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WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's Future

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Gregory Schaffer

Abstract

Part I of this Article provides a brief overview of the dominant discourse on linkages, which focuses on whether World Trade Organization (“WTO”) rules should be modified (or interpreted) to permit trade restrictions on environmental and labor rights grounds. Those fully familiar with the competing conventional approaches to trade-environment and trade-labor debates may either skim Part I or move directly to Part II. Parts II through V examine the political economy of trade-environment and trade-labor policy, particularly in the United States. Part II addresses the politics of trade-environment agenda setting and the reasons why U.S. critics more likely direct their criticism at the WTO instead of environmental policy decisions made domestically. Part III turns to the trade-labor linkage, again assessing the domestic politics behind the predominant focus on trade restrictions. It examines the apparent paradox (at first blush) that the demand for binding WTO labor norms is strongest in the United States, which arguably offers the fewest labor and social protections in the developed world. Part IV briefly addresses what potentially could be accomplished multilaterally through better coordination of the roles of international trade, development, and other economic institutions. Part V concludes with a discussion of the nexus between U.S. domestic politics and the WTO's future development. The links between U.S. domestic politics and international trade-environment/trade-labor policy help compose the WTO's blue-green blues.

WTO BLUE-GREEN BLUES: THE IMPACT OF U.S. DOMESTIC POLITICS ON TRADE-LABOR, TRADE-ENVIRONMENT LINKAGES FOR THE WTO'S FUTURE

Gregory Shaffer*

INTRODUCTION

While scores of Western commentators criticize the non-transparency¹ of the World Trade Organization² ("WTO") in their examination of "blue" trade-labor and "green" trade-environment issues, they often ignore the linkage between domestic politics in powerful states and international trade measures. Consciously or unconsciously, they blur this crucial linkage that divides WTO members and exacerbates conflicts and propels them to the WTO in the first place. Yet it is this underlying domestic-international, two-level game³ that also needs to be made more *transparent*, since its examination demonstrates that it is

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1. The term "transparency" is a buzzword used in public discourse to assess public access—or lack thereof—to deliberations and dispute settlement hearings within the World Trade Organization ("WTO") over trade and trade-related policies. This public access could be either (i) direct, through the provision of access of non-governmental groups to WTO negotiating rooms, committee meetings and dispute settlement hearings, or (ii) indirect, through making the minutes of meetings and transcripts of hearings, as well as all position papers, secretariat studies, and legal briefs submitted to them, publicly available over the Internet and by other media on an expeditious basis.

2. Marrakesh Agreement Establishing the World Trade Organization, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

3. Domestic politics remains the primary explanation for national negotiating positions in international fora, even though in some areas transnational advocacy groups can successfully act outside of national politics and international organizations such as the WTO can somewhat constrain national policymaking. See Robert D. Putman, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988) (discussing two-level game theory in international relations); DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS (Peter B. Evans et al. eds., 1993). For an application to the WTO, see, e.g., Gregory Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1 (2000) [hereinafter Shaffer, *WTO Under Challenge*].

this nexus more than the WTO's lack of transparency that results in trade-environment and trade-labor conflicts.⁴

This Article makes two central points about debates over the WTO's treatment of trade-environment and trade-labor matters. First, the U.S. public is relatively government-averse and foreigner-wary. The United States is thus far less likely to support financing of domestic and international programs that directly address environmental and social concerns than to support trade restrictions against imports. Trade restrictions against imports impose costs on domestic constituents, but these costs are less transparent than the costs of positive programs. Domestic politicians and the mass public, therefore, respond more favorably to critics' calls for trade restrictions against unrepresented foreigners. WTO critics employ the rhetoric of fighting "multinational corporations,"⁵ but the sanctions that they advocate can harm developing-country workers and these workers are rarely consulted about them. Positive assistance programs, on the other hand, are both more efficient and equitable. Yet, whatever political party is in control, domestic political processes prefer to shift costs through trade restrictions onto foreigners who, in a world of asymmetric power, tend to come from poorer, smaller countries.⁶ The result is North-South trade—social pol-

4. Social policy conflicts brought before the WTO are best explained by a more complex combination of factors, including the following: (i) the increasing importance of trade vis-à-vis domestic output in most WTO members, (ii) the overall lowering of tariffs and protectionist barriers worldwide so that protectionist interests look to new means to protect home markets from international competition, (iii) a shift in negotiating power in favor of capital against labor and environmental activists at the domestic level so that the latter attempt to restrict imports in order to reduce firms' negotiating leverage and exit options, (iv) different social priorities of constituencies around the world so that, for example, preservationist environmental policies are of less importance to developing-country non-governmental organizations ("NGOs") and constituents than to their developed country counterparts, and (v) conflicting national interests in a world characterized by asymmetric economic power in which developing countries fear that trade restrictions on alleged social policy grounds will be used primarily (or exclusively) against their exports because only economically powerful countries, such as the United States, will have the leverage to effectively implement them.

5. See, e.g., LORI WALLACH & MICHELLE SFORZA, *WHOSE TRADE ORGANIZATION? CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY*, at ix (1999) (referring in the preface by Ralph Nader to "an autocratic system of international governance that favors corporate interests").

6. The WTO *Shrimp-Turtle Case* took place during a Democratic presidency and a Republican-controlled Congress, while the General Agreement on Tariffs and Trade ("GATT"), *Tuna-Dolphin Case* took place during a Republican presidency and a Democratic-controlled Congress. See *United States—Import Prohibition of Certain Shrimp and*

icy controversies brought before the WTO because of the United States' imposition of unilateral trade restrictions against developing-country imports, as opposed to negotiated package agreements involving financial and technical assistance.⁷

Second, *domestic* laissez-faire-oriented policies within the United States, whether concerning labor and social policy or environmental protection, should encourage further backlash against the WTO and the *international* trade liberalization policies that it facilitates. Although it is primarily these domestic policies that exacerbate income inequality within the United States, political processes more easily focus on trade liberalization as the culprit. To attempt to counter this backlash, trade-liberals could work with environmental and labor advocates to address their concerns through specific domestic and international environmental and social programs. This policy response, however, is constrained by U.S. domestic politics for the reasons just stated. Thus, should the United States continue to push for trade liberalization policies without more coherently addressing domestic and international environmental and social concerns, it should trigger further backlash against the international trading regime.

Part I of this Article provides a brief overview of the dominant discourse on linkages, which focuses on whether WTO rules should be modified (or interpreted) to permit trade restrictions on environmental and labor rights grounds. Those fully familiar with the competing conventional approaches to trade-environment and trade-labor debates may either skim Part I or move directly to Part II.

Parts II through V examine the political economy of trade-environment and trade-labor policy, particularly in the United States. Part II addresses the politics of trade-environment agenda setting and the reasons why U.S. critics more likely direct

Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp-Turtle Case*]; *United States—Restrictions on Imports of Tuna*, GATT B.I.S.D. 39S/155 (Sept. 3, 1991) [hereinafter *Tuna-Dolphin Case*]. In both cases, a coalition of environmental activists, together with producers seeking a level playing field brought an action to compel the United States to implement a ban that triggered the GATT/WTO proceedings. In both GATT/WTO cases, the U.S. position on the appropriateness of trade sanctions on environmental grounds was basically the same.

7. Package agreements, of course, could be combined with monitoring and, eventually, trade restrictions, whether through market boycotts, adverse labeling, tariffs, or import bans.

their criticism at the WTO instead of environmental policy decisions made domestically. Part III turns to the trade-labor linkage, again assessing the domestic politics behind the predominant focus on trade restrictions. It examines the apparent paradox (at first blush) that the demand for binding WTO labor norms is strongest in the United States, which arguably offers the fewest labor and social protections in the developed world. Part IV briefly addresses what potentially could be accomplished multilaterally through better coordination of the roles of international trade, development, and other economic institutions. Part V concludes with a discussion of the nexus between U.S. domestic politics and the WTO's future development. The links between U.S. domestic politics and international trade-environment/trade-labor policy help compose the WTO's blue-green blues.

I. *THE CURRENT FOCUS ON TRADE-SOCIAL POLICY
LINKAGES: SHOULD WTO RULES FACILITATE TRADE
RESTRICTIONS ON ENVIRONMENTAL AND LABOR
RIGHTS GROUNDS?*

A. *Overview of the Debates*

The World Trade Organization is increasingly a household name, not because of the almost half century of multilateral trade negotiations leading to its current state, nor because of its multiple daily committee meetings in Geneva, but because of the dramatic anti-WTO protests and riots in Seattle, Washington in November 1999 at the WTO's third Ministerial Meeting.⁸ The two central claims of the protestors were, first, that the WTO system favors large corporate interests at the expense of workers, consumers, the environment, and developing countries; and second, that it is a closed, trade-biased, anti-democratic institution. Critics link these substantive and procedural claims, declaring that it is the non-transparent procedures of the WTO that lead to pro-corporate, neo-liberal outcomes.

The preferred remedy of many of these critics is trade restrictions on labor and environmental grounds. I call this the *western perspective* because it is almost solely a demand of western

8. Mark Barrett, *Trade Anger Reverberates; Issues Impact WNC*, ASHEVILLE CITIZEN-TIMES, Dec. 2, 1999, at A1 (remarking that "[b]efore this week, you might have thought the WTO was a wrestling organization seen on a cable channel you don't get").

nations and western constituents.⁹ This does not in itself signify that the demand for trade restrictions is correct or incorrect, but rather that the situation's political economy needs to be recognized. Although developing-country critics of the WTO demand fewer WTO constraints on their abilities to implement social and development policies,¹⁰ they largely oppose trade restrictions on environmental and labor grounds, particularly where they would be implemented through a unilateral determination by the United States.¹¹ On the other hand, Western protestors, Western academics, and often Western leaders and the Western media call for WTO authorization of unilaterally determined trade restrictions without any significant complementary financial assistance. Well before the Seattle concatenations, reams of U.S. law review articles addressed how WTO rules should be modified

9. For a detailed study of this issue in the environmental realm, see, e.g., Shaffer, *WTO Under Challenge*, *supra* note 3 (assessing how NGOs from developing countries support their governments' opposition to amendment of WTO rules that would facilitate unilateral trade restrictions on environmental grounds). The terms "western" and "northern" are used in this Article to distinguish developed country positions from those of the developing world. In many cases, U.S. politicians, academics, and interest groups play leading roles among developed country constituencies in pressing for trade sanctions on social and environmental grounds, so that this also could be dubbed a U.S. perspective. This, of course, does not mean that all constituencies around the globe can be divided on this basis, but the political economy of the situation is clear to any careful observer.

10. For example, developing-country critics demand that developing countries be granted special status so that they retain more discretion to promote "infant industries" and other policies through subsidies and import barriers than under WTO rules.

11. See, e.g., *Third World Intellectuals and NGOs Statement Against Linkage (TWIN-SAL)*, *ECONOMIQUITY* 2 (Nov. 1999), available at <http://www.cuts-india.org/Twinal.htm> (listing, in newsletter of Indian organization Centre for International Trade, Economics and Environment ("CUTS"), 99 third world intellectuals and NGOs as signatories and declaring "our unambiguous opposition to Linkage of Labour and Environmental Standards to WTO and to trade treaties"). "We also wish to disabuse the media and the governments in the developed countries of the notion that those who oppose Linkage are corporate interests and malign governments." *Id.* They propose that labor and environmental issues be handled in labor and environmental agencies, such as the International Labour Organization and the United Nations Environmental Programme. *Id.*; see also *Joint NGO Statement on Issues and Proposals for the WTO Ministerial Conference 8-11*, available at <http://www.twinside.org.sg/title/issue-cn.htm> [hereinafter *Joint Statement*] (signed by 34 NGOs from developing countries, including Bangladesh, Brazil, Colombia, Dominican Republic, Ghana, Guyana, India, Indonesia, Kenya, Malaysia, Mexico, Nepal, Philippines, South Africa, Thailand, Uruguay, and Zimbabwe). This Joint Statement asserts that "the environment should not be made use of as an issue for protectionism by the powerful for that would unfairly shift the adjustment cost to the weaker countries and people . . . There should be no recourse to unilateral trade actions for any purpose." *Id.* The statement also rejects "the idea of introducing labour standards or a 'social clause.'" *Id.*

or interpreted to accommodate trade restrictions imposed on environmental grounds.¹² In response to the Seattle mayhem, U.S. President Clinton called for mandatory trade “sanctions” against countries that fail to implement core labor standards.¹³ The U.S. media likewise supported some of the protesters’ demands. The *New York Times*’ lead editorial concluded that WTO dispute settlement panels “should bend over backward to side with the environmental advocates when the cause is just and not a disguised form of protectionism.”¹⁴ These western political and media leaders, however, ignore developing-country claims that the cause is *not* just if no financial assistance is provided to them,¹⁵ and that self-interested producers are always in league with well-meaning environmental activists when it comes to bans on the importation of developing countries’ competitive products.

B. Overview of WTO Rules: The Product-Process Distinction

WTO law prohibits discriminatory regulatory treatment of

12. See, e.g., Jeffrey Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT’L L. 733 (1999) (proposing new procedural mechanisms whereby WTO dispute settlement panels would avoid controversial trade-environment cases on standing, ripeness, political question, and related grounds, thereby permitting domestic trade restrictions imposed on environmental grounds to remain unchallenged before the WTO); see also Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 660 (1996) (proposing the creation of “an exception that would allow certain laws or actions to exist even if they violate the rules of the World Trade Organization”). This exception would be available provided that “the impediment to trade must be incidental” and the measure must be “enacted or undertaken for the purpose of reflecting an underlying societal value.” *Id.*; DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 113-36 (1994) (proposing a three-prong test to address trade-environment issues in more balanced manner); Robert Howse & Donald Regan, *The Product/Process Distinction—An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy*, 11 EUR. J. INT’L L. 249 (2000) (maintaining that WTO rules already permit countries to differentiate and restrict products based on how they are produced).

13. Steven Greenhouse & Joseph Kahn, *Talks and Turmoil: Workers’ Rights; U.S. Effort to Add Labor Standards to Agenda Fails*, N.Y. TIMES, Dec. 3, 1999, at A1 (referring to a Seattle Post-Intelligencer interview in which U.S. President Clinton stated, “[u]ltimately I would favor a system in which sanctions would come for violating any provision of a trade agreement”). President Clinton was responding to broader U.S. public views. *Id.* See, e.g., *Globalization: What Americans Are Worried About*, BUS. WK., Apr. 24, 2000, at 44 (noting that 80% of U.S. citizens polled said protecting environment should be major priority of U.S. trade agreements and 74% said it should be major priority of trade agreements to prevent unfair competition by countries that violate workers’ rights).

14. *Messages for the WTO*, N.Y. TIMES, Dec. 2, 1999, at A30.

15. See, e.g., Jeffrey Atik, *Two Hopeful Readings of Shrimp-Turtle*, 9 Y.B. INT’L ENVTL. L. 6 (1999).

foreign products by WTO members,¹⁶ subject to certain conditioned exceptions, such as those “necessary to protect public morals” and “human, animal, or plant life or health,” provided that the measures do not constitute “arbitrary or unjustifiable discrimination.”¹⁷ In the consumer health field, the WTO Agreement on Sanitary and Phytosanitary Measures¹⁸ supplements these provisions. Among other matters, it permits countries to maintain sanitary and phytosanitary requirements higher than internationally agreed standards so long as they are based on a risk assessment and do not arbitrarily or unjustifiably discriminate between Members.¹⁹ Under this approach, domestic clean air regulations cannot apply more stringent standards to foreign-produced gasoline than to domestically-produced gasoline.²⁰ Similarly, domestic health agencies cannot apply more stringent pesticide testing requirements to imported apples. Apples are apples and must be treated the same, whether they are produced in the United States, Chile, or Japan, whether they are Red Delicious or Granny Smith.

GATT judicial interpretations of these provisions traditionally distinguished between product and non-product related production and process methods.²¹ Apple growers, for example, can adopt widely different production processes. They could

16. GATT art. III(4), for example, provides the following:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

17. See GATT art. XX (setting forth these conditions).

18. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

19. *Id.* art. 2, 3, 5; see also *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS26/13 (Feb. 19, 1998).

20. See *United States—Standards for Reformulated and Conventional Gasolines*, Report of the Appellate Body, WT/DS2/9 (May 20, 1996) (upholding finding of panel that imported and domestic gasoline were “like products,” and that, since imported gasoline was treated “less favorably” than domestic gasoline, discriminatory U.S. regulations were inconsistent with GATT Article III(4)).

21. See, e.g., Joel P. Trachtman, *Decision: GATT Dispute Settlement Panel*, 86 AM. J. INT’L L. 142, 142-43 (1992) (discussing briefly relevant GATT articles III, XI, and XX and their application in the first *Tuna-Dolphin Case*). This approach, however, has been called into question somewhat by the WTO *Shrimp-Turtle Case*. See also Gregory Shaffer, *International Decision: United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 93 AM. J. INT’L L. 507 (1999) [hereinafter Shaffer, *Shrimp-Turtle Dispute*].

employ non-unionized or child labor, or use genetically modified seeds or a cocktail of pesticides and fertilizers. Under the traditional GATT approach, to the extent that production processes affect the safety of the product itself, WTO members may ban imports so long as they treat domestic products no more favorably. Where, however, there is no danger from the product's importation or consumption (for example, no pesticide or fertilizer remains on the fruit), then a WTO member may not ban its importation, regardless of the exporting country's domestic regulations and regardless of the actual production methods used.²² This view treats the use of child and non-unionized labor, or biotechnological and traditional agricultural techniques, in a similar manner as soil and climate differences. Together, such differences determine a country's comparative advantage to produce certain types of products as opposed to others.²³

22. Traditional GATT doctrine considers such an imported product to be a "like" product, which cannot be subjected to more stringent regulations. The notion of a "like product" is, nonetheless, a rather fluid concept in GATT and WTO jurisprudence. See, e.g., *Japan—Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS8/AB/R (Oct. 4, 1996). The Appellate Body stated in its Japan-Alcohol decision:

No one approach to exercising judgement will be appropriate for all cases . . . The concept of 'likeness' is a relative one that evokes the image of an accordion. The accordion of 'likeness' stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term 'like' is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.

Id.

This GATT approach, however, can potentially conflict with other international treaty provisions. For example, the regulation of genetically modified seeds is also governed by the 2000 Biosafety Protocol to the Convention on Biological Diversity. See Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Feb. 23, 2000, art. 1, available at <http://www.biodiv.org/biosafe/protocol.asp> [hereinafter Biosafety Protocol]. The Biosafety Protocol subjects import restrictions to a risk analysis, yet in doing so, grants importing countries greater discretion to restrict imports based on scientific uncertainty. For a review of the positions of GMO supporters and critics, as well as an overview of the Biosafety Protocol, see generally Mark Pollack & Gregory Shaffer, *Biotechnology: The Next Transatlantic Trade War?*, 23 WASH. U. L. Q. 41 (2000).

23. The traditional factors of production that determine a country's comparative advantage are land, labor, and capital. While human beings and the natural environment clearly are more than "factors of production," the issue remains as to which is the relatively better means, among imperfect alternatives, to address their plights and who should determine those means. Some who support environmental and social policy negotiations at the international level as a counterpart to liberalized trade policy nonetheless oppose the integration of environmental and labor standards into the WTO.

C. *The Traditional Trade-Liberal Approach*

Supporters of the traditional trade liberal approach maintain that labor and environmental standards are fundamentally a matter of domestic policy to be determined by domestic political processes. Many of them favor a regulatory competition model whereby environmental and labor standards constitute domestic political choices that form part of a country's comparative advantage.²⁴ They base their arguments on concepts of federalism (in the United States) and subsidiarity (in the European Union), whereby decision-making is to be made at a level closest to the citizen. Under a regulatory competition model, when consumers purchase products on the market, they effectively choose a regulatory system under which those products are produced, leading to competition between regulatory systems and (these commentators argue) more efficient, better regulation.²⁵

While critics charge that the regulatory competition model leads to downward competitive pressure on environmental and social standards,²⁶ defenders counter that, in the international

These commentators argue that the WTO is a relatively effective trade institution and should not address areas outside of its competence. If environmental and labor standards are to be set and enforced at the international level, they argue, this should be done through international labor and environmental organizations, such as the International Labor Organization ("ILO"), the United Nations Environmental Programme ("UNEP"), or a new Global Environmental Organization.

24. See generally REGULATORY COMPETITION AND ECONOMIC INTEGRATION (Daniel C. Esty & Damien Geradin eds., 2000).

25. See, e.g., Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418-20 (1956) (presenting what is known as Tiebout model, which maintains that ability of individuals—or in our case, firms—to “vote with their feet” leads to efficient allocation of local public goods); see also application to U.S. domestic environmental regulation in Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1212 (1992) (arguing that competition should not decrease social welfare, but rather “produce an efficient allocation of industrial activity among the states”). Cf. Richard Revesz, *Federalism and Regulation: Extrapolating from the Analysis of Environmental Regulation in the United States*, 3 J. INT’L ECON. L. 219, 224-26 (2000) (noting that there are stronger arguments “for allowing countries to impose environmentally-based trade measures, in particular where there are physical spillovers or global commons issues and centralized regulation is not feasible”).

26. See, e.g., RAVEENDRA N. BATRA, *THE MYTH OF FREE TRADE: A PLAN FOR AMERICA’S ECONOMIC REVIVAL* (1993); Herman Daly, *From Adjustment to Sustainable Development: The Obstacle of Free Trade*, 15 LOY. L.A. INT’L & COMP. L. J. 33 (1992); see also Esty, *supra* note 12, at 107 (noting the effect of a “political drag,” that is, “where a country with low environmental standards is perceived as having established a competitive advantage for its producers based on lower environmental compliance costs, companies

context, many of these critics erroneously focus on a country's absolute advantage instead of its comparative advantage.²⁷ Although companies can produce a product at a cheaper cost in jurisdictions with lax labor and environmental standards, a low-wage, low-standard country cannot produce all products consumed in the world. Similarly, a country with higher standards cannot import everything and produce nothing for export. Rather, a country can have an absolute advantage in nothing (whether on account of low skills, high social standards, or otherwise) and its citizens still benefit through trade vis-à-vis the alternative of an inward-looking, autarchic domestic system.²⁸

Even where they admit that there is a theoretical case for potential downward pressure on wages and standards,²⁹ defend-

competing in the global market against these producers may pressure their own governments to lower standards to even the 'playing field').

27. See, e.g., Kimberly A. Elliott, *Getting Beyond No . . . ! Promoting Worker Rights and Trade*, in *THE WTO AFTER SEATTLE 187, 197-98* (Jeffrey J. Schott ed., 2000) (commenting that "theoretical studies suggest that there is no systematic relationship between core labor standards and comparative advantage, while empirical studies suggest any effect is probably small in magnitude"); see also Jagdish Bhagwati, *Trade Liberalisation and "Fair Trade" Demands: Addressing the Environmental and Labour Standards Issues*, in *A STREAM OF WINDOWS: WESTERN REFLECTIONS ON TRADE, IMMIGRATION, AND DEMOCRACY 247, 251* (Jagdish Bhagwati ed., 1998) [hereinafter Bhagwati, *Trade Liberalisation*]; Jagdish Bhagwati, *The Agenda of the WTO*, in *CHALLENGES TO THE NEW WORLD TRADE ORGANIZATION 27-59* (Pitou von Dijk & Gerrit Faber eds., 1996); T.N. Srinivasan, *International Trade and Labour Standards from an Economic Perspective*, in *CHALLENGES TO THE NEW WORLD TRADE ORGANIZATION supra*, at 219-44. Cf. David Leebron, *Lying Down with Procrustes: An Analysis of Harmonization Claims*, in 2 *FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE?* 41, 60-61 (Jagdish Bhagwati & Robert Hudec eds., 1996) [hereinafter Bhagwati & Hudec, *FAIR TRADE AND HARMONIZATION*] (noting claim that low standards constitute a form of "subsidy" and not a "real" comparative advantage).

28. The theory of comparative advantage is ultimately based on relative productivity. What matters to investing firms is not wages nor regulatory compliance costs by themselves, but rather the relative productivity of all factors of production in a given jurisdiction. For overviews of the theory of comparative advantage, see PAUL R. KRUGMAN & MAURICE OBSTFELD, *INTERNATIONAL ECONOMICS: THEORY AND POLICY 14-24* (4th ed., 1997) [hereinafter KRUGMAN & OBSTFELD]; JAN PEN, *A PRIMER ON INTERNATIONAL TRADE* (1967); PAUL R. KRUGMAN, *POP INTERNATIONALISM 79-80* (1996) (mocking historian Paul Kennedy for his remark, "[w]hat if there is nothing you can produce more cheaply or efficiently than anywhere else, except by constantly cutting labor costs"). Krugman notes that Kennedy's remarks reenact the classic fallacy of confusing *comparative* advantage with *absolute* advantage. *Id.*

29. See, e.g., John Douglas Wilson, *Capital Mobility and Environmental Standards: Is There a Theoretical Basis for a Race to the Bottom*, in 1 *FAIR TRADE AND HARMONIZATION: ECONOMIC ANALYSIS 393, 396* (Jagdish Bhagwati & Robert Hudec eds., 1996) [hereinafter *ECONOMIC ANALYSIS*] (stating that "the theoretical case for a race to the bottom is mixed at best").

ers of the regulatory competition model maintain that there is little to no empirical evidence that this is occurring.³⁰ As regards environmental protection, polluting industries have not, in fact, shifted operations to the developing world to any significant extent.³¹ Rather, liberalized trade appears to have helped leverage up standards, not ratchet them down, through informal means.³² The system's defenders similarly assert that there is little hard evidence that trade is leading to downward pressure on wages for unskilled labor in northern countries.³³

Moreover, trade-liberals argue that the surest means to ratchet up standards in developing countries is to foster economic growth, particularly through open trade.³⁴ As the economist Paul Krugman writes, "The raw fact is that every successful

30. See, e.g., Bhagwati, *Trade Liberalisation*, *supra* note 27, at 53.

31. See, e.g., HAKAN NORDSTÖM & SCOTT VAUGHAN, WTO, SPECIAL STUDIES NO. 4: TRADE AND ENVIRONMENT (Oct. 14, 1999), available at <http://www.wto.org> ("Little evidence bears out claim that polluting industries tend to migrate from developed to developing countries to reduce environmental compliance costs."); see also *International Trade and the Environment*, WORLD BANK DISCUSSION PAPERS, No. 159 (Patrick Low ed., 1992); Arik Levinson, *Environmental Regulations and Industry Location: International and Domestic Evidence*, in *ECONOMIC ANALYSIS*, *supra* note 38, at 453. Levinson explains the difference between the rhetoric and the evidence, stating that "[p]oliticians receive support from many sources, including industry groups using pollution-intensive production processes. One convenient and inherently credible way of justifying favorable treatment for these polluting industries is to argue that regulations threaten their competitive position and that those industries might be forced to relocate." *Id.*

32. See, e.g., Werner Antweiler et al., *Is Free Trade Good for the Environment?*, NAT'L BUREAU OF ECON. RESEARCH 6707 (1998) (concluding that "freer trade is good for the environment"); DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* 5-8 (1995) (assessing how firms adapting to more stringent regulation in jurisdictions with large markets can facilitate raising of standards globally). For a similar analysis in another area of social regulation, see Gregory Shaffer, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards*, 25 *YALE J. INT'L L.* 1 (2000) (examining conditions under which cross-border exchange can lead to leveraging up of social protections such as data privacy standards).

33. See, e.g., Jagdish Bhagwati & Vivek Dehejia, *Freer Trade and Wages of the Unskilled—Is Marx Striking Again?*, in *TRADE AND WAGES: LEVELING WAGES DOWN?* (Jagdish Bhagwati & Marvin H. Kosters eds., 1994).

34. See, e.g., Drusilla Brown, *A Transactions Cost Politics Analysis of International Child Labor Standards*, in *SOCIAL DIMENSIONS OF U.S. TRADE POLICIES* 245 (Alan Deardorff & Robert Stern eds., 2000). Similarly, a 1996 Organisation for Economic Co-operation and Development ("OECD") report concludes that low labor standards play no significant role in attracting investment, and rather, "that there is a positive association over time between sustained trade reforms and improvements in core standards." OECD, *TRADE, EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE* 12-13 (1996).

example of economic development this past century—every case of a poor nation that worked its way up to a more or less decent, or at least dramatically better, standard of living—has taken place via globalization; that is, by producing for the world market rather than trying for self-sufficiency.”³⁵ Imposing trade restrictions on developing-country imports may be more equitable for unskilled workers in the United States and Europe vis-à-vis capital,³⁶ but it will likely hurt the world’s working poor.

D. *Critical Approaches*

As is true with the perspectives of the system’s supporters, the system’s critics employ many arguments, not all of which are adequately summarized here. I divide the critics into two camps, those who oppose trade liberalization generally and those who desire a modification or interpretation of existing trade rules to better accommodate trade sanctions on environmental and social grounds. More radical critics assert that globalization trends must be countered through eliminating or severely curtailing the WTO and IMF and thereby granting importing countries full discretion to implement trade and capital controls as they deem appropriate, whether for protectionist or other policy reasons.³⁷ More moderate critics support liberalized trade policies provided that they are complemented by appropriate labor and environmental regulation at the international and domestic levels.³⁸ A primary difference between some moderate critics

35. THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 363 (2000) (quoting Paul Krugman, *Enemies of the WTO*, SLATE (Nov. 23, 1999), at <http://slate.msn.com/Dismal/99-11-23/Dismal.asp>).

36. Workers in U.S. industries that depend on imported commodities and workers in export industries may, on the other hand, be hurt by protectionist trade policies in the United States and abroad. Labor groups, nonetheless, may be more aware of jobs lost to imports than jobs existing or made possible through liberalized trade. In addition, workers also benefit from liberalized trade policies as consumers, but again, they are less likely to be aware of this impact than are workers whose jobs are put at risk. Finally, unionized labor is more concerned about unionized jobs lost to imports than non-unionized jobs made possible through liberalized trade.

37. In my view, in a world of imperfect alternatives, this policy shift would result in not only a significant efficiency tradeoff—reducing aggregate national and world welfare—but also have perverse consequences in terms of equity, on account of curtailed market access for developing-country products.

38. Some commentators assert that labor and environmental rules must be integrated directly into the WTO itself. See, e.g., Andrew Strauss, *From Gattzilla to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization*, 19 U. PA J. INT’L ECON. L. 769 (1998).

and some defenders of the current system is that these critics maintain that countries should be free to restrict imports on environmental and social grounds, even where multilateral standards have yet to be agreed upon, provided that they do not do so for "predominantly" protectionist purposes.³⁹ In this section, I summarize the approach of these more moderate critics.

Critics of liberalized trade policies maintain that globalization processes, facilitated by liberalized trading rules, shift negotiating leverage to capital and away from labor and governmental regulators.⁴⁰ In a world without trade barriers or investment or capital controls, capital can threaten to invest elsewhere unless labor agrees to lower wages and government officials agree to reduce regulatory controls. In the decades following the Great Depression, labor advocates in Europe and the United States aimed to curtail companies' ability to compete through reducing wages and labor standards.⁴¹ The United States and European nations passed legislation that interfered with the labor market procedurally (through empowering collective bargaining) and substantively (through mandating minimum health and safety standards, minimum wages, and other requirements).⁴² For labor advocates, these procedural and substantive moves somewhat offset capital's unequal bargaining power. Globalization forces, however, firmly reintroduce market forces. Critics claim that globalization processes, facilitated by the WTO's legal regime, thereby buttress capital's negotiating leverage and undermine post-1930 social compromises.

Critics maintain that existing GATT rules should be interpreted or modified to permit "legitimate" trade restrictions im-

39. See, e.g., Howse & Regan, *supra* note 12, at 280 (noting that a test must focus on "dominant" purpose, since there will likely be protectionist producer support for trade restriction).

40. See, e.g., RAVI BATRA, *THE MYTH OF FREE TRADE* (1993); ROBERT KUTTNER, *EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS* (1999); Robert Scott, *Trade, in RECLAIMING PROSPERITY: A BLUEPRINT FOR PROGRESSIVE ECONOMIC REFORM* (1996); see also DANI RODRIK, *HAS GLOBALIZATION GONE TOO FAR?* 4 (1997).

41. See, e.g., Paula Voos, *Labor Law Reform in RECLAIMING PROSPERITY*, 123, 125 (Todd Schafer et al. eds., 1996) (referring to "taking wages out of competition"). Critics argue that international trade liberalization has contributed to reduced wages and benefits for the unskilled in the United States and increased unemployment in Europe.

42. See, e.g., Brian Langille, *General Reflections on the Relationship of Trade and Labor (Or: Fair Trade Is Free Trade's Destiny)*, in Bhagwati & Hudec, *FAIR TRADE AND HARMONIZATION*, *supra* note 27, at 231, 242 (noting procedural and substantive responses to "unequal bargaining power").

posed unilaterally on account of foreign production processes. They argue that the production process is an integral part of the product ultimately consumed and that it is disingenuous to maintain otherwise. Holes in the ozone layer and global warming so attest. Moreover, consumers do not wish to support practices that they find environmentally destructive or socially repressive. Were consumers to have the time and information to know how each product is produced, they might adjust their buying practices for social ends. Yet, consumers lack the time and information to make such an analysis, and they thus depend on government intervention.⁴³

Critics contend that their approach would not blow a hole in the WTO system, because countries would not be able to restrict imports simply based on some difference in some production method in a country at a wholly different level of development.⁴⁴ Critics would shift the test, they argue, from the current arbitrary one, which asks whether products are physically "like," to a more nuanced one, which asks whether the import restriction has a predominantly protectionist purpose.⁴⁵ These critics argue that the WTO has been trade-biased because it has fo-

43. Moreover, Howse and Regan claim that labeling is not sufficient because the political majority in an importing country may not wish their country, as a whole, to contribute to what they consider to be non-domestic environmental harm or social injustice. See Howse & Regan, *supra* note 12, at 272-74.

44. Some trade liberals and developing-country members argue otherwise. See, e.g., John Jackson, *Comments on Shrimp/Turtle and the Product/Process Distinction*, 11 EUR. J. INT'L L. 303 (2000). They maintain that countries have agreed to minimize tariffs and not to discriminate against each other's products. Were WTO rules to permit trade restrictions based on production processes, countries could void their obligations by maintaining that they are not discriminating because the imported product may be distinguished by how it is produced. Given the variety of labor, environmental, tax, and other regulatory structures around the world, they argue that no two products would ever be deemed to be alike, so that countries could be free to discriminate against each other's products and the WTO system could collapse. Critics counter that this alleged parade of horrors is a chimera, and that protectionism would still be checked by WTO judicial review.

45. That is, the test would be either (i) whether the imports were not "like" (but rather different) products under GATT Article III because of the processes under which they were produced so that, in fact, no discrimination takes place, or (ii) whether the import restriction constituted "arbitrary or unjustifiable discrimination" under GATT Article XX. See, e.g., Howse & Regan, *supra* note 12, at 260-61, 280-85; see also Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131 (1999); Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA J. INT'L L. 689 (1998). Supporters of the current approach query whether this sort of review would indeed be more "transparent," or would rather permit protectionist interests to cloak their rationales under "labor" and "environmental" guises.

cused on protecting trade of physically “like” products and not on protecting social values reflected in production processes. In light of the difficulty of international political negotiations over social and environmental standards and their enforcement⁴⁶ and in light of the critics’ distrust of the regulatory competition model, they are more willing than defenders of the current system to entrust the analysis of purpose, appropriateness, and proportionality of national trade measures to international judicial processes.

Critics similarly assert that the WTO’s treatment of prison labor under GATT Article XX(e) and of intellectual property under the Agreement on Trade-Related Aspects of Intellectual Property Rights⁴⁷ (“TRIPS Agreement”) already contradict the alleged product-process distinction. If countries can ban products produced with prison labor, they argue, then there is no reason that countries may not also ban products produced with other forms of forced labor, including forced child labor,⁴⁸ or products produced in violation of other “core labor rights” as such were recently defined by the International Labor Organization (“ILO”).⁴⁹ Moreover, the TRIPS Agreement now mandates

46. See, e.g., Daniel Bodansky, *What’s So Bad about Unilateral Action to Protect the Environment?*, 11 EUR. J. INT’L L. 339 (2000) (noting that choice might be “between unilateralism or inaction,” not “multilateralism”). Many critics envy the WTO’s well-functioning dispute settlement system. The WTO’s judicial process has no functioning analogue in institutions overseeing their preferred policy domains, such as the ILO or the international councils overseeing international environmental agreements. See, e.g., Christopher McCrudden & Anne Davies, *A Perspective on Trade and Labor Rights*, 3 J INT’L ECON. L. 43, 57 (2000). Were mandatory trade restrictions possible through these institutions, and were WTO rules not to constrain their application, some might be less critical of the WTO. But since they are not currently applied, these critics see an imbalance not only in how GATT and WTO panels have applied GATT rules, but also between the existing trade regime and its labor and environmental counterparts. See also Howard Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131, 2150 (1995) (maintaining that a “carrots only” solution is an endorsement of “victim pays” principle, because it would allow countries that harm the global environment to extract concessions from others).

47. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, Annex 1C, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1125 (1994) [hereinafter TRIPS].

48. Some commentators, in recognition of the different development context in developing countries, use the term “exploitative” child labor. See, e.g., Robert Howse, *supra* note 45. The trick, of course, is defining what is exploitative and what is not in a given developmental context, especially if sanctions could be applied unilaterally.

49. Elliott, *supra* note 27, at 193-94. See also Virginia Leary, *Workers’ Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)*, in Bhagwati & Hudec, FAIR TRADE AND HARMONIZATION, *supra* note 27, at 202-03 (proposing social clause by

harmonized recognition and enforcement of patent, copyright and other intellectual property rights. Under the WTO's Dispute Settlement Understanding, countries may impose import restrictions on products and services entirely unrelated to the violated property right in question. If the WTO system can protect Madonna's, Puff Daddy's, and Eli Lilly's royalties, critics pointedly remark, then there is no reason why it should not enforce "core" labor standards and environmental norms.⁵⁰

E. *Developing Countries' Realist Concerns*

National representatives before the WTO may adopt trade liberal or social policy rhetoric when advancing arguments in WTO negotiations. This does not mean that they are trade liberals or social activists. Rather, as shown by this author's detailed study on state positions within the WTO on trade-environment matters, state representatives primarily react to domestic constituent pressures.⁵¹ Although developing-country non-governmental organizations ("NGOs") may be harsh critics of their governments at home, they have largely supported them internationally in opposing developed country NGO demands for WTO accommodation of U.S. trade restrictions.⁵²

International Federation of Free Trade Unions, World Confederation of Labour and European Trade Union Confederations).

50. Some defenders of the WTO, however, argue that the TRIPS Agreement is a mistake that should be corrected. Under their view, the TRIPS Agreement in no way implements comparative advantage theory. For a study of the impact of the TRIPS Agreement on India, see, e.g., Jayashree Watal, *Pharmaceutical Patents, Prices and Welfare Losses: Policy Options for India Under the WTO TRIPS Agreement*, 23 *WORLD ECON.* 733, 752 (2000) (noting that "prices are likely to increase and welfare likely to decrease" in India); see also Keith Maskus, *Intellectual Property Issues for the New Round*, in *THE WTO AFTER SEATTLE* 137, 142 (2000) (noting estimate of "static risk transfers . . . of some \$5.8 billion per year" to the United States and "a net outward transfer of around \$1.2 billion per year" for Brazil); Alan Deardorff, *Should Patent Protection Be Extended to All Developing Countries?* 13 *WORLD ECON.* 497, 507 (1990) (noting that "patent protection is almost certain to redistribute welfare away from developing countries").

51. Shaffer, *WTO Under Challenge*, *supra* note 3, at 68-74, 81-83.

52. *Id.* For example, with respect to the *Shrimp-Turtle Case*, a dispute between India and the United States, the Center for Science and Environment ("CSE"), an Indian environmental NGO, criticizes the Indian government for not insisting "that all trawlers catching shrimp must use a turtle excluder device." The CSE maintains, "trust the government of India and its arms like the ministry of environment and forests to sit idle while the turtle massacre goes on . . . The government of India is probably the most hypocritical government of the Earth." Yet, in the same publication, the CSE confirms that it "has consistently opposed the use of trade sanctions to conserve the global environment because of the simple reason that only economically powerful nations can

Even though the primary aim of the WTO is to facilitate the negotiation of liberalized trade policies, state representatives typically take *mercantilist* positions within it. As mercantilists, they strive to expand national exports, limit imports from other countries, and in this way, satisfy both their exporting and non-exporting producer interests.⁵³ Given mercantilist intergovernmental bargaining in the WTO, developing countries are concerned that, in practice, the United States and the EU would impose trade restrictions on labor and environmental grounds to satisfy domestic producer interests. In both the controversial *Tuna-Dolphin Case* and *Shrimp-Turtle Case*, although environmentalists may have had idealist ends, domestic producer interests used environmental concerns to mask self-serving motives. Indeed, in the *Shrimp-Turtle Case*, it was the conservative Gulf Coast representatives in the U.S. Congress who were the sole sponsors of the relevant legislation. They sponsored it only after the State of Louisiana and its shrimping industry failed to block application of a similar domestic regulation before U.S. federal courts.⁵⁴

Developing-country representatives may rhetorically employ a trade liberal rationale for not adopting a WTO social clause. Yet, their primary concern is how such a clause would operate in practice.⁵⁵ Developing country representatives fear that the clause would be constructed and used by developed countries to restrict developing-country imports, and not vice versa, thus worsening existing biases against them.⁵⁶ They fear that the inte-

impose effective trade sanctions against less economically powerful nations." Anil Agarwal, *Turtles, Shrimp and a Ban*, DOWN TO EARTH, June 15, 1998, at 4. See also *Trade Control is Not a Fair Instrument*, DOWN TO EARTH, Aug. 15, 1992, at 4 (referring to how "trade and human rights are being used today as sticks to beat the South").

53. Shaffer, *WTO Under Challenge*, *supra* note 3, at 30-35, 52.

54. A U.S. environmental group, however, allied with the Gulf Coast shrimping industry to sue the U.S. government before a U.S. court to enjoin it to implement the import ban on South and Southeast Asian shrimp. See Gregory Shaffer, *Trade and Environment: Options for Resolving the WTO Shrimp-Turtle Case*, 15 INT'L TRADE REP. 294, 295 (1998).

55. See, e.g., Jose M. Salzar-Xirinachs, *The Trade-Labor Nexus: Developing Countries' Perspectives*, 3 J. INT'L ECON. L. 377-85 (2000) (providing perspective of developing country).

56. See, e.g., Bhagwati, *Trade Liberalisation*, *supra* note 27, at 262-63 (noting that, in light of power politics of international trade negotiations, social clause would likely be constructed so that there would not be challenges to U.S. regulations and business practices concerning union organization and treatment of migrant workers). Rather, the clause would likely cover child labor, which is a problem only in developing countries on account of their level of development. *Id.* For a critique of U.S. labor practices, see

gration of labor and environmental mandates into the WTO could be used predominantly by the big powers to appease domestic constituencies by blocking developing-country imports, without any compensation to developing countries. Developing-country NGOs often have very different priorities than their developed country counterparts. Yet even where developing-country NGOs have identical ideals, they experience in a more direct manner how power politics in international economic relations affect their application. While it is appropriate for developing countries to enact social standards, it is not apparent to them why this should be imposed and enforced by an international trade regime or through unilateral action by the United States. Many of them assert that such measures are coercive and undemocratic because they interfere with developing-country policymaking choices to advance developing-country-determined priorities.⁵⁷ It is the law-in-action of international economic relations that they distrust.

II. AN ALTERNATIVE FOCUS: DOMESTIC POLITICS IN THE UNITED STATES OVER THE TRADE-ENVIRONMENT NEXUS

The pyrotechnics of anti-WTO protests to the contrary, the WTO can do little about the underlying trade-environment nexus until there is a change in domestic politics within the world's great economic powers. If the United States wishes to

Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* (2000), available at www.hrw.org/reports/2000/uslabor/htm [hereinafter Human Rights Watch]. Cf. Elliott, *supra* note 27. See generally Gregory Shaffer, Public-Private Partnerships, Address before the Law and Society Annual Meeting in Miami (June 2000) (on file with author) (discussing existing biases within the WTO dispute settlement system).

57. See, e.g., VANDANA SHIVA, *POLICING THE GLOBAL ECONOMY: WHY, HOW AND FOR WHOM?* 105, 194 (Sadruddin Aga Khan ed., 1998). Vandana Shiva, Director of the Research Foundation for Science, Technology and Natural Resource Policy, India, stated the following:

[T]he principle that was the basis of the negotiation of the Rio treaty . . . was a principle of human rights, democracy, sovereignty and development. It was the right to development, which also implies the full realization of the right of peoples to self-determination, which in turn includes the exercise of their inalienable rights to full sovereignty over all their natural wealth and resources. That right to development, to me, is the key test in every dispute decision by the WTO.

Id.

seriously address critical international environmental problems such as global warming, the United States needs to do much more than impose trade restrictions. The United States can implement policies to reduce greenhouse gas emissions and spur the development and use of new technologies at home that can be exported abroad. If the United States is serious about environmental problems in developing countries, it can provide financial and technical assistance to assess and implement appropriate sustainable development policies, including through market-based mechanisms.⁵⁸ In each case, however, the United States does little because of U.S. domestic politics. Yet, U.S. protestors target their disdain on the WTO and not so much on their own home government.

Environmental problems require *positive* policy responses, but the trade-environment debate in the United States has almost solely revolved around the WTO legality of *negative* trade restrictions against those least well off. Were the United States serious about assisting with environmental protection efforts abroad, it would not simply ban foreign imports, but would help fund assessments of problems and implementation of improvements abroad. There are international institutions mandated to do this, and in particular the United Nations Development Programme, the United Nations Environmental Programme, and the Global Environment Facility. Yet, the United States has not only failed to pay US\$1,700,000,000 in U.N. dues,⁵⁹ it has successfully pressured the United Nations to reduce the amount of the United States' allotment, even though it is based on a smaller contribution in terms of U.S. per capita wealth than for any other developed country.⁶⁰ Moreover, the United States, which is by far the wealthiest country in the world, currently gives only 0.015% of its gross domestic product in foreign aid,

58. See, e.g., Jonathan Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 *YALE L.J.* 677 (1999) (discussing market-based mechanisms).

59. Tim Weiner, *Solitary Republican Senator Blocks Peacekeeping Funds*, *N.Y. TIMES*, May, 20, 2000, at A1.

60. *U.N. Approves Deal Cutting U.S. Dues*, *N.Y. TIMES*, Dec. 24, 2000, at A10; see also Christopher Wren, *U.S. Told It Must Pay \$550 Million or Risk Losing U.N. Vote*, *N.Y. TIMES*, Oct. 6, 1999, at A14 (noting that Richard Holbrooke, U.S. representative to the U.N., was lobbying to have U.S. contribution share reduced from 25% to 22%); *THE STATESMAN'S YEARBOOK: THE POLITICS, CULTURE AND ECONOMIES OF THE WORLD 1687* (2001) (stating that "[i]n terms of a percentage of GDP, the USA was the least generous major industrialized country" in granting international aid).

much of it targeted to Israel and Egypt for political and security reasons.⁶¹ During the 1990s, the amount of U.S. foreign aid declined an average of 8% per year.⁶²

There are numerous examples of the U.S. domestic political preference for trade bans over financial outlays. The Seattle protestors lambasted the WTO for failing to support the United States' ban on imports of South and Southeast Asian shrimp because of these countries' failure to require their shrimp trawlers to use sea turtle protection devices as required by U.S. domestic regulation. However, there have been no mass protests against the United States' refusal to take domestic measures to reduce its contribution to global warming, even though the United States is responsible for over one third of all greenhouse emissions.⁶³ Nor have there been mass protests against the United States' failure to provide financial assistance for environmental improvements in developing countries, a need documented in Agenda 21 signed at the 1992 "Earth Summit" in Rio de Janeiro.⁶⁴ Under pressure from oil-producing interests, the U.S. Congress has refused to enact a tax on carbon emissions that would create incentives to reduce them. In response to lobbying from U.S. automobile manufacturers, the U.S. Congress has relaxed fuel efficiency requirements for mini-vans and sports utility vehicles to 20.7 miles-per-gallon ("mpg") (as opposed to 27.5 mpg for all other automobiles).⁶⁵ Under pressure from U.S. pharmaceutical and petroleum interests, the United States has

61. Tim Weiner, *House Votes to Cut \$2 Billion From Clinton Foreign Aid Plan*, N.Y. TIMES, Aug. 4, 1999, at A3 (noting that U.S. House passed US\$12,600,000,000 international aid bill for 2000 with US\$4,880,000,000 billion earmarked for Israel and Egypt).

62. Joseph Kahn, *Ideas & Trends: Fewer Strings Attached; The World's Bankers Try Giving Money, Not Lessons*, N.Y. TIMES, Oct. 1, 2000, at 4.

63. The U.S. accounted for 36% of total greenhouse gas emissions in 1990. Moreover, of all industrialized countries, between 1990 and 1998, the amount of U.S. emissions increased the most rapidly, with 21.8% increase in emissions. In 1998, the U.S. emitted 5,954 million metric tons (in carbon dioxide equivalents) of the Kyoto Protocol's six targeted heat-trapping greenhouse gases. Japan was in second, far behind at 1,225,600 metric tons. See, e.g., Andrew C. Revkin, *2 Weeks Starting Today to Argue Fine and Crucial Details of Cutting Greenhouse Gas*, N.Y. TIMES, Nov. 13, 2000, at 6.

64. *U.N. Conference on Environment and Development: Convention on Biological Diversity*, Agenda 21, June 5, 1992, U.N. Doc. UNEP/Bio.Div./N7-Inc.S/4 (June 5, 1992) [hereinafter CBD].

65. Keith Bradsher, *With Sport Utility Vehicles More Popular, Overall Automobile Fuel Economy Continues to Fall*, N.Y. TIMES, Oct. 5, 1999, at A22 (noting that average fuel economy has been falling ever since 1987 and 1988 model years, with decline having "accelerated").

refused to ratify the U.N. Convention on Bio-diversity⁶⁶ or the Kyoto Protocol⁶⁷ on global warming.⁶⁸ Yet, there have been no significant protests in the United States against these policy decisions supported by U.S. multinational corporate interests, certainly nothing comparable to the scale in Seattle.

The primary explanation is that it is much easier to complain about the practices of other countries and use economic power to impose costs on the people of those countries, than to look critically at what one does at home. It is much easier to close markets to people abroad—and poor ones at that—than to protest against U.S. middle class preferences for cheap oil, treasured gas guzzling minivans and sports utility vehicles. If U.S. environmental NGOs wish to receive large contributions from the U.S. public, it is easier for them to challenge poor countries' production processes than central aspects of U.S. consumer culture with its negative environmental impacts. To be fair to U.S. environmental groups, many have been on the forefront of demanding greater U.S. contributions toward sustainable development projects and a more aggressive domestic approach to confront global warming. However, they are less successful on these fronts because of U.S. political constraints.⁶⁹

The WTO *Shrimp-Turtle Case* again provides a prime example of the domestic political context behind U.S. trade-environment policy choices. The U.S. legislation was easy to pass because it appeased the U.S. shrimp industry by forcing develop-

66. See CBD, *supra* note 64.

67. Protocol to the United Nations Framework Convention on Climate Change, opened for signature Mar. 16, 1998, available at <http://www.unfccc.de/resource/convkp.html> [hereinafter Kyoto Protocol].

68. Revkin, *supra* note 63; James Brooke, *U.S. Has a Starring Role at Rio Summit as Villain*, N.Y. TIMES, June 2, 1992, at A10; Barbara Crossette, *The World; Tying Down Gulliver with Those Pesky Treaties*, N.Y. TIMES, Aug. 8, 1999, at 4 (noting that the United States has also refused to ratify treaties prohibiting use of child soldiers, banning land mines, creating permanent international criminal court, and prohibiting nuclear weapons tests).

69. Although U.S. environmental NGOs may pursue altruistic environmental goals, as any political actor, they are self-interested in their own continuity and political relevance. I do not mean to suggest that U.S. environmental NGOs act in bad faith. They do what they can within a given political context to attempt to protect the oceans, the atmosphere, and endangered species and their habitat. The issue addressed here is not whether U.S. environmental NGOs are right or wrong in challenging developing-country production processes. Rather, I am addressing the domestic politics of which method of confronting this issue is more likely to win U.S. domestic political support—positive financial assistance and market-based programs, or trade restrictions.

ing-country shrimp trawlers to either use the same standards required in the United States or face an import ban. Legislation of this sort is more easily passed than financing serious environmental studies of the local sea turtle problems in developing countries and the most effective ways to address them. Through conditioning access to the U.S. market on the requirement of a developing country's adoption of a U.S. regulatory framework, the United States was attempting to force developing countries to assume the costs of these U.S. Congressional priorities.⁷⁰ In the end, neither the United States, nor U.S. NGOs, have offered any serious financial assistance to allay these costs.⁷¹ Although the United States and U.S. NGOs claim that the costs are minimal, they ignore the fact that local regulatory enforcement costs are significant. Without local enforcement, the regulations become merely symbolic.⁷² Yet, it is the symbolism of trade restrictions that assumes more importance than real financial outlays and tax incentives targeted toward environmental protection.

The United States chooses trade restrictions over financial

70. While it is true that some of these costs could be passed onto U.S. consumers in the form of higher prices, this is not the case with government programs abroad designed to introduce the requirements to their shrimpers, instruct them how to use the new technology efficaciously, monitor compliance, and enforce the requirements. Moreover, although it may be important for developing countries to require the use of turtle excluder devices by shrimp trawlers, no one in the U.S. Congress ever asked whether it was the most appropriate or the most effective way to proceed in a developing-country context. No one in the U.S. Congress looked at a study of local Asian conditions or heard any testimony as to what was the nature of the Asian sea turtle problem. No one assessed whether there might be other first order problems, such as the stealing and sale of sea turtle eggs, such that the U.S. legislation might be mis-targeted. Moreover, developing-country parliaments and constituents were never consulted to see if this was in fact their social priority. Yet, it is they who will have to expend resources on this U.S.-determined social priority, with less funds available for competing social programs. I am not arguing that this is not an important social priority. I, for one, believe that it is. The issues, however, revolve around the processes and means chosen to address the environmental problem.

71. The World Wildlife Fund, however, does support some local NGO efforts to protect sea turtle nesting habitats and related programs. See Telephone Interview with Jerry Tupasz, an employee/consultant with Wildlife Fund Thailand, a Thai NGO (Jan. 18, 2000) (on file with author).

72. For example, to avoid U.S. trade restrictions on shrimp imports, the foreign country must enact the shrimping regulations desired by the United States. Approximately one week per year, the United States sends an observer, who is accompanied by a national fisheries official as translator, to the foreign country. During this visit, it is relatively easy for shrimp trawlers to use turtle excluder devices ("TEDs") that week in order to demonstrate compliance with the U.S. program. The program can become a charade.

outlays, even though they impose costs on U.S. residents and are not necessarily cheaper for the United States in the aggregate. A ban on Asian shrimp imports results in higher priced shrimp in the U.S. market and less consumer pocket money for other goods. Although the costs are marginal per American consumer, they add up. This *de facto* shrimp tax, however, is far easier to pass because it is more beneficial to the U.S. shrimp industry, on the one hand, and less *transparent* to the U.S. general public, on the other.

A *de facto* shrimp tax is less transparent than funding for environmental protection in two important ways. First, the *de facto* shrimp tax does not appear on receipts when U.S. consumers buy shrimp, so that they remain unaware of the tax's existence. Second, it is easier to track how targeted funds for a conservation program are being used and whether the program is cost-effective. Whereas the *de facto* shrimp tax's aggregate amount is impossible to calculate, a line item budget allocation for Asian sea turtle conservation is easily reported in the media. Although an import ban and subsidization of environmental improvement projects may have similar aims, and although both impose costs on U.S. consumers, the ban is typically chosen instead of positive financial assistance because of the lack of transparency of its costs to the U.S. public.

In addition, and probably most importantly, import bans, directly benefit U.S. producers. Funds for environmental protection efforts abroad do not. U.S. producers, have high per capita stakes in the outcome of Congressional policy choices. They are thus more likely than other U.S. constituents to lobby Congress and to present it with informed views on alternative policy options. The result is U.S. legislation that triggers controversial disputes brought before the WTO, ensuing challenges to WTO legitimacy, and largely ineffective environmental protection, because developing-country governments and their constituencies are treated primarily as antagonists.

It is this domestic politics-international trade-environment linkage that is the fundamental challenge to the WTO and other international institutions. The United States does not provide significant financial support to international environmental institutions to promote positive sustainable development measures. The United States does not take measures to reduce its own emissions, which lead to the world's gravest environmental

challenge—global warming. For domestic political reasons, U.S. activists are most successful in garnering support when they focus on trade restrictions to compel change in developing-country regulatory policies, as opposed to the need for greater financial assistance that more transparently taps the pocketbooks of U.S. taxpayers. Ironically, it is this fundamental *disconnection* between international environmental needs and U.S. domestic politics that is the central trade-environment *linkage*. This disconnection both confronts the world with its severest environmental problems, and the WTO with controversies that it is ill-equipped to address.

Developing countries recognize U.S. hypocrisy. But it looms low in legal analysis of the international “trade-environment linkage” and the “future of the WTO.”

III. THE DOMESTIC POLITICS IN THE UNITED STATES OVER THE TRADE-LABOR NEXUS

A. The U.S. Political/Economic Context

Although trade liberals correctly point out that free trade policies increase U.S. national wealth, as well as global wealth, this increase is an aggregate one. There is no guarantee as to how it will be distributed. While skilled workers in the United States, especially in high technology industries, are well-positioned to take advantage of trade liberalization, U.S. lower-skilled workers are the most at risk within the developed world. While those with better education and more skills have become vastly wealthier under liberalized trade policies in a more knowledge-based, technology-intensive economy, those with lower skills and less education have been left largely behind. Whatever the cause may be (whether technology, trade, business culture, or deunionization), the United States has by far the greatest income inequality among developed countries.⁷³ From 1979 through 1998, the average income of the top 5% of U.S. families

73. See generally, PAUL R. KRUGMAN, *THE AGE OF DIMINISHED EXPECTATIONS: U.S. ECONOMIC POLICY IN THE 1990s* 21-28 (3rd ed. 1997); SHELDON DANZIGER & PETER GOTTSCHALK, *AMERICA UNEQUAL* (1995); FRANK LEVY, *THE NEW DOLLARS AND DREAMS: AMERICAN INCOMES AND ECONOMIC CHANGE* (1998). Cf. Edward Leamer, *Foreigners and Robots: Assistants of Some, Competitors of Others*, in *SOCIAL DIMENSIONS OF U.S. TRADE POLICY 19-64* (Alan Deardorff & Robert Stern eds., 2000) (offering alternative explanations); Lawrence Mishel & T.N. Srinivasan, *International Trade and Labour Standards from an Economic Perspective*, in *SOCIAL DIMENSIONS OF U.S. TRADE POLICY*, *supra* at 19-64.

grew by about 25%, while the average income of the bottom 20% fell about 4% in real terms.⁷⁴ The top 1% of households now possesses more wealth than the bottom 95%, more than double the figure in 1977.⁷⁵ A recent study shows that the average CEO salary of the 500 leading companies in the United States is now 475 times that of the average worker. This compared to a ten-to-twenty-four-fold difference for the largest companies in all other advanced industrialized countries.⁷⁶ Liberalized trade policies, when not coupled with domestic redistributive policies, can threaten to exacerbate this growing income gap.⁷⁷

The United States combines gaping income inequality with far less social protection than most developed countries. This is particularly the case with health care. While the United States, in aggregate, has the highest per capita wealth in the world, the

74. These are my calculations based on the tables in State of Working America. See LAWRENCE MISHLE, ET AL., *STATE OF WORKING AMERICA 1999-2000*, at 51 (2000) [hereinafter *STATE OF WORKING AMERICA*]. Cf. Daniel S. Levine, *Taking Stock of How Unfair the Economy Is*, *SAN FRANCISCO EXAMINER*, Jan. 9, 2000, at J5 (citing Jared Bernstein, economist with Economic Policy Institute, for proposition that, from 1979 through 1998, average income of top 5% of U.S. families grew by about 39%, while average income of the bottom 20% fell about 5% in real terms); see also OECD, *ECONOMIC SURVEYS: UNITED STATES 92-93* (2000) [hereinafter *OECD 2000 U.S. Survey*] (noting, however, that while inequality remained high in United States, growth in inequality stabilized from 1993-1998).

75. See CHUCK COLLINS ET AL., *SHIFTING FORTUNES: THE PERILS OF THE GROWING AMERICAN WEALTH GAP* 5 (1999); *STATE OF WORKING AMERICA*, *supra* note 74, at 262; see also Michael Weinstein, *5 Problems Tarnishing a Robust Economy*, *N.Y. TIMES*, Jan. 4, 1999, at 10 (citing study of Edward N. Wolff of New York University contending that "the wealthiest 1 percent of U.S. households controls nearly 40 percent of the total wealth," while "the bottom 40 percent of households control a meager two-tenths of a percent of total wealth").

76. *Executive Pay*, *ECONOMIST*, Sept. 30, 2000, at 110 (chart based on survey of Standard & Poor's 500 leading companies and separate study by international consultant Towers Perrin). The only other country listed as having more than a twenty-fold difference was the United Kingdom, with a twenty-four-fold difference. *Id.* Cf. *STATE OF WORKING AMERICA*, *supra* note 74, at 16 (noting average CEO earns "107 times more than the typical worker" in United States, "about 2.5 times more than their foreign counterparts").

77. See generally WILLIAM R. CLINE, *TRADE AND INCOME DISTRIBUTION* 272 (1997) (estimating that over the next two decades trade would raise U.S. skilled/unskilled wage ratio by about 6%); Paul Krugman & Robert Lawrence, *Trade, Jobs and Wages*, in *POP INTERNATIONALISM* (1998) (recognizing impact of trade, but maintaining that trade is only relatively minor cause for growing wage inequality compared to domestic factors). Cf. Bhagwati & Dehejia, *supra* note 33, at 71 (asserting that "the empirical evidence to date fails to put the burden of the explanation for the observed decline in real wages of the unskilled on freer trade").

World Health Organization rates the United States twenty-fourth in terms of general population health, thirty-seventh in terms of overall health system performance, and fifty-fourth in terms of distribution of the financial burden of health care.⁷⁸ The United States similarly has one of the highest poverty rates among developed countries, particularly with regard to children.⁷⁹

The United States, moreover, has among the least protective labor and employment laws of any developed country.⁸⁰ U.S. labor laws provide employers with numerous means to block union organizing, which is a major factor for the decline of unions in the United States.⁸¹ Early in his first term, U.S. President Clinton appointed a panel of experts to review the state of U.S. labor regulations. This Commission on the Future of Worker-Management Relations, chaired by former U.S. Secretary of Labor John Dunlop, recommended significant changes to provide for a more favorable environment for union organiz-

78. World Health Organization, *The World Health Report 2000*, available at www.who.int/whr/2000/en/report.htm; see also *The Health of Nations*, *ECONOMIST*, June 24, 2000, at 93; *OECD 2000 U.S. Survey*, *supra* note 74, at 98 (reporting that "the share of the poor [in the United States] who had no health insurance increased slightly to one-third in 1998").

79. Different studies use different measures of poverty rates. They typically measure poverty rates as a percentage of median wealth, as opposed to a defined standard of living in terms of purchasing power, so that the U.S. poverty rate, in part, is a measure of higher median U.S. wealth. Nonetheless, the United States retains its unenviable top position among developed countries in terms of the percentage of its population living below the poverty line according to such measures. See, e.g., GEOFFREY GARRETT, *PARTISAN POLITICS IN THE GLOBAL ECONOMY* 145 (1998) (noting U.S. rate of 18.4% in late 1980s compared to average OECD rate of 8.4%); see also *OECD 2000 U.S. Survey*, *supra* note 74, at 94 (reporting official U.S. poverty rate of 12.7% in 1998, down from 15% in 1993, yet noting that U.S. rates are relatively high once taxes and transfers are accounted for); STATE OF WORKING AMERICA, *supra* note 81, at 9 (noting in Executive Summary that "the percentage of U.S. children who are poor is twice as high as in other advanced countries").

80. See, e.g., John Myles, *When Markets Fail: Social Welfare in Canada and the United States*, in *WELFARE STATES IN TRANSITION: NATIONAL ADAPTATIONS IN GLOBAL ECONOMIES* 116-17 (Gosta Esping-Andersen ed., 1996) (noting that supporters of U.S. approach, on the other hand, maintain that "flexible" U.S. labor markets have led to job creation and economic growth); GOSTA ESPING-ANDERSEN, *SOCIAL FOUNDATIONS OF POSTINDUSTRIAL ECONOMIES* (1999) [hereinafter *SOCIAL FOUNDATIONS*]; Human Rights Watch, *supra* note 56.

81. See, e.g., Richard Hurd, *Contesting the Dinosaur Image: The Labor Movement's Search for a Future*, 22 *LAB. STUD. J.* 5 (1998); Daniel Nelson, *What Happened to Organized Labor*, 50 *AM. HERITAGE* 81 (1999); Richard Freeman & Morris Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 *INDUS. LAB. REL. REV.* 351, 351 (1990); Terry Carter, *A Labor of Law*, 86 *A.B.A. J.* 54, 60 (2000).

ing.⁸² Its recommendations, however, were ignored following the Republican upheaval in the 1994 election (dubbed the “Gingrich Revolution”). Because of lax U.S. sanctions, many employers can simply fire employees instrumental in union organizing efforts with little consequence.⁸³

These trends in the United States, and the prospect that trade liberalization policies may exacerbate them, deeply concern labor’s defenders. In the past, the link between U.S. domestic policy and international trade policy mattered less because the United States was a national economy relatively shielded from international developments. In 1970, U.S. imports and exports accounted for only 11% of U.S. gross domestic product, rising to 14% by 1980 and increasing to 29% by 1999.⁸⁴ Today, U.S. workers are more subject to international competition than ever before. Open trade policy makes more winners in the U.S. economy. It makes more losers as well.

B. *The Embedded Liberal Approach*⁸⁵

The relative globalization of the U.S. economy, however, does not signify that the United States has no choice but to curtail existing social policies. Northern European economies have long been more sensitive to trade. Even back in the 1970s, exports and imports in the Netherlands constituted over 80% of Dutch production.⁸⁶ Yet open trade policies were less controversial in the Netherlands, because the Netherlands (like other European states) cushioned those adversely affected through a more generous social safety net—providing universal health

82. Voos, *supra* note 41, at 134-35. Voos was a member of the Dunlop Commission and sets forth her proposals for U.S. labor law reform. *Id.*

83. See Carter, *supra* note 81, at 60; SHAUNA L. OLNEY, UNIONS IN A CHANGING WORLD: PROBLEMS AND PROSPECTS IN SELECTED INDUSTRIALIZED COUNTRIES 37 (1996) (noting that “[e]ven surviving legislation is rendered ineffective”). “Employers are resorting to both legal and illegal union avoidance techniques with minimal risk since in the case of the illegal tactics the penalties are inconsequential.” *Id.*

84. U.S. Department of Commerce, *GDP and U.S. International Trade in Goods and Services, 1970-99*, tbl. 1, in U.S. FOREIGN TRADE HIGHLIGHTS 1998 (1999), available at <http://www.ita.doc.gov/td/industry/otea/usfth/tabcon.html>.

85. The term “embedded liberalism” comes from John Ruggie, *International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order*, in INTERNATIONAL REGIMES 379-415 (1983) (referring to post-war compromise of liberalized trade policy combined with domestic sovereignty to determine social policies).

86. Garrett, *supra* note 79, at 57.

care, child care assistance, minimum income guarantees, and a more cooperative labor-management culture.⁸⁷ As Harvard economist Dani Rodrik writes, “[s]ocieties that expose themselves to greater amounts of external risk demand (and receive) a larger government role as shelter from the vicissitudes of global markets. In the context of the advanced industrial economies specifically, this translates into more generous social programs.”⁸⁸

Globalization does not significantly constrain advanced industrialized countries from ensuring more equitable social protections, but merely the manner in which they do so.⁸⁹ As political scientist Geoffrey Garrett writes in his study of the impact of globalization on domestic economic autonomy, countries such as the United States, with few social protections, have not, on average, outperformed countries with significant social safety nets and labor protections.⁹⁰ Economies can continue to grow and living standards rise under policies that provide for a more just distribution of the fruits of globalized markets. Even if certain social policies were to result in reduced growth, an extra US\$1 of income to someone below the poverty line is of greater importance than an extra US\$1 of income to someone already making US\$1,000,000 annually.⁹¹ Where there are equity-efficiency tradeoffs in domestic social policy, these can be addressed through the domestic political process.⁹² As economist Paul

87. See generally, Rodrik, *supra* note 40, at 49-67; PETER J. KATZENSTEIN, *SMALL STATES IN WORLD MARKETS: INDUSTRIAL POLICY IN EUROPE* (1994).

88. Rodrik, *supra* note 40, at 53.

89. For a social democratic perspective, see, e.g., MAURIZIO FERRERA ET AL., *PORTUGUESE PRESIDENCY OF THE EUROPEAN UNION, THE FUTURE OF SOCIAL EUROPE: RECASTING WORK AND WELFARE IN THE NEW ECONOMY* 21 (2000) [hereinafter FERRERA] (noting that “we counter the argument that welfare states are crumbling under external and domestically generated pressures”); Maurizio Ferrera & Martin Rhodes, *Building a Sustainable Welfare State: Reconciling Social Justice and Growth in the Advanced Economies*, in *PROGRESSIVE GOVERNANCE FOR THE 21ST CENTURY* 145-67 (1999) [hereinafter Ferrera & Rhodes]; *STATES AGAINST MARKETS: THE LIMITS OF GLOBALIZATION* (Robert Boyer & Donald Drache eds., 1996). For a neoliberal position, see, e.g., John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 *HARV. L. REV.* 511 (2000) (stressing benefits of jurisdictional competition over regulation at international level).

90. Garrett, *supra* note 79, at 18-20.

91. See, e.g., MAX CORDEN, *TRADE POLICY AND ECONOMIC WELFARE* 107-8 (1974) (stating that “in terms of welfare weights, increases are given relatively low weights and decreases very high weights”).

92. The central issues for the United States and Europe become (i) how much of an efficiency tradeoff do more equitable social policies entail, and (ii) how much do

Krugman affirms:

We have the resources to take far better care of our poor and unlucky than we do; if our policies have become increasingly mean-spirited, that is a political choice, not something imposed on us by anonymous forces. We cannot evade responsibility for our actions by claiming that global markets made us do it.⁹³

Politically, however, the United States is far from introducing new social reforms, and in fact is moving in the opposite direction. Take for example the recent conservative push for large-scale tax cuts in the United States. There is nothing in trade liberalization that mandates a repeal of the U.S. estate tax or a US\$2,000,000,000,000 tax cut that benefits primarily the wealthiest 1% of U.S. citizens.⁹⁴ The money targeted for tax cuts could provide funding for universal health care, a conditional negative income tax,⁹⁵ increased funding of public schools and job training, enhanced child care opportunities for working families, and other social infrastructure programs.⁹⁶

open trade and investment policies constrain them from implementing the balance that they desire. See Garrett, *supra* note 79, at 6 (focusing on advanced industrialized countries). As Garrett concludes, "globalization and national autonomy are not mutually exclusive options. The benefits of globalization can be reaped without undermining the economic sovereignty of nations, and without reducing the ability of citizens to choose how to distribute the benefits—and the costs—of the market." *Id.*

93. PAUL KRUGMAN, ACCIDENTAL THEORIST AND OTHER DISPATCHES FROM THE DISMAL SCIENCE 78 (1998).

94. Richard Stevenson, *The 2000 Campaign; Sorting It Out: Tax Cuts and Spending*, N.Y. TIMES, Oct. 6, 2000, at 26 (noting statement of Citizens for Tax Justice that a repeal of the U.S. federal estate tax would almost exclusively benefit people in top 1% income bracket, and 42% of benefits of U.S. President George W. Bush's proposed tax cut would also go to wealthiest 1%).

95. See, e.g., Ferrera & Rhodes, *supra* note 89, at 152 (asserting that a negative income tax could be conditional on efforts to obtain employment).

96. The domestic side of these policies can be roughly categorized as "health protection," "minimum income protection," "human capital formation," and "employment facilitation." The United States could implement greater social protection while retaining its relatively flexible labor laws on employee dismissals. Supporters of the U.S. approach to more flexible labor laws argue that rigid dismissal policies raise employee dismissal costs, with the result that "insider" employees have well-protected jobs, but employers have little incentive to hire new employees from amongst the unemployed ("outsiders"). Social protection can nonetheless be combined with significant labor flexibility to both ensure an effective labor market and policies protecting against widespread social exclusion and poverty. See, for example, the examination of the concept of "flexicurity," developed in the Netherlands, in Ferrera, *supra* note 89, at 48-49, 51-52 (the concept of flexicurity "reconcil[es] labour market flexibility with measures to counter growing social exclusion and the emergence of a class of working poor").

C. *The Domestic Politics of Policy Tools to Assist Domestic Labor*

Two primary forms of protection can be provided to the less privileged in the United States: *social protection* in the form of guaranteed medical care, union organizing rights, job retraining and adjustment assistance, and *trade protection*. Because of U.S. political constraints, mass protests can more easily rally over the need for trade restrictions on labor grounds rather than the need for greater financial assistance to the less privileged. Once more, the costs of domestic social programs to taxpayers are clear, while the costs of trade restrictions against developing-country imports are not.

From a policy perspective, however, withdraw of U.S. market access will be relatively ineffective in enhancing social protection compared to directly targeted social programs. While it is true that trade restrictions assist certain U.S. industries or firms and thus to some extent their workers, they do not provide greater social protection to workers generally. Moreover, systemic labor market forces determine, for the most part, how protectionist benefits are distributed among workers, management and shareholders. Where corporations retain some discretion, executive officers, subject to oversight by a board of directors, make this determination. Given trends in income disparity in the United States, reflected in management largesse toward its own compensation plans, it is not clear that U.S. workers would receive significant benefits from trade protection.⁹⁷ Rather, trade restrictions can become mere symbols that defuse and divert challenges away from the United States' own domestic policies.⁹⁸

Similarly, while union activists are justifiably concerned by

97. Corporations can distribute protectionist benefits in the form of increases in management compensation, worker wages and benefits, shareholder dividends, or retained earnings. To give just one example of management appropriation of the economic rents from trade restrictions, after the United States negotiated voluntary export restraints with Japanese automobile manufacturers in the early 1980s, the upper management of the Big Three automobile manufacturers paid themselves multi-million dollar salaries and bonuses. See, e.g., Stewart Fleming, *Sharing in New Profits*, N.Y. TIMES, May 6, 1984, at 4; John Holusha, *Big Bonuses at the Big 3 Again*, N.Y. TIMES, Apr. 13, 1985, at 31.

98. On the symbolism of politics and law and their uses, see, e.g. MURRAY J. EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964); MURRAY J. EDELMAN, *POLITICS AS SYMBOLIC ACTION; MASS AROUSAL AND QUIESCENCE* (1971).

the decline in unionization rates in the United States,⁹⁹ trade restrictions will not modify lax U.S. labor laws or their lax enforcement. First, trade liberalization is not the central cause of deunionization in the United States. Unionization rates remain between 75% and 95% in Scandinavian countries, whose economies are much more trade-dependent.¹⁰⁰ Second, if the United States desired to increase union representation, the primary means of doing so would be through new domestic labor regulation. The United States, for example, could pass legislation recommended by the Dunlop Commission that would grant a more favorable environment for union organizing. But this is not on the political radar screen.¹⁰¹ Rather, conservative and business interests now strategically deploy international competition as an argument to counter labor law reform proposals and to block unionization efforts, again spurring union demands for curtailing trade from developing countries.¹⁰²

There are consequences for the global trading system from U.S. domestic political choices. Conservative U.S. domestic politics beget conservative U.S. domestic policies that place U.S. workers at a greater risk when they lose their jobs on account of imports.¹⁰³ Some producer constituencies will always desire pro-

99. See Steven Greenhouse, *Unions Hit Lowest Point in 6 Decades*, N.Y. TIMES, Jan. 21, 2001, at 6 (noting that "down from 20 percent in 1983 and a peak of 35 percent in the 1950's . . . membership among private-sector workers fell to 9 percent"). See generally Carter, *supra* note 81.

100. GOSTA ESPING-ANDERSEN, *SOCIAL FOUNDATIONS OF POSTINDUSTRIAL ECONOMIES* 20 (1999).

101. This is, in part, because of the current Republican control of the U.S. presidency and Congress, but it also reflects the increasingly aggressive attitude toward unions among U.S. management starting in the 1980s, as well as less active U.S. public support for unions. See, e.g., *Low Levels of Confidence in Labor*, 9 HEADWAY 32, 32 (1997) (noting existence of "low levels of confidence in organized labor as an institution, and in labor union leaders' honesty and ethical standards" in United States).

102. See, e.g., Carter, *supra* note 81, at 60 (stating that "[t]he federal government must create an environment conducive to business or companies and jobs can and will go overseas").

103. The underlying link between domestic social policy and international trade policy is captured in a grid consisting of four separate squares. The grid measures the views of U.S. politicians on globalization on the one hand, and domestic social and labor protection on the other. While some politicians on the left and the right of the U.S. political spectrum have each opposed trade liberalization, the left has favored a more generous social safety net and more protective labor regulation, which the right has opposed. Other candidates on the left and on the right, however, have favored trade liberalization, but differed on the extent of U.S. social and labor protection. These policies, although usually debated separately, are interdependent. A similar ma-

tection from import competition. Worker demands, however, become more aggressive where the consequences from job dismissals are harsher and the opportunities to find comparable jobs reduced. Since union-organized workers are more at risk from liberalized trade policies than ever before, and since there are political constraints on obtaining increased social protection domestically, it is no surprise that they challenge the United States' support of liberalized trade policy overseen by the WTO. In the final analysis, there is no paradox between the fact that the U.S. offers the *least* generous social and labor protections in the developed world and is the *most* aggressive in demanding the right to restrict imports on labor rights grounds.¹⁰⁴

D. *The Domestic Politics of Policy Tools to Assist Foreign Labor*

Most labor rights proponents are genuinely concerned about the protection of foreign (as well as domestic) labor rights and ongoing abuses of those rights. There are a number of alternative and complementary policy tools from which they can choose. Economic sanctions constitute one means to combat violations of such rights. However, especially where those sanctions are unilaterally determined, they can perversely affect their purported beneficiaries—developing-country workers.

Among the “core” international labor rights that advocates promote are the rights of association and collective bargaining. A central goal behind these rights is to facilitate what European labor advocates call “concertation” between labor, capital, and government representatives to negotiate a more just social order.¹⁰⁵ However, regardless of what one thinks of this approach

trix is adopted by Thomas Friedman in Friedman, *supra* note 35, at 438 (charting Internationalists and Separatists, on one axis, and Social-Safety Netters and Let-Them-Eat-Cakers, on the other).

104. Although European Union federations have pushed for a WTO social clause, they have been much less aggressive than U.S. labor. They have found that U.S. proposals can convey more of a trade protectionist than an internationalist human rights concern. See David Trubek & Jody Knauss, *The Transatlantic Labor Dialogue: Minimal Action in a Weak Structure*, in *TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY* 250 (Mark A. Pollack & Gregory Shaffer eds., 2001) (noting view of European labor officials “that the U.S. proposal for Seattle smelled protectionist, was in any event a ‘nonstarter,’ and would needlessly alienate colleagues from the third world”). See also Brown, *supra* note 43, at 257 (noting lack of support from many European representatives of U.S. position on labor standards at 1996 WTO Ministerial meeting in Singapore).

105. See Ferrera et al., *supra* note 89, at 54-58 (noting preference for “negotiated labour market regulation” and “investment in negotiated structures of governance”).

to policymaking, "concertation" will not take place through facilitation of U.S. trade restrictions on labor grounds that have been unilaterally determined by U.S. officials. When officials in Washington D.C., subject to domestic political pressures, restrict developing-country imports on labor grounds, and an international trade panel assesses the appropriateness and proportionality of the U.S. action, no tripartite government-business-labor "concertation" takes place. As the human rights scholar Philip Alston writes, "the form in which the [labor] standards are stated [in U.S. trade laws] is so bald and inadequate as to have the effect of providing a *carte blanche* to the relevant U.S. government agencies, thereby enabling them to opt for whatever standards they choose to set in a given situation."¹⁰⁶

Developing countries and most developing-country unions and NGOs justifiably fear that their interests will not be seriously considered by U.S. decision-makers. They are not assuaged by the retort that developing countries would retain the right to challenge the proportionality of the U.S. trade restrictions, on a case-by-case basis, before the WTO Dispute Settlement Body. WTO procedures are expensive, take almost two years to complete, and their central remedy is the removal of the trade restrictions long after they have inflicted their harm.¹⁰⁷

An international institution exists which brings together representatives of governments, employers and labor to negoti-

"Concertation" refers to institutions that facilitate reasoned deliberation among representatives of government, business, and labor. *Id.*; see also SOCIAL PACTS IN EUROPE—NEW DYNAMIC (Giusepee Fajertag & Philippe Pochet eds., 1997) (referring also to "corporatism").

106. Philip Alston, *Labor Rights Provisions in U.S. Trade Law: Aggressive Unilateralism?*, 15 HUM. RTS. Q. 1, 7-8 (1993).

107. Moreover, this remedy assumes that the United States would comply with an adverse WTO ruling. Were the United States not to comply, WTO rules authorize the developing country to retaliate by withdrawing an equivalent amount of trade concessions from the United States. However, because of developing countries' relatively smaller markets, and because of potential U.S. political leverage in other areas, a developing country's threat of withdrawing trade concessions is less likely to be effective.

If transnational enforcement is to take place, it arguably should occur through a neutral forum determining that a violation has occurred, and not through unilateral determination (as by the United States), subject to ex post review under GATT Article XX. See Erika de Wet, *Labor Standards in the Globalized Economy: The Inclusion of a Social Clause in the General Agreement on Tariff and Trade/World Trade Organization*, 17 HUM. RTS. Q. 443, 455-60 (1995) (commenting on difference between ex post review under GATT Article XX and third party review under GATT Article XXIII as applied to core labor rights).

ate internationally recognized labor rights and mechanisms for their oversight and enforcement—the ILO. The ILO provides for periodic reporting, international review and complaint procedures over countries' compliance with these ILO commitments.¹⁰⁸ The United States, however, is notorious for refusing to ratify the vast majority of international labor agreements and for refusing to take an active part in the ILO, in particular compared to its active role within the WTO. In fact, the United States has ratified only thirteen of the 182 international labor conventions negotiated under the ILO's auspices.¹⁰⁹ Moreover, the United States has failed to ratify the conventions that cover two of the ILO's four "core" labor protection principles, those providing for (i) nondiscrimination in employment and (ii) the freedom of worker association and the "effective recognition of the right to collective bargaining."¹¹⁰ Because of ILO reciprocity rules, the U.S. government has no right to initiate ILO complaints under any agreement to which it is not a party.¹¹¹ If the United States genuinely desires greater international enforcement of "core" labor rights, its demands would be more credible were it to agree to work more closely with the existing international labor regime.

Working with and through the ILO is a more coherent way of addressing foreign labor issues than bringing them to an international trade body in which countries truck and barter their trading interests. However, because of its government-averse, foreigner-wary domestic politics, the United States invests few resources in the ILO. The United States refuses to grant ILO oversight over *its* labor policies (which have been subject to rebuke),¹¹² while demanding greater autonomy from WTO rules to restrict imports from developing countries because of *their* la-

108. The ILO system also contains mechanisms for sanctioning violations of labor rights, though these mechanisms remain relatively limited. See, e.g., Elliott, *supra* note 27; Leary, *supra* note 49, at 177.

109. Elliott, *supra* note 27, at 194-95; see also Leary, *supra* note 49, at 177, 188 (asserting that United States has "shameful record that places [it] among the countries that have ratified the fewest ILO conventions").

110. *Id.*

111. See generally Elliott, *supra* note 27, at 191, 195 (noting that United States has ratified core agreements on freedom from forced labor and "effective abolition of child labor").

112. See, e.g., Human Rights Watch, *supra* note 56.

bor policies.¹¹³ Developing countries recognize this U.S. hypocrisy. But it again looms low in legal analysis of the "trade-labor linkage."

International labor rights issues are more problematic than international environmental issues for two primary reasons. First, many environmental problems are clearly transnational and global in their effects and thus require global and transnational solutions. Second, many of the core labor rights are procedural in nature, such as the rights to association and collective bargaining. The benefit of funds targeted toward substantive environmental protection policies are more immediately apparent than the benefit of funds targeted toward the protection of procedural rights.¹¹⁴

Nonetheless, proactive policies (whether or not coordinated through the ILO) can be targeted toward foreign labor rights protection. For example, instead of simply imposing sanctions on products made with child labor (or countries that permit this), developed countries could work more closely with international and regional development institutions to finance programs that provide incentives for parents to place their children in schools or in less severe conditions.¹¹⁵ Developed countries and constituencies also can fund networks whereby developed country NGOs and labor representatives share information with developing-country counterparts.¹¹⁶ Working through such net-

113. See Alston, *supra* note 106, at 32 (pointing out that United States simply prefers to act "as the sole legislator, judge, jury, and enforcement authority").

114. Along the same lines, however, the criteria for determining what constitutes a procedural rights violation that can trigger trade restrictions is also subject to difficult interpretive issues, as witnessed by the vagaries of U.S. labor law jurisprudence itself.

115. In many developing-country contexts, children arguably may be better off in apprenticeships than in formal schooling. See Brown, *supra* note 43, at 254-55, 263 (expressing skepticism toward many programs to improve situation of child labor, but nonetheless supporting "country-specific incentive schemes"). Programs to address child labor are increasingly being financed, including through the ILO, World Bank, and UNICEF, although still at relatively modest levels. See Elliott, *supra* note 27 (noting, for example, that Clinton administration proposed increasing U.S. "contribution to the ILO's International Program for the Elimination of Child Labor" and "for a program of technical assistance for countries improving enforcement of the core labor standards, as well as . . . for bilateral assistance to help countries improve the administration of labor laws and social safety net programs"); see also Leary, *supra* note 54, at 202-03 (explaining that International Federation of Free Trade Unions, the World Confederation of Labour and European Trade Union Confederations have proposed creation of "new international social fund").

116. This, too, is at a very preliminary, unstable stage. See, e.g., David Trubek et al.,

works, activist groups can develop “codes of conduct,” and independent labeling and auditing procedures.¹¹⁷ Increased information exchange and monitoring can empower developing-country workers and be more effective than trade restrictions in actually enforcing labor rights abroad. They are, in addition, less likely to have a trade protectionist slant and unintended perverse social effects, such as driving children into deeper poverty or the sex trade. Market-oriented initiatives targeted at multinational commodity chains are not in themselves sufficient. But they are important policy tools to complement the necessary bolstering of social infrastructures within developing countries.

There are two prongs to the “Washington consensus” that are often treated as indivisible: trade and capital liberalization, on the one hand, and reduced taxes, government regulation, and social programs, on the other. Yet, as discussed above, these policy choices are divisible. In fact, they may be in contradiction. The U.S. demand for trade sanctions against developing-country imports on environmental and social policy grounds is in part a reflection of the United States’ failure to support programs domestically and internationally that directly address environmental and social concerns. If the United States truly wishes to assist workers abroad, it must pro-actively work with international and regional institutions to enhance the social infrastructure within developing countries. Again, however, because of the U.S. political attitude toward taxes, government, foreign aid and international development and labor institutions, and because of the less transparent costs of trade restrictions, it is much

Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks, 25 L. & Soc. INQUIRY 1187 (2000). In my view, these networks are inherently unstable because of the varying interests of constituencies—such as labor groups—in developed and developing countries. Nonetheless, the NAFTA environmental and labor side agreements do facilitate information exchange through such networks.

117. See, e.g., Charles Sabel et al., *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace*, Paper Given at the Work and Social Citizenship in a Global Economy Conference at the University of Wisconsin (Nov. 11, 2000) (on file with author) (setting forth decentralized “regulatory alternative that aims to improve social performance of firms in global economy”); Debora Spar, *The Spotlight and the Bottom Line: How Multinationals Export Human Rights*, FOREIGN AFF., Mar.-Apr. 1998, at 7. Many commentators criticize these labeling programs as well. See Brown, *supra* note 43 (reasoning that depending on how they are designed, some labeling programs could have adverse effects on developing-country workers, although they are not as blunt instruments as trade sanctions).

easier to pass U.S. legislation restricting market access than to fund social infrastructure and worker assistance projects. The U.S. failure to more coherently address social policy-international trade policy linkages can thereby pit developed and developing country workers against each other.

IV. *COORDINATING THE ROLES OF INTERNATIONAL ECONOMIC INSTITUTIONS*

In a globalizing economy, countries can pursue policies to ease workers' adjustment not only domestically, but also internationally. Some commentators on the left, for example, have called for a "global new deal" through which the United States would provide increased assistance to developing countries in exchange for greater oversight and enforcement of labor rights.¹¹⁸ These commentators recognize that trade restrictions alone are not sufficient. Western governments, however, are not close to considering a global new deal. Nonetheless, there is scope for a more modest coordination of international institutions to address developing-country adjustment to liberalized trade initiatives. While the United States and European countries have the wealth and the choice to provide for medical coverage, education, retraining, retirement pensions, child-care support, and other forms of social protection, developing countries do not. International development institutions can, however, provide some of this assistance in coordination with trade reforms.

This Part examines the domestic politics behind the WTO dispute over the EU's banana regime, as well as alternative policies that could be pursued to address worker concerns in poor banana growing regions. Although the banana dispute did not directly concern labor standards, one of the asserted rationales behind the EU's discriminatory banana regime was to assist banana producers in these lesser developed regions. The banana case again exemplifies the domestic politics behind the EU's choice of trade restrictions over positive measures to accomplish its stated social goals.

The EU banana regime imposed tariff-rate quotas on the importation of bananas from other than selected countries in

118. See, e.g., Jeff Faux, *Time for a New Deal with Mexico*, AM. PROSPECT, Oct. 23, 2000, at 11.

Africa, the Caribbean, and the Pacific ("ACP countries") that had former colonial ties with certain EU members. In addition, the EU granted licenses for the importation of non-ACP bananas in a manner that privileged certain European operators.¹¹⁹ The WTO Appellate Body held that the EU regime violated obligations under three WTO agreements.¹²⁰ This decision was the object of strong normative claims from both its critics and supporters. The decision's critics argued that, by subjecting African and Caribbean countries to a competitive global banana market, the WTO would uproot their economies and drive them to produce cocaine and other illicit drugs.¹²¹ They complained that the primary impetus of the dispute was a U.S. corporation, Chiquita, whose conservative Chairman of the Board is one of the largest contributors to both the U.S. Republican and Democratic parties.¹²² The decision's defenders countered that the critics tend to ignore the discriminatory nature of the EU banana regime, which profits well-placed British, French, and other EU banana trading companies working with former British and French colonies and harms workers in Latin American and Central American countries.¹²³

Both sides, in fact, fail to acknowledge that there is a broad policy spectrum between unbridled trade liberalization and keeping it corralled. Trade liberalization policies could, for example, be coupled with international trade adjustment assistance. Immediate undoing of the EU banana regime could severely harm workers in Caribbean and African countries, something ignored by many of the decision's defenders. Yet, Caribbean countries can produce more than bananas and illicit drugs, something ignored by many of the decision's critics.

119. See Rikke Thagesen & Alan Mathews, *The EU's Common Banana Regime: An Initial Evaluation*, 35 J. COMMON MARKET STUD. 615 (1997) (supplying an overview of the EU banana regime).

120. See *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R (Sept. 9, 1997) (finding that the EU banana regime violated provisions of GATT, the Agreement on Import Licensing Procedures, and GATS).

121. Larry Rohter, *Trade Storm Imperils Caribbean Banana Crops*, N.Y. TIMES, May 9, 1997, at A6.

122. David Sanger, *Even a Big Donor Can Find Political Dividends Elusive*, N.Y. TIMES, Mar. 15, 1997, at A10 (reporting that Carl Linder and his company, American Financial Corporation, have given US\$648,000 to Republicans and US\$400,000 to Democrats since 1993).

123. See, e.g., *Fruitless But Not Harmless*, ECONOMIST, Apr. 10, 1999, at 18.

Under existing WTO rules, trade adjustment relief can be provided for up to an eight-year period.¹²⁴ Developing countries, however, typically do not have the government revenues to ease the adjustment of workers to other occupations. Moreover, in the bananas case, the EU is implementing the trade restrictive regime, but developing-country banana producers in Africa and the Caribbean should be the object of assistance.¹²⁵ WTO coordination with other international agencies could play an important role. Agencies such as the World Bank, the United Nations Development Programme, and regional development banks could provide financial assistance, loans, and training to help industries, firms, and workers in these countries adjust to the dismantling of the EU's discriminatory banana regime. While this may not constitute a "global new deal," it shows how existing international agencies can re-conceptualize their missions and coordinate their work so that when discriminatory trade measures that benefit certain developing countries are removed, real financial assistance can be provided over an appropriate transition period.

Domestic politics in powerful states, however, bodes poorly for such enhanced coordination. The EU could, for example, independently finance trade adjustment in former European colonies. The EU could do so in a manner that, after tax, EU citizens would be better off, because they would no longer have to pay a hidden *de facto* banana tax (in the form of higher priced bananas). Yet, the EU has so far chosen to retain its banana regime in lieu of providing positive adjustment assistance to banana regime beneficiaries. It has done so for similar reasons as the United States when the United States does not fund sustainable development projects abroad. The *de facto* banana tax is simply less transparent and its cost-effectiveness less subject to monitoring and criticism than positive trade adjustment assistance. In

124. See Agreement on Safeguards, art. 7, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm [hereinafter Agreement on Safeguards] (mandating that period of safeguard application shall not exceed four years, unless extension is necessary to prevent or remedy serious injury and there is evidence that industry is adjusting, but total period of relief shall not exceed eight years).

125. In other words, under existing WTO safeguard rules, the EU can only apply safeguard relief where increasing imports "cause or threaten to cause serious injury" to its own "domestic industry that produces like or directly competitive products [i.e. bananas]," not to a third country's bananas industry. See *id.* art. 2.

addition, as in the U.S. environmental context, well-placed domestic commercial interests profit from the restrictions. In consequence, the EU banana regime remains, a legal case is scuttled to the WTO, the WTO applies its anti-discrimination rules, and critics challenge the WTO as trade-biased and illegitimate. These are the domestic political ingredients in WTO legal conflicts that produce the WTO's current quagmire.

*CONCLUSION: U.S. DOMESTIC POLITICS AND THE WTO,
THE REAL TRADE-SOCIAL POLICY LINKAGE*

This Article has taken a separate track from that of most Western commentators on trade-social policy linkages by assessing a second linkage—the domestic-international one. Simply stated, trade restrictions alone will not achieve most of the goals of anti-WTO protestors. To be effective, an international campaign to protect the environment and improve the lot of workers in poor countries requires positive programs by national governments and international agencies, whether or not these are implemented independently or as a complement to trade restrictions. Required initiatives include multilateral efforts to address global issues, such as global warming, and assistance to developing countries in devising effective environmental and labor policies at the national level.

The debate over trade sanctions is intense, and there are persuasive arguments on both sides as to whether certain minimum environmental and social standards should be negotiated and enforced at the international level. While I support the need for international cooperation, oversight and enforcement capacity as a complement to open trade policy,¹²⁶ this Article does not attempt to resolve that issue. Rather, this Article demonstrates the unlikelihood that the debate over trade sanctions in support of environmental and social goals will advance until there is greater evidence of political will within developed countries, and particularly within the United States, to address their own internal environmental and social problems and to expand their international economic assistance. WTO critics from northern states will not be successful in having developing countries agree to a modification (or interpretation) of WTO rules that would facilitate the imposition of trade restrictions on

126. See *supra* note 7, 107 para.2 and accompanying text.

agreed environmental and core labor rights grounds, unless the United States, Europe, and other developed countries *also* agree to provide significant financial assistance to developing countries for implementing appropriate environmental and social policies.¹²⁷ Moreover, from both equity and efficiency perspectives, developing countries and developing-country constituencies should retain a significant role in shaping and adapting these policies to their local conditions so that developing-country constituencies have a stake in them, and the policies are appropriate for the local situation.

It is unfortunate that so much of the trade-environment, trade-labor debate in the United States focuses on trade restrictions. The central explanation appears to be domestic politics within powerful states. It is simply easier to lambaste the World Trade Organization than to get the U.S. Congress' attention to pass legislation that transparently imposes costs on domestic constituents. Enactment of universal health care, a greenhouse gas emissions tax, trade adjustment assistance, and funding for sustainable development and social infrastructure projects abroad all would impose direct costs on domestic constituents in the form of taxes. When these initiatives are thwarted in the United States, it is more difficult to garner public sympathy through dramatic protests. Yet, livelihoods and environmental welfare remain at risk. Activists more easily rally masses by proclaiming that the threat's cause lies in foreign (or "multinational") producers and their protector, the WTO.¹²⁸ They focus their limited resources where they are most likely to succeed.

127. The members of the European Union, for example, are at a much more equal level of development. But even in the EU, there have been significant financial transfers to poorer EU members through the EU's cohesion and structural funds. See, e.g., Andre Sapir, *Trade Liberalization and the Harmonization of Social Policies: Lessons from European Integration*, in Bhagwati & Hudec, *FAIR TRADE AND HARMONIZATION*, *supra* note 27; Mark Pollack, *Regional Actors in an Intergovernmental Play: The Making and Implementation of EC Structural Policy*, in *BUILDING A EUROPEAN POLITY?* (Carolyn Rhodes & Sonia Mazey eds., 1995). However, given the relatively similar levels of development in the EU, the tradeoff between financial assistance and demands for higher standards is not nearly as challenging.

128. Conceivably, activists believe that by attacking the WTO, they threaten U.S. multinational export interests, and that these interest, in order to preserve an open trading system, will pressure the U.S. Congress to enact positive domestic and international environmental and social policies. I have, however, seen little evidence of this. As noted earlier, labor and environmental advocates work within the parameters of U.S. domestic politics, which respond more favorably to demands for trade restrictions than to demands for policies requiring more direct financial expenditure.

The U.S. 2000 election of a Republican administration bodes poorly for refocusing political pressure toward government funding of domestic and international environmental and social agendas. The likely result is that the WTO will continue to be a target for attacks and a symbol of the negative aspects of globalization and none of its benefits. The consequences for the WTO could be stagnation, hesitancy, and calls for curtailing the scope of its authority, from those at conservative think tanks,¹²⁹ to the demonstrators in Seattle demanding not a new round, but a “turnaround.”¹³⁰

People saw the result of anarchism in the streets of Seattle. Yet, Seattle’s black-clad anarchists have white-collar allies in those who attack any government policy to assist the less privileged as “big government.” Those who wish to curtail the role of government precisely at a time when the U.S. economy is more subject to international economic shifts than ever, and the U.S. government has large projected budgetary surpluses, also preach a form of anarchy.¹³¹ In the end, their anti-government policies will drive more U.S. citizens that are not benefiting from the global market to demand that the United States shut down its borders to imports.¹³² This would harm not only the United States as a whole, but developing countries and their workers in particular.

The WTO’s future development depends, in large part, not on whether it facilitates the use of trade restrictions, but rather on how trade liberalization policies are coordinated with the

129. See, e.g., CLAUDE E. BARFIELD, *FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION* (2001).

130. See *The New Trade War*, *ECONOMIST*, Dec. 4, 1999, at 25.

131. Although the underlying political philosophies of the two groups are opposed, they nonetheless are linked in their opposition to centralized government and the strengthening of international institutions. Moreover, conservative opponents to government policies that assist the less privileged should only swell the ranks of anti-globalization critics.

132. As the political scientist John Ruggie writes:

[L]arge segments of the American public and its leaders alike are trapped by their own ideological predispositions, which make it difficult for them to see the contradiction between espousing an increasingly neo-laissez-faire-attitude toward government and the desire to safeguard the nation from the adverse effects of increasingly denationalized economic forces. What is needed is a new ‘embedded liberalism’ compromise.

JOHN RUGGIE, *WINNING THE PEACE*, 172-73 (1996).

provision of environmental and social protection and adjustment, domestically and internationally.

Trade negotiations at the international level traditionally involve package deals based on reciprocal trade concessions.¹³³ In order to sustain the welfare-enhancing, non-discriminatory goals of liberalized trade, we need to direct more attention to U.S. domestic reciprocity packages.¹³⁴ These domestic packages should include the advancement of environmental and social policies domestically and internationally. The question becomes: in return for further trade liberalization, what domestic and international environmental and social programs will trade liberals endorse, and how energetically will they do so? This is what the 1999 WTO-UNEP joint report on *Trade and Environment* suggests when it states:

[T]here is no inherent conflict between trade and the environment. Rather, the conflict, to the extent it exists, arises as result of a failure of political institutions to address environmental problems, especially those of a transboundary or global nature that require a concerted effort to solve . . . [T]he removal of economic borders and the associated increase in mobility of industries, has made cooperation more urgent . . . But this need for cooperation goes far beyond what the WTO is cable of delivering by itself.¹³⁵

Resolution of the WTO's blue-green blues will require collaborative initiatives of trade liberal policy networks, export-oriented commercial interests, and labor and environmental constituent

133. Sylvia Ostry, the former Canadian ambassador to the WTO, refers to the Uruguay Round of trade negotiations as the "North-South grand bargain," in which developing countries acquiesced to new services and intellectual property agreements in return for U.S. and European concessions on trade in textiles and agriculture. See Sylvia Ostry, *The Uruguay Round North-South Grand Bargain, Implications for Future Negotiations*, in *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW* (Robert Hudec ed., 2001) (on file with author) (noting that South now believes that it received the worse of the "bargain"); see also David Sanger, *A Grand Trade Bargain*, 80 *FOREIGN AFF.* 65 (2001).

134. Of course, political deals are also made domestically to "buy off" different producer interests. See, e.g., C. O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned into a Battle*, 28 *GEO. WASH. J. INT'L L. & ECON.* 2, 10-11 (1994); Yuri Devuyt, *The European Union and the Conclusion of the Uruguay Round*, in 3 *THE STATE OF THE EUROPEAN UNION* 449 (Carolyn Rhodes & Sonia Mazey eds., 1995) (concerning the payoff to Portugal for its textile industry). This Article, on the other hand, points to the potential desirability of trade-environment, trade-labor domestic packages within the United States. It nonetheless recognizes the political constraints on their potential.

135. See Nordstöm & Vaughan, *supra* note 31, at 11, 59.

cies. Only then will we attain the broad-based benefits that liberalized trade makes possible, and with them, a more positive future for the WTO.

Yet, whatever one's position on these environmental and social policy questions—whether you believe in the virtues of *laissez-faire* or a role for government regulation and redistribution—there is not much that the WTO alone can do about them. While the management of blue-green trade issues has become the greatest challenge for the WTO, it is a challenge that the WTO is ill-equipped to handle because of this second linkage to domestic politics in powerful states. This second under-analyzed, underlying linkage of domestic politics and international negotiating positions is a critical part of the explanation of the WTO's current funk of blue-green blues. The lingering questions from Seattle remain: how will the United States react to the protests? Will it ignore them? Will it curtail trade from developing countries on "fair trade" grounds? Will it provide greater positive assistance, domestically and internationally, to those most at risk? Will it proceed with some combination of the above? These remain open questions. What is clear is that U.S. domestic politics, concerned with U.S. constituent interests, will continue to lie at the center.