *THE INTERNATIONAL TRADE IN ART* 39 n.76 (University of Chicago Press 1983) (1982).

The audiovisual sector is of great importance to the cultural identity of peoples, regions and nations. It is also a rapidly growing sector of the world economy, significant in its own right and with considerable multiplier effects on other sectors such as electronics, telecommunications, the space industry, and publishing.¹⁹¹

Attempts to preserve cultural identity often do so by stemming the flow of property out of—or of services into—a country. Because cultural identity is such an amorphous concept,¹⁹² it is easy for those who value free trade “to deny the validity of intervention in markets for cultural productions and to argue that ‘culture’ simply provides a convenient and mendacious frosting that conceals protectionist industrial policies.”¹⁹³

On the other hand, unfettered trade may pose a real threat to the continuity of a specific cultural identity. “Languages other than English are potentially threatened by cultural free trade.”¹⁹⁴ Cultures as a whole are vulnerable to media and cultural free trade.¹⁹⁵ Turkey, for example, first received foreign television broadcasts on a widespread basis in 1990, and now has a fairly competitive television market that includes substantial U.S. and European programming.¹⁹⁶ Haluk Şahin and Asu Aksoy describe the effect on Turkish culture:

In the new media terrain where nothing seemed to be sacred, issues that had long been suppressed resurfaced with surprising freshness. Old wounds, old scores, forgotten vendettas were brought back to life as if by the touch of a magic wand. Speaking in Pascalian terms, “the eternal chatter of infinite spaces” acquired frightening proportions. . . . Coherence and consistency became as outmoded as the Kemalist principles upon which the republic was founded. While some ultranationalist critics saw this as an acute case of cultural destruction, others interpreted them as a sign of the fact that the old intellectual map of the country was all wrong. Obviously, in this multifaceted tug-of-war the previously co-

¹⁹¹ EUR. PARL. DOC. (A2-0347/88) 8 (1989). Philip Schlesinger identifies two goals of the European Union’s audiovisual policy: to fashion a cultural bulwark against “Americanization” and to create a single market that can compete effectively with Japan and the United States. Philip Schlesinger, *Wishful Thinking: Cultural Politics, Media, and Collective Identities in Europe*, J. COMM., Spring 1993, at 6, 11-12.

¹⁹² See *supra* note 171.

¹⁹³ Richard Collins, *The Screening of Jacques Tati: Broadcasting and Cultural Identity in the European Community*, 11 CARDOZO ARTS & ENT. L.J. 361, 363 (1993).

¹⁹⁴ *Id.* at 364.

¹⁹⁵ See Jean-Claude Burgelman & Caroline Pauwels, *Audiovisual Policy and Cultural Identity in Small European States: The Challenge of a Unified Market*, 14 MEDIA, CULTURE & SOC’Y 169, 181 (1992) (“If the public watches only American, English or French programmes, there is a tendency to incorporate values which are not those of their country or region.”).

¹⁹⁶ Haluk Şahin & Asu Aksoy, *Global Media and Cultural Identity in Turkey*, J. COMM., Spring 1993, at 31, 33-34.

herent national image was pulled in different directions, leading to tensions and confusion, as well as feelings of relief and liberation.¹⁹⁷

Trade in media is not the only form of trade that can transform a cultural identity. Japan has long bemoaned the loss or degradation of Japan's cultural identity, which the Japanese themselves attribute to its vibrant trade in goods.¹⁹⁸ Less economically-developed societies have proven even less resilient to the cultural images attached to imported goods.¹⁹⁹ In the extreme, trade in humans has demolished entire cultures in Africa and South America. Thus, although proponents of free trade have legitimate concerns that cultural identity may be a guise for protectionist impulses, the caretakers of cultural identity have legitimate concerns about unregulated trade.²⁰⁰

¹⁹⁷ *Id.* at 35-36 (citations omitted). Şahin and Aksoy conclude that "the unitary identity of Turkey was fragmented under the new logic—that of the competitive market." *Id.* at 36.

¹⁹⁸ See Michio Katsumata, *Filling the Asia Pacific Vacuum*, NIKKEI WKLY., Oct. 11, 1993, at 15; *Japanese Snapping Up Anti-Materialism Book*, CHI. TRIB., May 10, 1993, at N5.

¹⁹⁹ This phenomenon is not, of course, limited to economically underdeveloped countries. See, e.g., Kurt Luger, *The Sound of Music Country: Austria's Cultural Identity*, 14 MEDIA, CULTURE & SOC'Y 185, 187 (1992) ("'Hooligans' and teenagers . . . were the first [in postwar Austria] to attempt to emancipate themselves from the dominant middle-class lifestyle with the aid of a mass culture imported from the USA.").

²⁰⁰ That cultural identity is important is beyond peradventure. See *supra* notes 174-79 and accompanying text. Whether or not preservation of diverse cultural identities is important is the subject of more debate. See Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311, 1312-13 (1993) (outlining debate between proponents and opponents of preserving different cultural identities within one country). Deconstructionists argue that cultural identity is a totalitarian tool used to stigmatize others and suppress heterogeneous impulses—an argument which itself has been attacked as ethnocentric. Guyora Binder, *What's Left?*, 69 TEX. L. REV. 1985, 2035-40 (1991). Others argue that the impulse to preserve cultural identity is itself "a relative assessment." Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 88 (1992) ("It springs from the empirical conjecture that if subject to world government, different groups and minorities would tend to see their claims for identity ignored by a huge bureaucracy, whereas local government might appear to be more responsive to such claims. Yet by no means must all cultures live under separate governments; there are a number of successful examples of multicultural states."). Indeed, it can even be asked: "Doesn't the attempt to preserve a collective cultural identity inevitably falsify that identity by freezing it in some respects and transforming it in others, and in neither case responding to the internal imperatives of the culture itself?" Joseph H. Carens, *Democracy and Respect for Difference: The Case of Fiji*, 25 U. MICH. J.L. REF. 547, 598 (1992) (the author's answer to his own question is "no").

For the purposes of this Article, the answers to these questions are irrelevant. What is relevant is that many countries value the preservation of their cultures, and that those values conceivably conflict with values that relate to free trade.

Those who remain troubled at the prospect of a unicultural world can take comfort in the assurances of Claude Lévi-Strauss. "For if there exists, as anthropologists have always affirmed, a certain 'optimum diversity' which they see as a permanent condition of human development then we may be sure that divergences between societies and groups within societies will disappear only to spring up again in other forms." Claude Lévi-Strauss, *Today's Crisis in Anthropology*, UNESCO COURIER, May 1986, at 56.

4. *Others.*—To claim that the preceding list is exhaustive would be foolhardy. The potential conflicts between a value of free trade and other societal values are virtually infinite because societal values develop and evolve as time passes.²⁰¹ Nor are values constant between societies. Different societies have different values for the place of religion in daily life, what constitutes bannable obscenity,²⁰² when a human life should be taken,²⁰³ and when theft is permissible.²⁰⁴ Any of these differences could impede trade among nations: one country may require that food be prepared according to certain religious rituals, another may prohibit the sale of bawdy British tabloids. Because these values are deeply held, and because they can at times conflict with the goal of free trade, the trade regime's response to those conflicts is critical.

201 See JOHN HOSPERS, *HUMAN CONDUCT: PROBLEMS OF ETHICS* 12 (2d ed. 1982). This has tangible effects on legal regimes. See, e.g., Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 *STAN. L. REV.* 1433, 1446-48 (1993) (describing how property definitions change to reflect change in economic and social values).

202 What constitutes pornography and obscenity clearly is related to societal values. See U. S. DEPARTMENT OF JUSTICE, *THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT* 197 (July 1986) ("To some a discussion of pornography raises concerns of sincerely and deeply felt moral imperatives . . ."). There is also little question that pornography is economically significant. See I Spy Productions, *Pornography and Capitalism: The UK Pornography Industry*, in *PORNOGRAPHY: WOMEN, VIOLENCE & CIVIL LIBERTIES* 76, 76 (Catherine Itzin ed., 1992) ("Pornography is bread and butter to the commercial printers, the magazine distributors and wholesalers. It has acquired a strategic significance for tabloid newspaper barons and go-getting magazine companies Pornography makes up 2 per cent of the profits of the UK publishing industry."); William A. Linsley, *The Case Against Censorship of Pornography*, in *PORNOGRAPHY: PRIVATE RIGHT OR PUBLIC MENACE?* 138, 138 (Robert M. Baird & Stuart E. Rosenbaum eds., 1991) ("From the public's patronage of bookstores and movie theatres to the use of videocassette recorders, . . . telephones, and computers to bring pornography into the home, the evidence of its acceptance and impact on the economy is indisputable.").

203 HOSPERS, *supra* note 201, at 14 ("Some South Sea tribesmen used to kill their parents when the parents reached the age of sixty. . . . [T]hey believed, as we do not, that the dead will enter the next world in the same body with which they made their exit from this world Thus, pushing the old into the next world, while their bodies are still healthy or at least manageable, would be doing them a service.").

204 *Id.* at 12 ("Americans generally believe that stealing is wrong and that being caught and punished for stealing is all right, provided the punishment isn't too severe; but the Spartan youth who allowed the fox to gnaw at his vital organs rather than be caught for stealing the animal reflected the then current belief that it wasn't stealing itself but being caught at it that was to be condemned. The Dolou tribesmen of New Guinea believe that growing your own vegetables is honorable, but stealing your neighbor's vegetables is still more honorable."); Walter O. Weyrauch & Maureen A. Bell, *Autonomous Lawmaking: The Case of the "Gypsies"*, 103 *YALE L.J.* 323, 361 (1993) ("The Gypsies, however, have no moral objection to [theft and fraud] so long as one does not victimize another Gypsy, causes no physical harm, and takes no more than is necessary to survive.").

III. FREE TRADE'S RESPONSE IMPERILS FREE TRADE

The desire for free trade clearly can conflict with other societal values. This conflict may be resolved at the local level through the domestic political process. If, however, a country's political process results in a legal regime that impedes trade, that country may run afoul of its former obligations pursuant to the General Agreement on Tariffs and Trade or its present obligations pursuant to the annexes to the World Trade Organization charter.

Conflicts between national legal regimes and General Agreement obligations were handled in a quasi-adjudicatory fashion; the World Trade Organization will preserve (in a significantly altered way) the adjudicatory capacity, but will also allow *ex ante* resolution of the conflicts between societal values and trade through a legislative process.²⁰⁵ Although the changes wrought by the World Trade Organization charter are for the most part beneficial, they do not in themselves adequately deal with the problems created by conflicts between societal values and trade.

A. *The Legislative Process*

The Marrakesh Agreement Establishing The World Trade Organization (the Charter) establishes a "Ministerial Conference composed of representatives of all the Members, which shall meet at least once every two years."²⁰⁶ When the Ministerial Conference is not in session, a "General Council," also composed of representatives of all members, will meet "as appropriate" to conduct the business of the Ministerial Conference.²⁰⁷ The role of the Ministerial Conference will be to carry out the functions of the World Trade Organization and to make decisions on all matters relating to the multilateral trade agreements annexed to the Charter.²⁰⁸ Those agreements cover trade in goods²⁰⁹ and services,²¹⁰ rights in intellectual property,²¹¹ procedures

²⁰⁵ See Patterson & Patterson, *supra* note 1, at 42, 52 (noting that the World Trade Organization will resolve disputes in both adjudicatory and legislative fashion).

²⁰⁶ Charter, *supra* note 2, art. 4(1), reprinted in 33 I.L.M. at 13. The economic significance of the creation of an international organization to govern trade relations has probably not been fully realized. The international trade regime is one of the exogenous factors that determines whether or not trade is profitable and desirable, so much so that one economist states "[a]t each point in time, the combined impact of institutions, endowments, technology, and preferences determines actual trade." Avner Greif, *Institutions and International Trade: Lessons from the Commercial Revolution*, AM. ECON. REV., May 1992, at 128, 128. Nonetheless, Greif notes, "[i]nternational trade theory distances itself from an examination of the institutions that govern trade." *Id.*

²⁰⁷ Charter, *supra* note 2, art. 4(2), reprinted in 33 I.L.M. at 16.

²⁰⁸ *Id.* art. 4(1), reprinted in 33 I.L.M. at 11.

²⁰⁹ *Id.*, Annex 1A, reprinted in 33 I.L.M. at 28 (Multilateral Agreement on Trade in Goods). This agreement consists of the General Agreement as amended up to the present time (or, as it

for dispute settlements,²¹² and review of national trade policies.²¹³ Significantly, the Ministerial Council and General Council will have the exclusive authority to interpret the various agreements.²¹⁴

The Charter acknowledges the current practice within the GATT of reaching decisions by consensus.²¹⁵ When consensus cannot be achieved, however, matters may be put to a vote. Most matters will require a simple majority of voting members;²¹⁶ those that require a larger vote include adoption of an interpretation,²¹⁷ waiver of an obligation pursuant to the agreements,²¹⁸ accession to the World Trade Organization,²¹⁹ and amendment of the Charter or the various agreements.²²⁰

In short, the World Trade Organization will create a legislative assembly consisting of all of the members of the Organization. The terms of reference of this assembly will include virtually anything connected to the various multilateral trade agreements. Decisions by this assembly will be made through a vote.²²¹

One solution to the problem of conflict between societal values and trade, therefore, is the elimination of conflict through coordination of social policies by means of this legislative process.²²² This is

is referred to in the Charter, "GATT 1994") and various instruments and understandings that relate to GATT 1994.

²¹⁰ *Id.*, Annex 1B, reprinted in 33 I.L.M. at 44 (General Agreement on Trade in Services).

²¹¹ *Id.*, Annex 1C, reprinted in 33 I.L.M. at 81 (Agreement on Trade-Related Aspects of Intellectual Property Rights).

²¹² *Id.*, Annex 2, reprinted in 33 I.L.M. at 112 (Understanding on Rules and Procedures Governing the Settlement of Disputes) [hereinafter the Understanding].

²¹³ *Id.*, Annex 3 (Trade Policy Review Mechanisms).

²¹⁴ *Id.* art. 9(2), reprinted in 33 I.L.M. at 19.

²¹⁵ *Id.* art. 9(1), reprinted in 33 I.L.M. at 19; see Patterson & Patterson, *supra* note 1, at 46 (observing that except for accession and waivers, GATT has not proceeded to formal vote in several years). Pierre Pescatore provides an instructive definition of consensus. "Consensus comes close to unanimity or natural agreement; but it is not simply unanimity. It is, rather, a state of non-objection, a resigned let-it-go." Pierre Pescatore, *The GATT Dispute Settlement Mechanism: Its Present Situation and Its Prospects*, J. INT'L ARB., Mar. 1993, at 27, 35.

²¹⁶ *Charter*, *supra* note 2, art. 9(1), reprinted in 33 I.L.M. at 19.

²¹⁷ *Id.* art. 9(2), reprinted in 33 I.L.M. at 19 (three-fourths of members).

²¹⁸ *Id.* art. 9(3), reprinted in 33 I.L.M. at 19 (three-fourths of members).

²¹⁹ *Id.* art. 12, reprinted in 33 I.L.M. at 21 (two-thirds of members).

²²⁰ *Id.* art. 10, reprinted in 33 I.L.M. at 20 (two-thirds of members).

²²¹ The structure of the World Trade Organization has obvious similarities to the United Nations. In fact, developing nations at one point pressed for the creation of a multilateral trade organization within the United Nations rather than as a separate entity. See William Dullforce, *Leading Developing Countries Urge UN World Trade Body*, FIN. TIMES, Oct. 2, 1990, at 8.

²²² See G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 910 (1995) (proposing stakeholder model for World Trade Organization); cf. Claus-Dieter Ehlermann, *The International Dimension of Competition Policy*, 17 FORDHAM INT'L L.J. 833, 840 (1994) (suggesting that World Trade Organization should legislate uniform competition policy rules).

the approach that has evolved in the European Union.²²³ The European Union's evolution, therefore, is worthy of a brief examination.

The European Union evolved from transnational economic regulation of coal and steel.²²⁴ The European Coal and Steel Community was eclipsed by the European Economic Community with the signing of the Treaty of Rome in 1957.²²⁵ The European Economic Community was folded into the European Community with the signing of the Single European Act in 1987.²²⁶ In 1993, after a delay of over one year, the European Community was in turn folded into the European Union with the signing of the Treaty on European Union at Maastricht.²²⁷

Each time its name has become shorter, the primary entity regulating economic transactions has grown in size and has gained more power over social policy in Europe. The European Coal and Steel Community was administered by a High Authority that consisted of nine independent members appointed by the six member countries.²²⁸ The European Court of Justice, European Parliament, and European Commission have since been added. The European Coal and Steel Community limited its concerns to coal and steel production.²²⁹ The European Economic Community was also intended to have a minimal role in social policy, with social policy limited to an equal-pay provision.²³⁰ By the late 1960s, the political climate in Europe was such that the European Commission discerned a need to put a human face on its economic policies.²³¹ European Community programs included efforts to achieve full employment and to improve living and working

²²³ Alexander King, *The Holistic Path to a Global Society*, 44 INT'L SOC. SCI. J. 57, 57 (1992) ("The [European] Community has, in fact, almost without realizing it, moved far from its initial exclusive concern with the strictly economic.").

²²⁴ J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2405 (1991) (the European Community began when Belgium, France, Germany, Italy, Luxembourg, and the Netherlands established the European Coal and Steel Community); see TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY [ECSC TREATY].

²²⁵ TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY]; see John H. Jackson, *United States—EEC Trade Relations: Constitutional Problems of Economic Interdependence*, 16 COMMON MKT. L. REV. 453, 473-76 (1979) (discussing the constitutional aspect of the Treaty of Rome).

²²⁶ Single European Act, Feb. 28, 1987, 1987 O.J. (L 169) 1; see George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 344-45 (1994) (discussing the Single European Act).

²²⁷ Treaty on European Union, Feb. 7, 1992.

²²⁸ Heinrich Kirschner, *The Framework of the European Union Under the Treaty of Maastricht*, 13 J.L. & COM. 233, 235-36 (1994).

²²⁹ Thomas C. Fischer, "Federalism" in the European Community and the United States: *A Rose by Any Other Name . . .*, 17 FORDHAM INT'L L.J. 389, 416 (1994).

²³⁰ Antonio L. Faro, *EC Social Policy and 1993: The Dark Side of European Integration?*, 14 COMP. LAB. L.J. 1, 6 (1992).

²³¹ Juliet Lodge, *Towards a Human Union: EEC Social Policy and European Integration*, 4 BRIT. J. INT'L STUD. 107, 120-21 (1978).

conditions.²³² The European Union, of course, is deeply entrenched in developing social policy, and all but one member have acceded to a Social Protocol that goes far beyond simple economic development.²³³

While the European Union has substantially evolved into a viable organ for social coordination, this evolution has not been easy, nor should it be assumed that such evolution can be replicated on a global scale. At the heart of European Union social policy coordination is the fact that social policy may be set by a majority *vote* of members rather than by the unanimous *consent* of members.²³⁴ This may seem to be a simple and common sense procedure, but the willingness of nations to be bound by the majority represents an astounding relinquishment of sovereignty. Philip Allott cogently explains how Western Europe has allowed "the interrelationship of the nations of Western Europe" to be "democratized."²³⁵ He characterizes the democracies of Western Europe as "post-Marxist," which imbues them with the common "idea that all public power is held only in the interest of the people, that all public power exists only for promoting the well-being of all the people."²³⁶ The United States, in contrast, "remains a political system for aggregating individual interest in the eighteenth-century fashion, rather than a political system for realizing the communal interest."²³⁷ Post-Marxist democracy is used as "a system for communalizing all socially significant decisionmaking in accordance with a society's highest values."²³⁸ Thus, democratizing inter-European relations "seem[s] natural and normal to most people in Western Europe."²³⁹

A corollary to Allott's explanation is that there must be a foundation of common values. Indeed, Allott finds the true European community not in a set of treaties or legal relations, but rather in "the society of Europe which has been made by and in the European mind."²⁴⁰ This cannot be said of the world as a whole.

The World Trade Organization undoubtedly will become a very important forum for issues of global concern. Hopefully, it will also

²³² Faro, *supra* note 230, at 6-7.

²³³ Protocol on Social Policy, reprinted in 31 I.L.M. 357 (1992); see Donald C. Dowling, Jr., *EC Employment Law After Maastricht: "Continental Social Europe"?*, 27 INT'L LAW. 1, 8 (1993) (explaining European Community decision to allow Great Britain not to accede to social protocol).

²³⁴ See Faro, *supra* note 230, at 10.

²³⁵ Philip Allott, *The European Community is Not the True European Community*, 100 YALE L.J. 2485, 2491 (1991).

²³⁶ *Id.* at 2492.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 2499. Allott acknowledges the differences among constituent members of this society: "It is the Europe of the tribes." *Id.* But see Faro, *supra* note 230, at 4 (arguing that Europe is deteriorating along nationalist lines).

be an effective forum in which to resolve matters that affect the entire world. There are, however, important reasons why the World Trade Organization should not attempt to micromanage world social policy.

The first is that, as has already been alluded to, it would not work. Consensus on even global matters will be extremely difficult to obtain. Unfortunately, there is a dearth of analytical research on the viability of international organizations.²⁴¹ Thus, it is not possible to lay down a theoretical foundation for the commonsense observation that 125 polities ranging in form from democracies to totalitarian dictatorships are going to find agreement on social policy elusive. This observation has, however, been made.²⁴²

Consensus in the realm of societal values will be especially difficult to obtain. As Kenneth Karst has noted, “[w]hen two cultural groups with conflicting values contend in the political arena, . . . distrust can ripen into open hostility and even cause the rupture of the social fabric.”²⁴³ It is not hard to hypothesize conflicts regarding trade in which underlying societal values of various members would scarcely meet. In Western societies, for example, the media is regarded as a forum for the dissemination and competition of ideas, and is thus accorded significant freedoms. However, “communication in Muslim cultural theory is a fundamental and core activity defining, shaping and directing human existence . . . , which means the mass media must have guidelines—external as well as internal—to help them exercise their power in an effective and responsible manner, like all other societal components and institutions.”²⁴⁴ Singapore, which has an extremely liberal trade policy, firmly believes that unrestrained speech undermines the stability of a society, and thus engages in fairly heavy censorship.²⁴⁵

²⁴¹ Pierre de Senarclens, *Regime Theory and the Study of International Organizations*, 45 INT’L SOC. SCI. J. 453, 453-54 (1993).

²⁴² See, e.g., Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039, 2097 (1993) (“[A]s a practical matter many developing countries would not agree, at least in the short term to medium term, to adopt the same environmental standards as the OECD nations. Nor would the latter agree to lower their existing standards.”); Abram de Swaan, *Perspectives for Transnational Social Policy*, 27 GOV’T & OPPOSITION 33, 35 (1992) (“[W]elfare states shield their domain of entitlement against foreigners. . . . [A] welfare state is not only a national system, but it is also anti-international.”).

²⁴³ Karst, *supra* note 175, at 310.

²⁴⁴ Syed H. Pasha, *Towards a Cultural Theory of Political Ideology and Mass Media in the Muslim World*, 15 MEDIA, CULTURE & SOC’Y 61, 77 (1993). The danger in using specific values of specific countries is that one may easily lapse into the habit of stereotype. This Article does not mean to imply that Islam is either monolithic in its beliefs or that it does not respect the basic freedoms of speech. See Ann E. Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with Construct?*, 15 MICH. J. INT’L L. 307, 350-64, 379-88 (1994).

²⁴⁵ Kishore Mahbubani, *The United States: “Go East Young Man,”* WASH. Q., Spring 1994, at 5; see William Branigin, *Asians Question America’s Moral Authority to Lecture on Rights*, WASH. POST, Apr. 22, 1994, at A33.

Social policy coordination is also unlikely to concern itself with anything less than global concerns. Many of the conflicts between a society's values and its trade obligations will not, however, be global in nature. Between 1948 and 1989 there were 207 complaints brought under the auspices of the General Agreement.²⁴⁶ These complaints include some that raised broad concerns, but a number were quite mundane or provincial.²⁴⁷ It is doubtful that the assembly of members would, or even should, occupy itself with the resolution of these matters.

Finally, social coordination does not in fact address the problem. Those who advocate social policy coordination fail to realize that imposition of universal laws is not the same thing as creation of universal values.²⁴⁸ Transformation of the World Trade Organization into an arbiter of social policy as well as economic policy would not diminish the potential for conflict between a society's value-expressive laws and the international regime; rather, it would increase the likelihood of conflict. Those conflicts would undermine the World Trade Organization's legitimacy and effectiveness.²⁴⁹

B. *The Adjudicatory Process*

The alternative, then, is resolution of conflict through the adjudicatory process. As currently envisioned, however, this solution is equally unsatisfactory.

Dispute settlement under the General Agreement was rooted in Article Twenty-Three, which directed the parties to the General Agreement to investigate complaints by a country that "any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired" by another party to the Agreement.²⁵⁰ For the first several years, complaints were in fact dealt with by all of the parties or

²⁴⁶ Robert E. Hudec et al., *A Statistical Profile of the GATT Dispute Settlement Cases: 1948-1989*, 2 MINN. J. GLOBAL TRADE 1, 3 (1993).

²⁴⁷ See, e.g., *Norway—Procurement of Toll Collection Equipment for the City of Trondheim*, GATT Doc. GPR.DS2/R (Apr. 28, 1992); *European Economic Community—Restrictions on Imports of Dessert Apples, Complaint by Chile*, GATT Doc. L/6491 (June 22, 1989), reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS 93 (36th Supp. 1990); *Exports of Potatoes to Canada*, GATT Doc. L/1927 (Nov. 16, 1962), reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS 88 (11th Supp. 1963).

²⁴⁸ It has been demonstrated in controlled experimental conditions that fraudulent norms imposed on a society are short-lived, particularly in nonauthoritarian states. Robert L. Montgomery et al., *Arbitrary Norms and Social Change in High- and Low-Authoritarian Societies*, 33 J. PERSONALITY & SOC. PSYCHOL. 698, 705 (1976).

²⁴⁹ See Spencer W. Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 KAN. L. REV. 557, 591 (1994) ("Successful transference or harmonization [of national laws] ultimately hinges on values, norms and actual behavior, not rules and texts.")

²⁵⁰ General Agreement, *supra* note 1, art. 23.

by working groups of diplomatic representatives.²⁵¹ After 1955, however, investigation of complaints was largely delegated to panels composed of three to five trade officials.²⁵²

The guidelines for the dispute settlement panels were set forth in the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.²⁵³ Basically, when a party complained of nullification and impairment, it was encouraged to consult with the offending party to resolve the dispute.²⁵⁴ If consultations failed, the Secretariat of the GATT, in consultation with the parties, appointed a panel of trade experts from countries not party to the dispute. The panel heard the arguments of the parties, took evidence, and then drafted a decision.²⁵⁵ The most striking aspect of this process was that a decision by a panel did not become final until it was both submitted by the prevailing party for a vote by all of the countries that were party to the General Agreement and unanimously adopted by all of the parties that voted.²⁵⁶ In other words, a single vote—even the vote of the losing party—could prevent adoption of a panel decision. This strange fact had a profound effect on the panel process. Most disputes were resolved in a manner mutually acceptable to both parties²⁵⁷—a process better described as mediative than as quasi-adjudicatory.²⁵⁸ Some decisions, however, were never submitted for a vote,²⁵⁹ or were submitted but not unanimously adopted.²⁶⁰

²⁵¹ JACKSON, *supra* note 2, at 63. Robert Hudec reports that the first complaint, in which the Netherlands complained of Cuba's consular tax, was brought up in the second general session of the contracting parties and was answered, without discussion, by the Chairman. HUDEC, *supra* note 1, at 75-76.

²⁵² HUDEC, *supra* note 2, at 92; JACKSON, *supra* note 2, at 63.

²⁵³ GATT Doc. L/4907 (Nov. 28, 1979), reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS 210 (26th Supp. 1980). This Understanding, in turn, was supplemented and modified by the *Ministerial Declaration on Dispute Settlement Procedures*, GATT Doc. L/5424 (Nov. 29, 1982), reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS 13 (29th Supp. 1983); the *Decision on Dispute Settlement Procedures*, GATT Doc. L/5752 (Nov. 30, 1984), reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS 9 (31st Supp. 1985); and the *Decision on Improvements to the GATT Dispute Settlement Rules and Procedures*, GATT Doc. L/6489 (Apr. 12, 1989), reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS 61 (36th Supp. 1990).

²⁵⁴ General Agreement, *supra* note 1, art. 23(1).

²⁵⁵ Rosine Plank, *An Unofficial Description of How a GATT Panel Works and Does Not*, J. INT'L ARB., Dec. 1987, at 53, 60-65.

²⁵⁶ JACKSON, *supra* note 2, at 64-65.

²⁵⁷ See ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 29-58 (1993); JACKSON, *supra* note 2, at 66-69; Plank, *supra* note 255, at 88-92.

²⁵⁸ See Fred L. Morrison, *The Future of International Adjudication*, 75 MINN. L. REV. 827, 838 (1991) ("[T]he relative success of the GATT mechanism has been because of, not in spite of, its recognition of a political role in the process.")

²⁵⁹ For example, the infamous Tuna/Dolphin decision. See *supra* note 123.

²⁶⁰ See, e.g., *United States—Antidumping Duties on Stainless Pipes and Tubes from Sweden*, GATT Doc. ADP/47 (Aug. 20, 1990); *Canada—Countervailing Duty on Boneless Manufacturing Beef*, GATT Doc. SCM/85 (Oct. 13, 1987); *GATT Dispute Settlement System, Note by the Secreta-*

The ability of one party—particularly the losing party—to block adoption of a GATT panel report was troubling to some members of the negotiating group charged with negotiating dispute settlement issues in the Uruguay Round.²⁶¹ The United States, in particular, noted the problem and proposed supplementing the existing procedures by allowing parties to a dispute to choose binding arbitration.²⁶² The existing system would be used, as it was meant to be, for “harder cases.”²⁶³ The European Community agreed in principle,²⁶⁴ as did a number of other countries,²⁶⁵ although each had reservations.²⁶⁶ By 1988, however, the European Community abandoned its earlier tepid endorsement of binding arbitration, arguing that interpretation of the General Agreement requires the consent of the parties to that Agreement.²⁶⁷ Adoption of panel reports remained an open issue when the negotiating group was absorbed into the Working Group on Institutions,²⁶⁸ and was considered by the chairman of the Uruguay Round to be one of the most contentious remaining issues when he took stock in 1991 of the progress made by Uruguay Round negotiations.²⁶⁹

Hidden in the United States’s original proposal was a list of alternative solutions to the problem of blocked panel reports; this list included automatic adoption of panel reports unless all of the parties to the General Agreement voted otherwise.²⁷⁰ This seed germinated in a Draft Final Act to the Uruguay Round that was circulated by chairman Arthur Dunkel to spur the parties into a final round of negotiations. Not only did the Dunkel Draft mandate automatic adoption of panel reports,²⁷¹ it also created a Dispute Settlement Body to oversee the panel process.²⁷²

Shortly after the release of the Dunkel Draft, the European Community reversed course yet again and embraced the automatic adop-

riat, GATT Doc. MTN.GNG/NG13/W/4, at 103-04 (June 10, 1987) (of the 24 panel reports submitted between 1979 and 1984, 5 were blocked), cited in Stewart, *supra* note 2, at 2731 n.453.

²⁶¹ Negotiating Group 13 was chaired by Ambassador Julio A. Lacarte-Muro of Uruguay and Ambassador Julius Katz of the United States. Stewart, *supra* note 2, at 2726.

²⁶² *Id.* at 2727.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 2727-28 (citing *Communication from Austria*, GATT Doc. MTN.GNG/NG13/W/25, at 2 (Mar. 8, 1988); *Communication from Nordic Countries*, GATT Doc. MTN.GNG/NG13/W/10, at 1-2 (Sept. 18, 1987) (proposing flexible system utilizing a number of mechanisms, including binding arbitration)).

²⁶⁶ The European Community, for example, desired a clear expression that the results of a binding arbitration would not constitute precedent for future proceedings. *Id.* at 2727.

²⁶⁷ *Id.* at 2742-43.

²⁶⁸ *Id.* at 2789.

²⁶⁹ *Id.* at 2792.

²⁷⁰ *Id.* at 2733-34.

²⁷¹ *Dunkel Draft*, *supra* note 2, annex S para. 14.4, reprinted in Stewart, *supra* note 2, at 763.

²⁷² *Id.*, Annex T, reprinted in Stewart, *supra* note 2, at 775.

tion provisions. Commentators suggest that this reversal was caused both by the European Community's increasing use of GATT panels as a complainant (and concomitant desire to prevent losing defendants from being able to block panel reports) and a strategic choice to undermine the United States's justification for use of unilateral trade sanctions.²⁷³ In the absence of European Community opposition,²⁷⁴ the language of the Dunkel Draft was essentially incorporated into the Understanding on Dispute Settlements that was annexed to the Charter.²⁷⁵

Thus, in the context of the World Trade Organization, the form of dispute will remain essentially the same as under the General Agreement, except that adoption of panel decisions will become virtually automatic. Adjudicatory dispute resolution will be administered by a Dispute Settlement Body.²⁷⁶ As with the General Agreement, complaints may be brought for nullification and impairment, and may be brought only by countries that are members of the World Trade Organization.²⁷⁷ The signatories to the Charter reaffirmed "their resolve to strengthen and improve the effectiveness of the consultation procedures" and "to accord sympathetic consideration to and afford adequate opportunity for consultation."²⁷⁸ However, should consultation fail to resolve the dispute, it will move on to the adjudicatory process.

Complaints will be heard initially by a panel. The members of a panel will be chosen from "well qualified" officials and others: qualification can be shown by prior involvement in GATT panels, by service as a trade official or in the GATT secretariat, or by teaching and writing about international trade law and policy.²⁷⁹

²⁷³ Miquel Montaña i Mora, *A GATT With Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103, 134-35 (1993); Shell, *supra* note 222, at 847; see 19 U.S.C. §§ 2411, 2420, 2422 (1988) (trade measures known as "Section 301," "super 301," and "special 301"). These trade measures are extremely disliked outside of the United States. Mora, *supra*, at 130-35.

²⁷⁴ Developing countries also supported automatic adoption. Shell, *supra* note 222, at 848.

²⁷⁵ See *supra* notes 209-13 and accompanying text.

²⁷⁶ Charter, *supra* note 2, art. 4(3), reprinted in 33 I.L.M. at 16; Understanding, *supra* note 212, art. 2, reprinted in 33 I.L.M. at 114; see Andreas F. Lowenfeld, *Remedies along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 481 (1994).

²⁷⁷ Understanding, *supra* note 212, art. 1, reprinted in 33 I.L.M. at 114. Ernst-Ulrich Petersmann has argued for expanding to individuals the right to bring a complaint. ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW 311-13 (1991); Ernst-Ulrich Petersmann, *Strengthening the Domestic Legal Framework of the GATT Multilateral Trade System: Possibilities and Problems of Making GATT Rules Effective in Domestic Legal Systems*, in THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS 33 (Ernst-Ulrich Petersmann & Meinhard Hilf eds., 2d ed. 1987).

²⁷⁸ Understanding, *supra* note 212, art. 4, reprinted in 33 I.L.M. at 116.

²⁷⁹ *Id.* art. 8(1), reprinted in 33 I.L.M. at 118. The Dispute Settlement Board is to maintain a roster of such individuals; moreover, they are not nominated by countries. *Id.*

Decisions of the panels may be appealed to a standing appellate body.²⁸⁰ The jurisdiction of the appellate body is "limited to issues of law covered in the panel report and legal interpretations developed by the panel."²⁸¹ It is clear from the construction of the Understanding on the Settlement of Disputes that appeal to the Appellate Body is not to be considered the normal course of events. Article 16, which precedes any discussion of appeals, states that a panel decision will be adopted within sixty days of circulation to members of the World Trade Organization unless a party to the dispute notifies the Dispute Settlement Board that it is going to appeal, or unless the members unanimously vote not to adopt the decision.²⁸² The Understanding also makes clear that members who transgress must bring their legal regimes "into conformity with" whichever of the agreements they have violated.²⁸³ In fact, in addition to requesting compliance, panels are empowered to "suggest ways in which the Member concerned could implement the" request for compliance.²⁸⁴

These changes effectively transform dispute settlement from a diplomatic, mediative process to a binding adjudicatory process.²⁸⁵ In many ways, this is a beneficial change. Hopefully, it will both increase discipline among members and improve the ability of businesses to predict the contours of the regulatory environment.²⁸⁶ However, in the context of conflict between societal values and trade, this new inflexibility in combination with the trade regimes' insistence on the primacy of trade may prove damaging to the long-term viability and legitimacy of the World Trade Organization.

That the trade regime gives primacy to trade is evidenced throughout the history of GATT dispute settlement, as well as in the writings of officials and scholars closely allied with the General Agreement and the nascent World Trade Organization. GATT dispute settlement panels, when faced with national measures that infringe on free trade, have traditionally "examined those measures solely in the light of the relevant GATT provisions, concerning [themselves] only

²⁸⁰ *Id.* art. 17, reprinted in 33 I.L.M. at 123.

²⁸¹ *Id.* art. 17.6, reprinted in 33 I.L.M. at 123. Lowenfeld points out that "[w]e cannot be sure yet what this means." Lowenfeld, *supra* note 276, at 483.

²⁸² Understanding, *supra* note 212, art. 16, reprinted in 33 I.L.M. at 122. Pierre Pescatore, in contrast, has argued that the possibility of appellate review will reduce the prestige and authority of the panels. Pierre Pescatore, *The GATT Dispute Settlement Mechanism: Its Present Situation and Its Prospects*, 10 J. INT'L ARB. 27 (1993).

²⁸³ Understanding, *supra* note 212, art. 19(1), reprinted in 33 I.L.M. at 124.

²⁸⁴ *Id.*

²⁸⁵ Richard Shell characterizes this, in more doctrinal terms, as transformation from a realist system to a legalistic system. Shell, *supra* note 222, at 858.

²⁸⁶ See ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW xli-xlii (1991) (discussing benefits of "rule-oriented" legal process).

with the trade issue under dispute," even when they realize that the trade issues are "but one aspect of a more general problem."²⁸⁷ In keeping with this myopic view of trade relations, panels do not take into account social, historical, cultural, or economic factors that may explain a country's behavior.²⁸⁸ A basic doctrine of GATT law has been that exceptions²⁸⁹ are "to be interpreted narrowly."²⁹⁰ Moreover, issues before dispute panels are to be examined in light of the purposes of the General Agreement, which is to facilitate the reduction of tariffs and other barriers to trade.²⁹¹ These two doctrines in conjunction have created a third: that a party to the GATT "is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."²⁹² This doctrine was recently reconfirmed in the latest panel decision ruling against the United States's Marine Mammal Protection Act.²⁹³

The former head of the GATT's Office of Legal Affairs, Ernst-Ulrich Petersmann, is now a Swiss professor who writes prodigiously and elegantly about and retains significant influence over the development of that institution.²⁹⁴ Doctor Petersmann believes that the right to free trade is a basic human right that should be enshrined in national constitutions.²⁹⁵ Unfortunately, this attitude, which is typical (and understandable) of a trade regulator, is not leavened with other viewpoints at the policymaking level. This imbalance has led to the

²⁸⁷ *United States—Imports of Sugar from Nicaragua*, GATT Doc. L/5607 para. 4.1 (Mar. 13, 1984), reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS 67, 73 (31st Supp. 1985).

²⁸⁸ See, e.g., *Japan—Measures on Imports of Leather*, GATT Doc. L/5623 (May 15/16, 1984), reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS 94, 111 (31st Supp. 1985); *EEC—Quantitative Restrictions Against Imports of Certain Products From Hong Kong*, GATT Doc. L/5511 (July 12, 1983), reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS 129, 138 (30th Supp. 1984); *France—Special Temporary Compensation Tax on Imports* (Jan. 17, 1955), reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS 26, 27 (3d Supp. 1955).

²⁸⁹ Article 20 of the General Agreement lists exceptions to the requirements of the Agreement. General Agreement, *supra* note 1, art. 20.

²⁹⁰ *Canada—Import Restrictions on Ice Cream and Yoghurt*, GATT Doc. L/6568 (Dec. 5, 1989), reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS 68, 84-85 (36th Supp. 1989). This has led GATT panels to rule against "flexible interpretation" of various GATT provisions.

²⁹¹ *United States—Restrictions on Imports of Sugar*, GATT Doc. L/6514 para. 5.3 (June 22, 1989), reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS 331, 342 (36th Supp. 1989).

²⁹² *United States—Section 337 of the Tariff Act of 1930*, GATT Doc. L/6439 (Nov. 7, 1989), reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS 345, 393 (36th Supp. 1990).

²⁹³ GATT: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839, 896 (1994). It should be noted that neither this panel decision nor the panel decision in the original Tuna/Dolphin dispute was adopted by the General Council of parties to the GATT. Philip M. Nichols, *Trade, Values and Differentiating Trade Sanctions: A Commentary on the Free Trade-Fair Trade Debate*, in ECONOMIC ANALYSIS OF INTERNATIONAL LAW (Alan O. Sykes & Jagdeep S. Bhandiri eds., forthcoming 1996) (manuscript at 5-6).

²⁹⁴ See Daniel K. Tarullo, Book Review, 84 AM. J. INT'L L. 338, 339-40 (1990) (discussing Ernst-Ulrich Petersmann).

²⁹⁵ See PETERSMANN, *supra* note 286, at xxxii.

observation that "non-trade concerns are subordinate to trade concerns within the GATT framework."²⁹⁶

C. *Primacy of Free Trade Imperils the Free Trade Regime*

So long as international regimes are not backed by "organized international sanctions,"²⁹⁷ they will to some extent exist at the behest of national governments.²⁹⁸ To the extent national governments are in some measure democratic,²⁹⁹ their abilities to support an international trade regime depend on marshaling popular support.³⁰⁰ Placing primacy on free trade is discordant with both personal and societal orderings of the world. Societal values tend to be deeply held.³⁰¹ Placing primacy on trade thus imperils popular and sovereign support for a trade regime, and endangers all of free trade.³⁰² As Louis Sohn has noted, "the easier it becomes to develop new principles and rules

²⁹⁶ Anderson, *supra* note 121, at 752; see Robert Howse & Michael J. Trebilcock, *The Fair Trade-Free Trade Debate: Trade, Labour and the Environment*, in ECONOMIC ANALYSIS OF INTERNATIONAL LAW, *supra* note 293 (manuscript at 2) ("A visceral distrust of any or all demands for trade restrictions has impeded a careful analysis of the kinds of normative claims at issue and has allowed fair traders to characterize free traders as moral phillistines. Under these circumstances, the debate about trade, environment, and labour rights has frequently assumed the character of a 'clash of absolutes.'"); Shell, *supra* note 222, at 837 (various models of trade management "seek to promote trade over other domestic and transnational values").

²⁹⁷ Cf. Anthony A. D'Amato, *The Neo-Positivist Concept of International Law*, 59 AM. J. INT'L L. 321, 321 (1965).

²⁹⁸ See de Jonquières, *supra* note 3, at 11. de Jonquières quotes Robert Hudec as saying "[t]hose of us who have watched GATT operate for years have long realised that political will is everything." *Id.*

²⁹⁹ Virtually all of the major trading nations are democratic or substantially democratic. See Ronald Rogowski, *Trade and the Variety of Democratic Institutions*, 41 INT'L ORG. 203, 212-13 (1987) (most major trading nations are members of the OECD, which limits membership to democracies); see also John F. Helliwell, *Empirical Linkages Between Democracy and Economic Growth*, 24 BRIT. J. POL. SCI. 225, 233-35 (1994) (finding significant correlations between national wealth and democracy, and positive effect of increase in national wealth on democracy); *Democracy and Growth: Why Voting Is Good for You*, ECONOMIST, Aug. 27, 1994, at 15.

³⁰⁰ See RONALD ROGOWSKI, *COMMERCE AND COALITIONS: HOW TRADE AFFECTS DOMESTIC POLITICAL ALIGNMENTS* 5 (1989).

³⁰¹ See Wilson, *supra* note 69, at 1 ("Were values too readily displaced we should, in all probability, not recognize them as such. They are taken to be ultimate dispositions or commitments.").

³⁰² The difficulties faced by the Uruguay Round in the United States are illustrative. While some of the objections were based on outright protectionism, see *Protectionist of the Old School*, FIN. TIMES, Oct. 2, 1994, at 6 (describing Senator Ernest Hollings's attempt to defeat GATT legislation), or xenophobia, see Nancy Dunne, *Why George Washington Ordered an American Suit: A Book That Challenges Most Devout Free Traders*, FIN. TIMES, Sept. 27, 1995, "Review of Business Books," at II (describing Patrick Buchanan), much of the popular antagonism was generated by concerns that a World Trade Organization will preclude the United States from enacting value-laden legislation. See Ralph Nader, *WTO Means Rule by Unaccountable Tribunals*, WALL ST. J., Aug. 17, 1994, at A12 (claiming that Uruguay Round "would be a staggering rejection of our due process and democratic procedures").

of international law, the more a safety valve is needed to safeguard national sovereignty and vital state interests."³⁰³

1. *Primacy Does Not Comport with Persons' Desires or Society's Orderings.*—An extreme, but unfortunately not fictional, example can be used to show that placing primacy on trade does not comport with how individuals would order the world. Under a *pure* free trade regime, the sale or purchase of human beings could not be stopped at a national border.³⁰⁴ While most people find this example extreme to the point of lacking pedagogical purpose, trade in human beings has, unfortunately, not been relegated to history.³⁰⁵

The fact that most people find the example of trade in human beings extreme is illustrative of the place of economic efficiency in personal and societal ordering of the world. This example is extreme not because slavery is economically inefficient or because it causes economic distortions, but rather because slavery is wrong.³⁰⁶ In this case, as in so many others, people and society react on the basis of a deeply held value other than economic efficiency.³⁰⁷

³⁰³ Louis B. Sohn, "Generally Accepted" *International Rules*, 61 WASH. L. REV. 1073, 1080 (1986). John Jackson has long held that the GATT system of dispute resolution accomplishes this. See, e.g., JACKSON, *supra* note 45, at 109-13; see also Robert E. Hudec, *The GATT Legal System: A Diplomat's Jurisprudence*, 4 J. WORLD L. 615, 665 (1970) (concluding that GATT dispute resolution "allows room for maneuver").

³⁰⁴ See Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEG. STUD. 323, 339 (1978) (suggesting elimination of restrictions "that prevent the market from operating freely in the sale of babies *as of other goods*") (emphasis added); see also RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 86 (1981) (defending slavery contracts as a matter of economic theory); Posner, *supra* note 57, at 134 (defending slavery contracts as a matter of legal theory). It must be noted that Posner has more recently stated that slavery fails "the ultimate test of a moral" theory—conformity to intuition. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 376-77 (1990).

³⁰⁵ See Abdelmajid Bejar, *Tunisia-Children: Modern-Day Slavery Found in Middle Class Homes*, Inter Press Service, Sept. 26, 1994, available in LEXIS, News Library, CURNWS File (stating that illegal slavery is found in Tunisia); Catherine Bowman, *Saving Nepalese Girls from Slavery*, S.F. CHRON., Oct. 3, 1994, at A16 (noting that thousands of Nepalese girls are bought and sold, usually for prostitution); Gail Gerhart, Book Review, FOREIGN AFF., Sept.-Oct. 1994, at 172 ("Mauritania . . . has distinguished itself in Africa mainly as the only country whose government continues to tolerate slavery in the last decade of the twentieth century."); Robert A. Senser, *The Crime of Child Slavery*, CURRENT, Mar.-Apr. 1994, at 29 (noting there are 200 million children worldwide in slavery or near slavery); *Charlie Rose* (PBS television broadcast, Sept. 20, 1994) (describing slave trade in peasant women in remote parts of China); *Turning Point* (ABC television broadcast, Aug. 31, 1994) (describing slavery in Indian subcontinent, Amazon basin, and in the contemporary United States).

³⁰⁶ POSNER, *THE PROBLEMS OF JURISPRUDENCE*, *supra* note 304, at 376-77 (slavery is economically defensible but intuitively wrong); see also HOSPERS, *supra* note 201, at 12 ("In most eras slavery was an accepted institution; today almost everyone considers it wrong.")

³⁰⁷ See STEVEN KELMAN, *WHAT PRICE INCENTIVES?: ECONOMISTS AND THE ENVIRONMENT* 29 (1981) (noting that people make decisions on basis of beliefs rather than economics).

Various countries prohibit the importation of a large number of items that are far less extreme than human beings: U.S. movies into France,³⁰⁸ pornography into Saudi Arabia,³⁰⁹ or narcotics into the United States.³¹⁰ In each case, the prohibition exists not for economic reasons, but instead because the prohibited item violates some belief or value of the prohibiting country.

At this point, a proponent of unfettered free trade may argue that a ban on the importation of a product is not overly violative of the principles of free trade so long as the same product may not be sold within that country by domestic producers, and that what is more distressing is a ban only on a product that has been produced in a certain way. Indeed, the prospect of banning goods on the basis of process is one of the most frightening scenarios to free trade proponents. They correctly fear that allowing such bans could set trade regulation on a slippery slope that would result in a slide into protectionism.³¹¹ In the context of societal values, however, it is disingenuous to distinguish between a ban on a product and a ban on a product made in a certain way. This is true for two reasons.

First, a ban on a product is just as likely to exist for purely protectionist reasons as is a ban on a process. For example, if an imported good is different than but completely fungible with a domestic good, a ban on the importation, sale, or use of the imported good may exist for no reason other than to protect the market of the domestic good. Or, if an imported good is not fungible with a domestic good, but would nonetheless compete with that good (for example, movies, which divert entertainment spending from books), then a ban on the imported good may be protectionist.³¹²

Second, the value-laden reasons for tolerating bans of products are just as compelling for tolerating the ban of goods made in certain ways. Society does not tolerate trade in human beings because such trade is abhorrent. Similarly, society does not wish to trade in goods *made* by slave labor. In the same vein, the United States prohibits trade in child pornography, not because child pornography is more or less repugnant than other forms of pornography,³¹³ but because such a

³⁰⁸ See Tara K. Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT'L L. & ECON. 327, 335 n.56 (1993) (explaining how French requirement that 60% of all television broadcasting must be French or EC in origin operates as an import quota on U.S. films).

³⁰⁹ Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1184 (1993).

³¹⁰ Controlled Substance Act, 21 U.S.C. §§ 801-1509 (1988 & Supp. V 1993).

³¹¹ See Jackson, *supra* note 20, at 1243 (warning that allowing bans on basis of process will open up a "pandora's box" of loopholes).

³¹² See Stewart, *supra* note 242, at 2043 ("[F]acially nondiscriminatory product regulations are often designed in such a way as to give a competitive advantage to local firms.").

³¹³ Such a reason would be constitutionally unsound.

prohibition is an effective means of deterring the process by which child pornography is made, a process that involves exploitation of vulnerable children.³¹⁴

It is important to note that bans on goods made through certain processes are already tolerated in the international trade regime. The General Agreement specifically allows bans on goods made with forced labor.³¹⁵ That provision continues in the trade agreement annexed to the Charter of the World Trade Organization. Clearly, even the drafters of global trade agreements are unable to draw a bright line between product and process.

2. *Placing Primacy on Trade Is Not an Efficient Means of Maximizing Welfare.*—Trade enhances efficiency and increases overall wealth.³¹⁶ But to see completely unfettered trade as the most efficient means of maximizing welfare is to have a fairly myopic view of economic theory. Completely unfettered trade would produce one state of economic efficiency; there are, however, a “multitude of economically efficient states.”³¹⁷ This “fundamental theorem of economics,”³¹⁸ is demonstrated with the Edgeworth-Bowley Box:

Stated simply, the Edgeworth-Bowley Box shows that whatever initial distribution of goods exists in a given society, the members of that society have an incentive to trade among themselves as long as each of the trading partners wants more of one good than another and is willing to give up other products in order to obtain additional quantities of that good. As long as one party wants to give up a different good than the other party, and also wants something the other party is willing to surrender, the potential for trade exists. When the parties are no longer willing to trade because each party will no longer give up what the other party wants in exchange for his or her goods, they have reached what is called economic efficiency. Clearly, the rate at which the parties will exchange, the amount they will exchange, and when they will stop trading, is greatly affected by many factors. Included among these factors are: the personal idiosyncrasies of the trading partners with respect to the goods, the relative bargaining strengths of the parties, and most importantly, their initial endowments of wealth and resources. Obviously, if there are variations in any of these factors, then the economically efficient state that society will reach will be different.³¹⁹

³¹⁴ See *Ferber v. New York*, 458 U.S. 747, 759-60 (1982).

³¹⁵ General Agreement, *supra* note 1, art. 20, para. 1(e).

³¹⁶ See *supra* notes 19-43 and accompanying text.

³¹⁷ White, *supra* note 45, at 603 n.103.

³¹⁸ *Id.* at 604.

³¹⁹ *Id.* The Edgeworth-Bowley Box looks like nothing more than an indifference curve and an inverted indifference curve.

Two points must be emphasized. First, there are a number of possible economically efficient outcomes.³²⁰ Second, which of the many possible outcomes that a given society will arrive at is a function of the values of that society.³²¹

The concepts of Pareto optimality or efficiency are no more limiting than the broader concept of economic efficiency.³²² Just as there is no unique state of economic efficiency, there is also no unique state of Pareto efficiency: a multitude of Pareto-efficient states exist. Moreover, when individual preferences other than wealth maximization are taken into account, it is possible to achieve a Pareto-efficient outcome that is not allocatively efficient.³²³ Nor is Pareto efficiency any more defensible than wealth maximization:

Pareto-efficient allocations should not be identified with the public interest, since the Pareto criterion is distributionally neutral but social welfare functions need not be, and, to touch on reality for a moment, almost surely are not. Inefficient resource allocations with superior distributional characteristics may be, and almost surely are, socially preferable to some alternative allocations which satisfy the Pareto criteria.³²⁴

This leaves a final refuge for those who desire a formula that will leave but one possible economic condition: strip economic transactions, including trade, of any goal other than maximization of monetary wealth.³²⁵ Such a formula would be indefensible on virtually every level.³²⁶ Fortunately, such a formula is also impossible; it is no

³²⁰ *Id.* at 607 n.108; see Richard A. Westin, *When One-Eyed Accountants are Kings: A Primer on Microeconomics, Income Taxes and the Shibboleth of Efficiency*, 69 MINN. L. REV. 1099, 1106 (1985) ("Economists do not define 'optimal' as the unique best, its Latin root notwithstanding. Instead, they mean one of an infinite number of 'best' allocations.").

³²¹ White, *supra* note 45, at 607 ("[T]he economically efficient state reached results in large part from the value choices that society makes with respect to the initial endowments.").

³²² An allocation of resources is "Pareto optimal" if "there exist[s] no other productively feasible allocation which [makes] all individuals in the economy at least as well-off, and at least one strictly better off, than they were initially." 3 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 811 (John Eatwell et al. eds., 1987). "A particular change is Pareto efficient if it makes at least one party better off without making another party worse off." David D. Haddock et al., *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CAL. L. REV. 1, 15 n.42 (1990). Pareto efficiency is itself a value judgement. MARC R. TOOL, *ESSAYS IN SOCIAL VALUE THEORY: A NEOINSTITUTIONALIST CONTRIBUTION* 88 (1986).

³²³ Jules L. Coleman, *Efficiency Exchange and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CAL. L. REV. 221, 231 (1980).

³²⁴ Peter L. Kahn, *The Politics of Unregulation: Public Choice and Limits on Government*, 75 CORNELL L. REV. 280, 285 n.21 (1990).

³²⁵ See Mark M. Hager, *The Emperor's Clothes Are Not Efficient: Posner's Jurisprudence of Class*, 41 AM. U. L. REV. 7, 16 (1991) ("In several passages, Posner hints that economic analysis provides legal decisionmakers an escape from the world of value clash and controversy into a realm of clear answers and value-neutral conditions.").

³²⁶ See DAVID M. FREEMAN, *CHOICE AGAINST CHOICE: CONSTRUCTING A POLICY-ASSESSING SOCIOLOGY FOR SOCIAL DEVELOPMENT* 66 (1992) ("[E]conomic growth cannot be synonymous with a defensible conception of societal development."); see also ANDREW B. SCHMOOKLER, *THE ILLUSION OF CHOICE: HOW THE MARKET ECONOMY SHAPES OUR DESTINY*

more possible to extricate an economy from the social mores in which it is embedded than it is to pull all of the bones out of a living chicken.³²⁷ An economy, and thus economic efficiency, is inextricably intertwined with the rest of a society.³²⁸

In short, unfettered trade cannot lead a society to the single most efficient economic state, for no such state exists. Moreover, the multitude of efficient states cannot be narrowed to one by excising all goals except maximization of monetary wealth; such an operation is impossible in the real world.

D. *The Peril of Giving Primacy to Trade*

Ironically, insistence by the World Trade Organization that trade be given primacy would imperil free trade. Giving primacy to a single value, particularly an economic value, does not comport with the way people and societies arrange the world, does not make economic sense, and does not allow domestic law to reflect the full range of societal values. To the extent that domestic laws do not reflect societal values, those laws become nonlegitimate. A sovereign faced with the choice between a domestically legitimate legal regime or compliance with its international obligation is likely to choose not to adhere to its free trade obligations.

Ronald Rogowski has developed a theory that provides insights into the relationship between domestic politics and international trade regimes.³²⁹ Although his work is of the "second image reversed" school of thought,³³⁰ a byproduct of his theory is a blueprint for pre-

34 (1993) ("Our economy, with its focus on the material and the mechanical, embodies an approach to human life with the spirit drained out of it."). Interestingly, this is not a new complaint. See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 112-13 (6th ed. 1790) ("[T]he age of chivalry is gone[—]that of sophisters, economists and calculators has succeeded; and the glory of Europe is extinguished for ever.").

³²⁷ See FREEMAN, *supra* note 326, at 66 ("[M]arkets must function within a social nexus, and market-generated efficiencies cannot by themselves prescribe the shape of 'developed' social structures within which markets function any more than the chemistry of the blood corpuscle can by itself adequately define the structural shape of the human body."). The empirical experience of those who advocate wealth maximization as a theoretical norm illustrates the impossibility of isolating the concept of economic efficiency from the society in which an economy is embedded. See George M. Cohen, Comment, *Posnerian Justice and Economic Analysis of the Law: The View from the Bench*, 133 U. PA. L. REV. 1117 (1985) (concluding that Posner misapplies or avoids economic doctrine in order to achieve desired result).

³²⁸ See Francis M. Bator, *The Simple Analytics of Welfare Maximization*, 47 AM. ECON. REV. 22, 56 (1957) ("Allocation and distribution interact in countless ways with the politics and sociology of a society . . . 'everything depends on everything.'").

³²⁹ See ROGOWSKI, *supra* note 300.

³³⁰ Paul Midford, *International Trade and Domestic Politics: Improving on Rogowski's Model of Political Alignments*, 47 INT'L ORG. 535, 535 (1993). Second image reversed "refers to the impact of international-level independent variables upon domestic political processes." *Id.* at 535 n.2; see Peter Gouveitch, *The Second Image Reversed: The International Sources of Domestic Politics*, 32 INT'L ORG. 881, 882-83 (1978) ("Two aspects of the international system have

dicting domestic support for free trade. The foundation of his theory is the work of economists who showed that trade

protection benefits (and liberalization of trade harms) owners of factors in which, relative to the rest of the world, that society is *poorly* endowed, as well as producers who use that scarce factor intensely. Conversely, protection harms (and liberalization benefits) those factors that—again, relative to the rest of the world—the given society holds *abundantly*, and the producers who use those locally abundant factors intensely.³³¹

Rogowski proceeds to characterize economies as advanced (capital rich) or backward (capital poor) and further divides them on the basis of the ratio of land to labor.³³² He then predicts various social conflicts within these various economies as the result of trade policy and exogenous trade conditions.³³³ What is pertinent to this Article, however, are not Rogowski's predictions, but rather his hypothesis "that the beneficiaries of a change [in the level of trade liberalization or protectionism] will try to continue and accelerate it, while the victims of the same change will endeavor to retard or halt it."³³⁴

Rogowski's hypothesis is useful in that it highlights the connection between popular political support and trade liberalization. His approach, however, is unfortunately simplistic. It is limited by its reliance on economic self-interest as the sole generator of popular support. Particularly when the economic benefits of trade are not immediate or are so diffuse as to be undetectable by the individual, this cannot be true. Indeed, a useful addition to Rogowski's theorem would be that popular support for trade liberalization is in part attributable to the extent to which trade liberalization comports with extant societal values.

The failure of countries to adhere fully to their World Trade Organization obligations would significantly erode, and perhaps completely vitiate, the ability of the World Trade Organization to perform its functions. The World Trade Organization has no resources of its own to enforce compliance.³³⁵ Instead, its authority "will depend entirely on its credibility."³³⁶ Defiance of any treaty creates a risk that the cooperative structure built around that treaty will collapse.³³⁷ In-

powerful effects upon the character of domestic regimes: the distribution of power among states, or the international state system; and the distribution of economic activity and wealth, or the international economy. Put more simply, political development is shaped by war and trade.").

³³¹ ROGOWSKI, *supra* note 300, at 3; see Wolfgang F. Stolper & Paul A. Samuelson, *Protection and Real Wages*, 9 REV. ECON. STUD. 58 (1941).

³³² ROGOWSKI, *supra* note 300, at 6-7.

³³³ *Id.* at 7.

³³⁴ *Id.* at 4-5; see Charles K. Rowley & Robert D. Tollison, *Rent-Seeking and Trade Protection*, in PROTECTIONISM AND STRUCTURAL ADJUSTMENT 141, 151-52 (Heinz Hauser ed., 1986) (explaining that protectionism is the result of pressures by those harmed by free trade).

³³⁵ de Jonquières, *supra* note 3, at 11.

³³⁶ *Id.* (quoting "a senior trade official in Geneva").

³³⁷ ORAN R. YOUNG, INTERNATIONAL COOPERATION 73-74 (1989).

deed, one senior trade official has predicted that if the World Trade Organization's " 'authority is once eroded by a big trading power, that will be the end of the [World Trade Organization].' "338

IV. THE VIABILITY OF A FREE TRADE REGIME REQUIRES RECOGNITION THAT LEGITIMATE EXPRESSIONS OF SOCIETAL VALUES MAY INCIDENTALLY IMPEDE TRADE

The temptation for countries to violate their obligations to the World Trade Organization could be significantly ameliorated through the adoption of a simple doctrine. In its most basic form, this doctrine would exempt certain laws from scrutiny by the Dispute Settlement Body. Exempted laws would be those that, first, only incidentally impede trade (or otherwise nullify or impair a benefit accruing under a trade agreement) and, second, are enacted or otherwise created primarily to reflect underlying societal values. For example, a quota on the number of television sets that could be imported into a country would not escape scrutiny, and would be subject to review and recommendations. On the other hand, a requirement that broadcasters reserve one hour per evening for locally produced programming could reflect a value relating to the preservation of cultural identity, and might on that basis escape scrutiny.

This doctrine could be instituted in three ways. The most improbable is amendment of the Charter or of the Understanding on the Settlement of Disputes. The most satisfactory is adoption of an interpretation. The most likely is a *de facto* creation by the Dispute Settlement Body.

A. *Amendment of the Charter or the Understanding*

Amendment of the Charter or the various trade agreements is governed by Article 10 of the Charter. A proposal to amend must come from either a member country or from the Council for Trade in Goods, the Council for Trade in Services, or the Council for Trade-Related Aspects of Intellectual Property Rights and must be made at the Ministerial Conference.³³⁹ If the proposed amendment is an amendment to the Charter, the Ministerial Conference must vote on whether the amendment is "of a nature that would alter the rights and obligations of the Members."³⁴⁰ If it is not, then the proposed amend-

³³⁸ de Jonquières, *supra* note 3, at 11 (quoting "a senior trade official").

³³⁹ *Charter, supra* note 2, art. 10, *reprinted in* 33 I.L.M. at 20. In the case of the various Councils, they may propose amendments only to those trade agreements whose functioning they oversee. *Id.*; *see id.* art. 4(5), *reprinted in* 33 I.L.M. at 17 (establishing Councils and describing oversight functions).

³⁴⁰ *Id.* art. 10(1), *reprinted in* 33 I.L.M. at 20. Actually, all amendments are assumed to be such unless the Ministerial Conference decides by a three-fourths vote that they are not. *Id.*

ment must be approved by a two-thirds vote, and becomes effective for all members.³⁴¹ If it is, however, then the proposed amendment still requires acceptance by two-thirds of the members, but is binding only on those members who accept it.³⁴² The Ministerial Conference may, however, decide by a three-fourths vote to require all members to accept the amendment or withdraw from the World Trade Organization.³⁴³

An amendment to the Charter embodying the proposed doctrine would almost certainly be considered important to the rights and obligations of the members. Thus, such an amendment would require approval by two-thirds of the members, and might not even be binding on all members. Moreover, an amendment that would allow such scrutiny by the Dispute Settlement Body would probably not be made to the Charter, but would instead be made to the Understanding on Rules and Procedures Governing the Settlement of Disputes.

Amendment of that Understanding is more straightforward, and more stringent, than amendment of the Charter. The proposal must be submitted by a member country at a Ministerial Conference, where it must be approved unanimously.³⁴⁴ It then becomes binding on all members.

The requirement that an amendment to the Understanding be unanimous severely curtails the likelihood that a substantive amendment could be made. Even though a doctrine that would allow incidental trade infringement that reflects societal values to escape scrutiny would be of tremendous benefit to the World Trade Organization, it is almost certain that at least one member would hold such an amendment hostage in exchange for something of benefit to that country alone.³⁴⁵ Moreover, the Ministerial Conference convenes only once every two years; implementation of this amendment would thus be further delayed.

It is also unlikely that any member of the World Trade Organization will soon propose an amendment to the Charter or the Understanding because a review of the dispute settlement rules and procedures has been scheduled to be concluded in 1999.³⁴⁶ The signatories to the Charter agreed that upon completion of this review a decision will be made by the Ministerial Conference "whether to con-

³⁴¹ *Id.* art. 10(4), reprinted in 33 I.L.M. at 20.

³⁴² *Id.* art. 10(3), reprinted in 33 I.L.M. at 20.

³⁴³ *Id.*

³⁴⁴ *Id.* art. 10(8), reprinted in 33 I.L.M. at 21.

³⁴⁵ See Charnovitz, *supra* note 47, at 514 (noting that the General Agreement, which also required unanimous consent for amendment, was practically unamendable); Waller, *supra* note 249, at 600 (same).

³⁴⁶ See Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 152 (1994).

tinue, modify or terminate such dispute settlement rules and procedures."³⁴⁷ Thus, it is possible that the World Trade Organization itself may correct the deficiencies in its dispute settlement system sometime early in the next century. Unfortunately, that will not be soon enough; the dispute settlement process will be particularly scrutinized during the first few years of the World Trade Organization's life.³⁴⁸ It is also painfully unclear how the decision regarding the dispute settlement rules is to be made, and whether a unanimous or supermajority vote will be required to effectuate the changes suggested by the review.

B. Implementation of the Doctrine through an Interpretation

An interpretation is a statement regarding what a trade agreement means or how it is to be applied. The ability to issue interpretations was found in Article 25 of the General Agreement, which allowed the parties to that agreement to take joint action "with a view to facilitating the operation and furthering the objectives of this Agreement."³⁴⁹ In 1949, during the third meeting of the parties to the General Agreement, the Chairperson stated that it was within the functions of the parties, "acting jointly [under Article XXV,] to interpret the Agreement whenever they saw fit."³⁵⁰ Since that time, the parties have issued interpretations on several very substantive provisions.³⁵¹

The World Trade Organization keeps open the possibility of interpretations. An interpretation may be adopted by either the Ministerial Conference or the General Council. Adoption of an interpretation requires a three-fourths vote. The only restriction on interpretations is that they not be used in a manner that would undermine the procedures for enacting amendments.³⁵²

An amendment or interpretation would be the better means of instituting the proposed doctrine. Each would allow member countries to work through the appropriate language in order to create agreed-upon guidelines for the Dispute Settlement Body and the dispute panels. Moreover, those guidelines would be available for countries to contemplate as they enacted their own domestic laws.

³⁴⁷ *Id.*

³⁴⁸ See de Jonquières, *supra* note 3, at 11.

³⁴⁹ General Agreement, *supra* note 1, art. 25(1).

³⁵⁰ GATT Doc. GATT/CP.3/SR.37, at 5 (Aug. 8, 1949).

³⁵¹ See, e.g., Decision of 26 March 1980 on Rectification and Modification of Schedules, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 25, 25-26 (27th Supp. 1981); Decision of 18 November 1968 on Rectification and Modification of Schedules, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 16, 16-17 (16th Supp. 1969).

³⁵² Charter, *supra* note 2, art. 9(2), reprinted in 33 I.L.M. at 19.

Unfortunately, although superior, an interpretation may not be available for some time. Several issues were left open or postponed for further discussion when the parties to the Uruguay Round signed the final agreements in Marrakech.³⁵³ It is likely that the first several years will be devoted to these issues rather than to amending or interpreting existing structures. Thus, although the World Trade Organization will be required at some point in time to address the conflict between the principles of free trade and other societal values, in the short term the dispute settlement panels themselves will find it necessary to create a doctrine that accommodates domestic legislation that incidentally impedes trade while reflecting those values.

C. *Creation of the Doctrine by Dispute Panels*

Although the dispute resolution system under the World Trade Organization is far more rigid than under the GATT, the agreements creating the Organization allow a small degree of flexibility. There are at least three places in which the documents explicitly recognize that trade cannot be given primacy over all other considerations. The first is the opening paragraph of the preamble to the Charter:

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.³⁵⁴

“Standard of living” is itself an ambiguous term that conceivably encompasses noneconomic factors. Moreover, the economic goals set forth in this paragraph are conditioned by recognition of the need for sustainable development, protection of the environment, and recognition of different stages of economic development.

³⁵³ See, e.g., Decision Concerning Paragraph (b) of Article XIV of the General Agreement on Trade in Services, 33 I.L.M. 144 (1994) (working party established to examine relationship between trade in services and the environment); Decision on Movement of Natural Persons, 33 I.L.M. 150 (1994) (negotiations on further liberalizing movements of natural persons to continue); Decision on Negotiations on Basic Telecommunications, 33 I.L.M. 144, 144-45 (1994) (voluntary negotiations on liberalizing basic telecommunications to begin); Decisions on Negotiations on Maritime Transport Services, 33 I.L.M. 151 (1994) (voluntary negotiations on maritime transport services to begin). The Agreement on Trade in Civil Aircraft, which is one of the plurilateral trade agreements annexed to the Charter, is also under negotiation. *Charter*, *supra* note 2, Annex 4, Agreement on Trade in Civil Aircraft, GATT Doc. MTN/FA II-A4(a). See de Jonquières, *supra* note 3, at 11 (noting that details of services agreement have yet to be filled in).

³⁵⁴ *Charter*, *supra* note 2, pmb., reprinted in 33 I.L.M. at 15.

The second recognition of the place of trade occurs in the Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking,³⁵⁵ which is one of the Ministerial Decisions and Declarations that accompanied the signing of the Charter in Marrakech. The Ministers specifically recognized that “difficulties whose origins lie outside the trade field cannot be redressed through measures taken in the trade field alone.”³⁵⁶ Finally, in the accompanying Decision on Trade and Environment, Ministers expressed a desire “to coordinate the policies in the field of trade and environment, and this *without exceeding the competence of the multilateral trading system*, which is limited to trade policies and those trade-related aspects of environmental policies which may result in *significant* trade effects for its members.”³⁵⁷ These three statements taken together could be used by a panel to justify an interpretation that the drafters of the trade agreements did not intend for trade to be given primacy in all circumstances.³⁵⁸ Such action would be neither unprecedented nor unprincipled.

Perhaps the best known example of a supranational court actively creating a doctrine not explicitly set out in its organic legislation is the European Court of Justice’s creation of a basic code of human rights, which it applies to European Community legislation.³⁵⁹ “It is also a widely shared view that the Court not only acted legally, but also wisely and courageously in filling an embarrassing lacuna in the Treaty [of Rome] and in giving the individual an additional judicial guarantee.”³⁶⁰ Joseph Weiler, who has long studied the European Court of Justice, believes that active and independent judicial review is a critical element in making a supranational body both legitimate and effective.³⁶¹

On this foundation, the Dispute Settlement Board and the panels it administers must create a doctrine that will allow those laws to sur-

³⁵⁵ 33 I.L.M. 139-40 (1994).

³⁵⁶ *Id.* para. 4.

³⁵⁷ GATT Doc. MTN.TNC/MIN(94)/2 (Apr. 15, 1994) (emphasis added).

³⁵⁸ Cf. *European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, GATT Doc. L/6627 para. 144 (Jan. 25, 1990), reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS 86, 126-27 (37th supp. 1991) (paying attention to what drafters conceived); *United States—Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions*, GATT Doc. L/6631 para. 5.20 (Nov. 7, 1990), reprinted in BASIC INSTRUMENTS AND SELECTED DOCUMENTS 228, 261 (37th supp. 1991) (same).

³⁵⁹ See Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103, 1105-06 (1986) (describing European Court of Justice action).

³⁶⁰ *Id.* at 1106.

³⁶¹ Joseph Weiler, *The Community System: The Dual Character of Supranationalism*, 1 Y.B. EUR. L. 267, 298-303 (1982).

vive panel scrutiny that (1) are enacted as a reflection of a societal value rather than for the purpose of frustrating trade and (2) whose impact on trade is incidental. This doctrine is neither impossible to apply nor will it vitiate the gains of the Uruguay Round.

D. Operation of the Doctrine

Laws that exist purely to impede free trade must, in the majority³⁶² of cases, be annulled. On the other hand, laws that incidentally impede trade but are in fact expressions of societal values should be allowed. At the heart of this distinction is the purpose for which the law in question was created.

Discerning the purposes for which a law was enacted may seem an ominous exercise; courts in the United States, however, have been doing so for many years.³⁶³ The Supreme Court has long held that “[a]cts generally lawful may become unlawful when done to accomplish an unlawful end.”³⁶⁴ Courts have inquired into legislative purpose when legislation effects bills of attainder, the First Amendment, the Fourteenth Amendment, and the Commerce Clause.³⁶⁵ Although these inquiries have not been without difficulty or some reticence on

³⁶² In some cases, international regulation itself recognizes that countries have legitimate reasons for enacting protectionist rules. See, e.g., Agreement on Subsidies and Countervailing Measures, art. 8 (identifying assistance to disadvantaged areas and assistance for environmental purposes as nonactionable subsidies).

³⁶³ See John H. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1208-09 (1970); Joseph Trussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 346 (1949) (“The inescapable answer is that we must look . . . to the purpose of the law.”). In fact, “[s]ince 1976, . . . fourteenth amendment equal protection claims have required proof of intentional discrimination.” Theodore Eisenberg & Sheri L. Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1152 (1991).

The United States is a particularly apt example. Courts in the United States have been charged with reviewing federal and state laws for conformity to the United States Constitution, much as the Dispute Settlement Board will be charged with reviewing national laws for conformity to the Charter and its various annexes. The courts of the United States have created countless doctrines to avoid annulling laws based on the literal language of the Constitution; virtually no amendment, for example, is without a court-created exception. See Alan Brownstein, *How Rights are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HAST. L.J. 867, 893 (1994). It is fair to ask whether 200 years of sustained governance could have been possible without judicially created flexibility. See Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 39 (1943).

³⁶⁴ *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (quoting *Western Union Tel. Co. v. Foster*, 247 U.S. 105, 114 (1918)).

³⁶⁵ RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* §§ 11.7, 15.9(c), 18.4, 20.49 (2d ed. 1992).

the part of the courts,³⁶⁶ such analysis is both necessary and philosophically untroubling.³⁶⁷

The courts of the United States are not alone in making inquiries into legislative motive. More than twenty years ago, the European Court of Justice ruled that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."³⁶⁸ That rule was later modified to exclude legislation enacted to effectuate necessary state action that does not disproportionately affect trade.³⁶⁹ Determining whether a state's actions fall within the rubric of necessary—a vague term that seems to include "legislation whose enactment entails political, cultural or socio-economic policy choices which are in keeping with the objectives in the general interest pursued by the Treaty"³⁷⁰—is difficult enough, but is only the first step in the process. If the ostensible purpose is legitimate, the reviewing court must then "ascertain whether the national legislation, as interpreted and applied, actually pursues the intended objective, . . . or whether it is used for another purpose."³⁷¹ In other words, the court must inquire as to purpose. GATT dispute settlement panels themselves have not eschewed inquiry into the purpose behind a national law—in fact, some panels have even required such an inquiry. Article 3 of the General Agreement requires that "[t]he products of the territory of any [party to the GATT] imported into the territory of any other [party] shall be accorded treatment no less favourable than that accorded to like products of national origin" with respect to certain laws affecting their sale.³⁷² If this provision were taken literally, countries could easily circumvent it by classifying foreign and domestic products as unlike products. On the other hand, the General Agreement is cer-

³⁶⁶ See JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 136 (1980) ("For years the Supreme Court has gone back and forth on the question of whether an official act should be invalidated because it was undertaken for an unconstitutional reason, and it has continued to vacillate lately.").

³⁶⁷ Ely uses the example of a sergeant in the National Guard who picks three men for an especially hazardous assignment based on their race, religion, or political party membership—such a motivation would be constitutionally impermissible. *Id.* at 137.

³⁶⁸ Case 8/74, *Procureur du Roi v. Dassonville*, 1974 E.C.R. 837, 852, 2 C.M.L.R. 436, 453-54 (1974); see Weiler, *supra* note 224, at 2457 (describing *Dassonville* and its progeny as rigorous and courageous jurisprudence).

³⁶⁹ Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, 1979 E.C.R. 649, 3 C.M.L.R. 494 (1979); see Ulrich Everling, *The Court of Justice as a Decisionmaking Authority*, 82 MICH. L. REV. 1294, 1301 (1984) (discussing the importance of the *Cassis de Dijon* decision).

³⁷⁰ Case C-312/89, *Union Departementale des Syndicats CGT de L'Aisne v. SIEF Conforma and Others*, 3 C.M.L.R. 746, 759 (1993).

³⁷¹ *Id.* at 760.

³⁷² General Agreement, *supra* note 1, art. 3(4).

tainly not intended to preclude legitimate economic regulation that might involve differentiating among products. Thus, panels have found it "necessary" to determine whether the measures they are scrutinizing under Article 3 were enacted for the malign purpose of protecting local products or for the benign purpose of effecting a legitimate regulatory function.³⁷³ This has, in turn, required a "consideration of the policy goals and legislative background" of the measures in question.³⁷⁴

Criticism of inquiry into legislative motive has focused on "issues of ascertainability, futility, and disutility."³⁷⁵ Simply put, the problem with ascertainability is that it is often difficult to determine legislative or administrative motive. The problem with futility is that legislators may hide their motive or reenact legislation with a proffered, permissible motive. Lastly, the problem with disutility is that good laws might be invalidated due to an improper motive.³⁷⁶ Although these criticisms have been applied to motivation inquiry in the context of the United States Constitution, they might also be raised in the context of an exception created by a trade dispute panel.

Comparison of judicial inquiry for purposes of constitutional review and panel inquiry for purposes of allowing an exception is hazardous because, although both deal with the reason a legal regime was created, they are actually quite different. In constitutional review, a finding of an improper motive results in the overturning of legislation. In review under the proposed exception, a finding of a legitimate motive will result in the law *not* being changed to conform with a trade agreement. In that difference lie some of the answers to the problems of ascertainability, futility, and disutility.

Paul Brest very ably demonstrated that ascertainability was an illusory problem and should not deter inquiry into legislative motive or purpose.³⁷⁷ He pointed out that both circumstantial and direct evidence often explain the motivations of lawmakers.³⁷⁸ It is quite possible, however, that not all countries' lawmaking processes are as transparent as that which Brest was discussing. In some countries

³⁷³ *United States—Measures Affecting Alcoholic and Malt Beverages*, GATT Doc. DS23/R para. 5.25 (June 19, 1992), reprinted in *BASIC INSTRUMENTS AND SELECTED DOCUMENTS* 206, 276-77 (39th supp. 1993); *United States—Taxes on Automobiles*, 33 I.L.M. 1397, 1448 (1994).

³⁷⁴ *United States—Measures Affecting Alcoholic and Malt Beverages*, GATT Doc. DS23/R para. 5.74 (June 19, 1992), reprinted in *BASIC INSTRUMENTS AND SELECTED DOCUMENTS*, at 294.

³⁷⁵ Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 966 (1993).

³⁷⁶ Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 119-28; Ely, *supra* note 363, at 1212-17.

³⁷⁷ Brest, *supra* note 376, at 120 (stating that the occasional impossibility of determining motive "does not justify a blanket refusal to undertake the inquiry if a decisionmaker's motivation can sometimes be determined with adequate certainty").

³⁷⁸ *Id.* at 120-24.

there will be no legislative histories, administrative records, or other direct evidence available from which to elicit purpose. Moreover, a country attacking a legal regime will have far less access to circumstantial evidence than will the country that created that regime. This problem can be alleviated by placing the burden of proof on the country that is defending its law or regulation.³⁷⁹

Under such an allocation of the burden of proof, a legal regime that demonstrably nullified or impaired the benefits of another member would be considered violative of a trade agreement unless the offending country could demonstrate that the legal regime was expressive of a societal value. This could be demonstrated through historical analysis, literary traditions, folk traditions, customs, and even surveys and polls. Similar inquiries are already made by international tribunals to determine whether a country's behavior satisfies the legal definition of custom.³⁸⁰ In order to constitute custom, and thereby be binding on a country, a country's behavior must constitute a general practice and be accepted by that country as obligatory.³⁸¹ International tribunals must therefore determine how a country has behaved and why it behaved in that manner. The sources of evidence sifted through by these tribunals include diplomatic correspondence, policy statements, press releases, opinions of official legal advisors, policy manuals, executive practices, comments by government officials, domestic legislation, and patterns of behavior.³⁸²

Such an allocation of the burden of proof also does away with the criticisms of futility and disutility. Lawmakers will have no reason to hide their purposes for creating legal regimes; moreover, they will be unable to fabricate societal values out of wholecloth. And because the exception will only be used to allow laws to exist, it will not be used to annul good laws.

Finally, it should be noted that this exception does not open the Pandora's box of allowing unilateral bans on process. This doctrine alone will not justify process bans. Process bans will be treated as any

³⁷⁹ Cf. *European Economic Community—Restrictions on Imports of Dessert Apples*, GATT Doc. L/6491 para. 12.3 (June 22, 1989), reprinted in *BASIC INSTRUMENTS AND SELECTED DOCUMENTS* 93, 124 (36th Supp. 1990) (noting that a party to the GATT "invoking an exception to the General Agreement bears the burden of proving that it has met all of the conditions of that exception"); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 *STAN. L. REV.* 1105, 1107 (1989) (suggesting that inquiry into legislative intent in the United States works "by allocating burdens of proof between the individual and the state").

³⁸⁰ See G.M. DANILENKO, *LAW-MAKING IN THE INTERNATIONAL COMMUNITY* 75-82 (1993) (describing principle of custom).

³⁸¹ Statute of the International Court of Justice, art. 38.

³⁸² IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4-5 (4th ed. 1990); cf. *Norway—Restrictions on Imports of Apples and Pears*, GATT Doc. L/6474 paras. 5.9-12 (June 22, 1989), reprinted in *BASIC INSTRUMENTS AND SELECTED DOCUMENTS* 306, 321 (36th Supp. 1990) (reviewing series of Norwegian legislative actions).

other legal regime: the mere fact that a process ban is involved is not evidence that a societal value is at stake, nor does it mean that the impediment to trade will be incidental. Countries that defend process bans will be required to do so in the same way that any other legal regime would be defended.

The exception that has been described and proposed in this Article is necessary for the effective operation of the World Trade Organization.³⁸³ To some, however, it may appear to be a retreat from the hard-won steps toward governing international trade through rules and legal process,³⁸⁴ or a reversion to the conceptualization of trade regulation as a political accommodation among distrustful nations.³⁸⁵ Nothing could be further from the truth. Rigorous application of rules does not mean that the rules themselves must be rigid, draconian, or lacking in common sense. Any set of rules, particularly rules governing international economic relations, must be both grounded in the real world and designed to most effectively accomplish the desired goal.³⁸⁶ Moreover, as bulky as the Final Act Embodying the Results of the Uruguay Round of Trade Negotiations may be, it is clear that it in and of itself does not, indeed cannot, contain all of the rules that will be applied to international trade. The lacuna must be filled in by the World Trade Organization and the Dispute Settlement Body.

By setting out this doctrine either as an amendment, interpretation, or panel-created doctrine, the cause of rule-oriented trade regulation would actually be furthered. The doctrine itself would become a rule, just as the plain-view exception to the Fourth Amendment to the United States Constitution is a rule,³⁸⁷ or *Dassonville's* application to Article 30 of the Treaty of Rome is a rule.³⁸⁸ As such, it would be consistently applied and would create a predictable environment for countries and businesses as they planned their various courses of action.

³⁸³ See de Jonquières, *supra* note 3, at 11 ("But however impeccably decisions are taken, what really counts is making them stick. In an organisation like the WTO, the core of which is a set of voluntary contracts between sovereign governments, that comes down to a question of political acceptability.").

³⁸⁴ See Shell, *supra* note 222, at 842-48 (describing evolution of legalism in trade governance).

³⁸⁵ See Phillip R. Trimble, *International Trade and the "Rule of Law"*, 83 MICH. L. REV. 1016 (1985) (book review) (espousing such a view).

³⁸⁶ See JACKSON, *supra* note 45, at 110 (arguing that trade rules must preserve "play in the joints").

³⁸⁷ See Wayne R. LaFare, *Supreme Court Review: Fourth Amendment Vagaries (of Impossible Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1217-18 (1983).

³⁸⁸ See *supra* note 368 and accompanying text.

V. CONCLUSION

International trade is good, for both individuals and societies. International trade allows specialization, which in turn promotes efficient allocation of resources and lowers production costs, and increases the range of products available to consumers. On a noneconomic level, trade prompts cooperative interaction among countries.

The results of the Uruguay Round of Multilateral Trade Negotiations has the potential to make a good thing even better. As tariffs and other trade barriers go down, global wealth will increase. A forum for continuing negotiations will facilitate a coordinated approach to vexing problems of global scale, of which there seems to be no shortage. The Dispute Settlement Body and the automatic adoption of panel reports should instill discipline among members and will provide predictability for businesses working in the international context.

Unfortunately, the results of the Uruguay Round might also carry the seeds of the disruption of the free trade regime. Automatic adoption of panel reports may prove too rigid, if the trade regime continues its current practice of promoting free trade above all other interests. For while free trade is an important interest, it is not the only interest a society or country may have. Unless the trade regime can devise some method of accommodating those other interests, at some point a country will face the choice of adhering to a panel ruling or adhering to its societal values.

One method—the only realistic method—is the creation of a doctrine that would except from scrutiny those laws that (1) are enacted to reflect underlying societal values and (2) incidentally impede trade. This exception would not preclude coordination of social issues that affect trade. Nor would it excuse legal regimes that purposefully or significantly impede trade. It would, however, restore a small degree of the flexibility that has been lost and would allow laws to remain true to the societies that enacted them. In this way, it would lessen the possibility that countries would be forced to make difficult, if not impossible, choices regarding compliance with the World Trade Organization.

Trade is good, and important. It is far too important to endanger through the overzealous pursuit of perfectly free trade. “Be straightforward but not unrestrained; . . . For ordering humanity and serving Heaven, nothing’s so good as being sparing.”³⁸⁹

³⁸⁹ LAO-TZU, *TE-TAO CHING* 27-28 (Robert G. Henricks trans., 1989) (c. 300 b.c.) (Ma-Wang-Tui texts).