

HOW CAN THE UNITED STATES CORRECT MULTI-NATIONAL CORPORATIONS' ENVIRONMENTAL ABUSES COMMITTED IN THE NAME OF TRADE?

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I. INTRODUCTION

The marriage between international trade and environmental protection policy needs counseling. Left to its own devices, this troubled union has produced the Multi-National Corporation (MNC)—a child that manages to escape the discipline of both Papa Trade and Mother Earth. The externalities of this uncontrolled being have led to a race to the bottom in terms of environmental protection, wages, consumer protection, health and welfare, and social responsibility.

In response to the ascent of MNCs, a working alliance has arisen amongst national industrial advocates, labor interests, and those concerned with environmental and human rights abuses. Commentators who are adversaries on the national playing field agree that, in the international arena, there is a need to leash the MNC and restore order. Thus far, environmentally oriented trade remedies (such as the unilateral measures that led to the Tuna-Dolphin dispute between Mexico and the U.S.) have been insufficient. To target the environmental abuses of MNCs, the United States needs to reconsider its trade strategy, and supplement this strategy with multilateral environmental measures.

II. MNCs HAVE DEVELOPED A CORPORATE STRUCTURE THAT ALLOWS THEM TO TAKE ADVANTAGE OF DISPARATE LEGAL AND ECONOMIC SYSTEMS

A. *MNCs Place Their Production Facilities Where They Will be Subject to the Least Amount of Restriction.*

As long as the cost of doing business (whether this results from low wages, under-priced resources, or less restrictive laws) is cheaper in a developing country, it makes economic sense for the MNC to operate there. The corporate decision-makers have little incentive to achieve environmental standards beyond those that will actually be enforced in the host country. The host country decision-makers are no more inclined than their corporate counterparts to enforce environmental standards if it means slowing

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development or drawing from social welfare resources. And if the host government *did* attempt to renegotiate the environmental rules, the MNC could always find another lesser-developed (but more receptive) country in which to base its production.

MNCs are also able to take advantage of having an information monopoly over the local populations in which their facilities are located. MNCs have sometimes deliberately withheld information from communities or even governments to avoid any adverse resistance to potentially hazardous facilities.¹

In other cases, MNCs have resisted worst-case scenarios when preparing environmental impact assessments for their projects due to implementation expenses.² As a result of their information leverage, MNCs can disguise their activities to appear much safer and less detrimental to the environment.

B. By Maintaining Distant Production Facilities, the Unpleasant Characteristics of MNC Production Facilities are Less Likely to Initiate Opposition.

When an MNC locates its headquarters in one country, but puts its base of operation in a different country, there is a significant physical separation between production and consumption. This separation allows consumers to ignore the environmental harm that their consumption may be causing in a different country. For example, when rain forests are cleared in Latin America to make way for beef production, the average North American McDonald's customer remains blissfully unaware of the resource depletion her hamburger has caused. As long as the ecological damage costs are left out of the price of the Big Mac, the hamburger customer's state of ignorance can persist.

C. MNCs are not Directly Subject to International Law.

International environmental law agreements regulate sovereigns rather than the entities within these sovereigns. Lesser-developed sovereigns, in many cases, have less wealth than the MNCs themselves,³ but are expected to control the foreign-owned entities that they host.⁴ Problematically, there is usually not

1. *Transnational Corporations and Environmental Management in Selected Asian and Pacific Developing Countries*, U.N. Economic & Social Commission for Asia and the Pacific, UNCTC Publications Series B, No. 13 (1988).

2. *Id.*

3. Of the largest 100 economies in the world, fifty-one are now corporations. Sarah Anderson & John Cavanaugh, *Top 200: The Rise of Corporate Global Power*, Institute for Policy Studies (2000), at <http://www.ips-dc.org/reports/top200text.htm> (n.d.) (last visited Nov. 14, 2004).

4. E.g., Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Final Act Embodying the Results of the Uruguay Round Multilateral Trade Negotiations, April 15, 1994, Legal Instruments – Results of the Uruguay Round vol. 1 (1994), 33 I.L.M. 1125 (1994), available at http://www.wto.org/english/docs_e/legal_e/03-fa_e.htm

a sufficient normative structure outlining just *how* the host country should control such wealthy and powerful entities. In the absence of a normative structure, countries can easily claim that their broad sovereign right to develop is more important than the equally broad need to control MNCs' environmental abuses.⁵

D. *MNCs can Limit Their Liability.*

The use of limited liability externalizes the cost of doing business. By providing for liability only to the extent of the corporation's assets, limited liability shields the owners of corporations (who are the stockholders in publicly traded corporations) from some of the costs of doing business. The advantages to this system are that investors (including stockholders) are encouraged to invest, and receive higher dividends in return. The disadvantages are apparent when an injured plaintiff cannot fully recover damages from a corporation. Likewise, the public does not fully recover the costs of environmental damages that the corporation externalizes. The public, rather than the corporation, pays for the damage (in terms of health care and other costs) and in return gets higher dividends. Problematically, the people who are receiving these dividends are often not the same as the ones who are suffering the most severe pollution costs. Pollution occurs more often in poorer areas—particularly in poorer countries—while the stockholders tend to form part of a more affluent society. Thus, the ultimate cost-bearers of environmental degradation have little say.

The use of subsidiary corporations adds an additional layer of externalization. The subsidiary is often located in a poor country where it is easy to pollute, while the parent company and stockholders are in the wealthier country that has strict environmental laws. Not only are stockholders protected by the limited liability of the parent company, they are also protected by the fact that it is extremely difficult to “pierce the corporate veil” to reach the assets of the parent company.⁶ Further, American courts typically refuse to assert

[hereinafter Final Act], art. 13, http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm (last visited Nov. 11, 2004) [hereinafter SPS Agreement].

5. For example, in *Ullonoa Flores v. S. Peru Copper Co.*, 253 F. Supp. 2d 510, 522, 524 (S.D.N.Y. 2002), in order to counter the plaintiffs' allegations of gross human and environmental rights violations based on the Rio Declaration and other sources, the court noted that the Rio Declaration also acknowledges “the ‘sovereign right’ of nations to control the level of environmental exploitation within their territories.” *Id.* at 521. In addition, the “rights” submitted by plaintiffs “are not ‘sufficiently determinate’ to show that the nations of the world universally prohibit the sort of conduct that plaintiffs allege in this case.” *Id.*

6. Liability requires that corporate formalities were wholly disregarded by a pervasively controlling parent or fraud or its equivalent was perpetrated on third parties. The traditional reference point is *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336 (1925) (citing *Conley v. Mathieson Alkali Works*, 190 U.S. 406 (1903)), in which the Supreme Court held that “use of a subsidiary does not necessarily subject the parent corporation to the jurisdiction” of the state in which the subsidiary is incorporated. *Cf.* *United States v. Scophony Corp. of Am.*, 333 U.S. 795, 813 (1948) (lowering the burden for piercing the corporate veil.).

jurisdiction over a foreign subsidiary that has no links to the forum except its relationship to its American parent.⁷ As a result, a plaintiff injured by the subsidiary's actions will have a difficult time getting into an American court.

Environmental harm adds another twist to this scenario because in many situations the consequences of corporate abuse have long latency periods.⁸ It may be a couple of decades before a river becomes undrinkable or cancer manifests itself in significant portions of a local population. Even if this damage is linked to the subsidiary's actions, and even if this results in heavy losses for the subsidiary, the parent company has many years during which it can profit.

III. THE WTO FACILITATES THE UNCHECKED OPERATION AND ENVIRONMENTAL ABUSES OF MNCs.

A. *The WTO Facilitates Trade at the Expense of Environmental Protection.*

The General Agreement on Tariffs and Trade (GATT) was born in an exhausted and depleted post-war society. Liberalizing trade seemed like the best way to aid war-torn countries and to keep them from falling prey to the Communists.⁹ There was little thought as to the long-term consequences of imbalanced trade, or to how increased global trade would affect a country's authority to enact environmental and social policies. As long as the United States could maintain a strong currency, seigniorage, the bull market, and high interest rates, it had little incentive to upset this trend towards increasing imports.

Although GATT was born outside of a proper treaty, it was "legitimized" by the Agreement on the World Trade Organization (WTO) in 1994.¹⁰ With

7. *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1983) (stating that the jurisdiction of an American Court over a foreign subsidiary often depends on an "alter ego" theory, which is control by the parent over the internal business operations and affairs of the subsidiary that is "greater than that normally associated with common ownerships and directorship"). Thus, if a plaintiff cannot hold the parent company liable based on the evidence, it is unlikely to get the jurisdiction necessary to sue the subsidiary. *See id.*

8. *See* Patrick J. Ryan, *Strange Bedfellows: Corporate Fiduciaries and the General Law Compliance Obligation in Section 2.01(a) of the American Law Institute's Principles of Corporate Governance*, 66 WASH. L. REV. 413, 440 (1991).

9. *See, e.g.*, Joseph R. Glancy, Jr., *Building Bridges: U.S. Policy Toward FRG Trade with Eastern Europe: 1961-1968*, in *ESSAYS IN HISTORY* 39 (1997), <http://www.etext.virginia.edu/journals/EH/EH39/glance39.html> (last visited Sept. 23, 2004); POLICY PLANNING COUNCIL, U.S. POLICY ON TRADE WITH THE EUROPEAN SOVIET BLOC 42-51 (July 26, 1963) (on file at John F. Kennedy Library, National Security Files, Box 310) (discussing Kennedy's attempts to amend the Trade Expansion Act in a way that would give him greater flexibility to grant or deny Most-Favored Nation status to any area determined to be "dominated or controlled by the foreign government or the foreign organization controlling the world Communist movement").

10. WTO, *WTO Legal Texts*, at http://www.wto.org/English/docs_e/legal_e/legal_e.htm

147 members from countries in various degrees of development,¹¹ and with both regulatory and juridical power, the WTO is by far the most central control on world trade policy. But the WTO is a trade organization, designed to promote the relatively short-term economic interests of those who are most able to control it. Its mandate is to reduce tariffs and destroy barriers to trade.¹²

Several provisions of the WTO Agreement may have direct or indirect effects on environmental policy. One example is Article XI, which prohibits the use of quotas and import bans. This makes it difficult for a country to limit or ban the import of an environmentally harmful product without justification. Nor can a country ban a particular product from one country that uses detrimental environmental practices, yet accept the same product from another country. Under the unconditional most-favored-nation (MFN) rule,¹³ a country that grants a concession to one member must grant it unconditionally to all members. This means that a country is unable to reward those countries that enact protections for the environment, workers, and general health and welfare without granting these same rewards to all countries.

The production or process method (PPM) rule also conflicts with environmental protection policy by preventing discrimination between similar products based on their particular production or process method.¹⁴ This rule prohibits a country from banning the import of goods manufactured by a foreign MNC on the ground that the product's production violated environmental norms.

MNCs can take advantage of the WTO's PPM rule in order to sell seemingly identical products manufactured with inadequate social and environmental standards. MNCs may also contribute to pollution or accelerate the extraction of natural resources without remediating sites to their former status. For example, although petroleum exploitation and development in Ecuador resulted in the spillage of 17 million gallons of oil from the Trans-Ecuadorian Pipeline between 1982 and 1990,¹⁵ the United States could not

(last visited Sept. 25, 2004) (The- "Final Act" signed in Marrakesh is an umbrella policy to which WTO agreements on goods, services and intellectual property, dispute settlement, trade policy review mechanism and the plurilateral agreements are attached. *See also* Final Act, *supra* note 4.

11. WTO, *Members and Observers*, at http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Sept. 23, 2004).

12. WTO, *Principles of the Trading System*, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Sept. 23, 2004) ("Lowering trade barriers is one of the most obvious means of encouraging trade. The barriers concerned include customs duties (or tariffs) . . .").

13. General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, http://www.wto.org/English/docs_e/legal_e/26-gats_01_e.htm (last visited Sept. 25, 2004) [hereinafter GATS]. *See also* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, http://www.wto.org/english/tratop_e/trips_e/t_agm2_e.htm (last visited Nov. 14, 2004) [hereinafter TRIPS].

14. *See* WTO, *CTE on: How Environmental Taxes and Other Requirements Fit In*, at http://www.wto.org/english/tratop_e/envir_e/cte03_e.htm (last visited Nov. 14, 2004).

15. Raissa S. Lerner & Tina M. Meldrum, *Debt, Oil, and Indigenous Peoples: The Effect of United States Development Policies in Ecuador's Amazon Basin*, 5 HARV. HUM. RTS. J. 174,

have banned Ecuadorian oil on this basis, because it appears to be just like any other oil. Nor could the particular MNCs involved be brought before a WTO dispute panel proceeding, because only the host country is answerable to the WTO.¹⁶ Once again, there is a conflict of interest between a host country's duty to apply environmental sanctions against its corporations, and the country's potential to benefit from the corporation's production and exports.

The Agreement on Technical Barriers to Trade (TBT Agreement) extends the trade protection of WTO to ensure that non-tariff barriers, including technical standards, do not act as trade barriers. Eco-labeling schemes, whether voluntary and mandatory, are examples of such barriers.¹⁷

The most important GATT article under which many countries have (unsuccessfully) defended environmental protection policies is Article XX of GATT. This article contains a list of general exceptions that allow countries to pass protective measures in the interests of certain national policies. For instance, a country can adopt measures "necessary to protect public morals, . . . human, animal or plant life or health,"¹⁸ and "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."¹⁹

When put to the test, GATT and WTO dispute panels have adopted rulings that limit the environmental application of these exceptions. For instance, no environmental law has ever been upheld on the grounds that it was necessary to protect the public morals under GATT article XX(a). The famous Tuna-Dolphin disputes²⁰ ruled out the use of article XX as a tool to influence a foreign country's sub par environmental policies and practices.

178-79 (1992).

16. SPS Agreement, *supra* note 4. It the responsibility of the host country to ensure that non-governmental entities within its borders comply with the agreement. *See* SPS article 13 ("Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement.").

17. Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf (last visited Sept. 23, 2004) (stating that the TBT Agreement does not apply to "sanitary and phytosanitary" measures, such as rules or standards pertaining to food or pesticide health or safety requirements) [hereinafter TBT Agreement].

18. SPS Agreement, *supra* note 4 (addressing national laws that protect humans, animals, and plants from risks of food additives, contaminants or toxins).

19. General Agreement on Tariffs and Trade, Apr. 15, 1994, WTO Agreement, art. XVI, http://www.wto.org/English/tratop_e/tratop_e?envir_e/issu4.htm#gatt20 (last visited Sept. 23, 2004) [hereinafter GATT 1994].

20. Tuna-Dolphin I (United States Restrictions on Imports of Tuna (Mexico v. United States)), GATT Doc. DS21/R (Sept. 3, 1991), 30 I.L.M. 1594 (1991) [hereinafter Tuna-Dolphin I]; Tuna-Dolphin II (United States Restrictions on Imports of Tuna (European Economic Community and the Netherlands v. United States)), GATT Doc. DS29/R (Jan. 16, 1994), 33 I.L.M. 839 (1994)) [hereinafter Tuna-Dolphin II].

The WTO has a forum for addressing environmental issues, the Committee on Trade and the Environment. In theory, this committee is supposed to work towards increasing transparency and access to information in the dispute process. It is also supposed to support multilateral environmental agreements (MEAs) outside of the WTO, and encourage WTO/MEA members to seek recourse first in the MEA. However, in spite of the fact that some MEAs directly conflict with the WTO,²¹ the Committee has made no effort to bridge these inconsistencies, or even clarify the WTO's relation to the MEAs.²² The WTO's approach contrasts with that of the North American Free Trade Agreement (NAFTA), which at least in name provides that specified MEAs will take precedence over the provisions of the agreement.²³

B. What Appears to be "Free" Trade is Actually Asymmetrical, Resulting in a Trade Imbalance.

Even though trade is supposed to be "free" in the WTO system, it is in fact asymmetrical. The WTO system allows lesser-developed host countries to place substantial tariffs on products from the United States, while the reverse is not so.²⁴ U. S. trade laws have not been able to control this asymmetry because the United States has little say in the WTO regime. This is because voting in the WTO relies mainly upon the "one country one vote"²⁵ principle, and the United States does not have a large trading block like the other developed countries in the European Union.²⁶ However, Japan and the other developed Asian countries are not disadvantaged to the same degree, because their undervalued currencies enable high export volumes.²⁷

21. When the Basel Convention and the Montreal Protocol are applied between WTO parties, they arguably violate article I (Most Favored Nation), III (National Treatment), and XI (Quantitative Import Restrictions) of GATT. With respect to the countries that are members of the MEA, it can be said that they have waived their rights to dispute the provisions of the MEA within WTO (Article XXV contains a waiver provision that allows for across the board exceptions to its various proscriptions, such as for MEAs.). The same cannot be said with respect to non-members of the MEAs, such that eventual WTO challenge is possible.

22. See John Nagel, *Hope Dims for Environmental Accords After Collapse of WTO Talks in Cancun*, 26 INT'L ENV'T REP. 922, 922 (2003).

23. North American Free Trade Agreement, Dec. 17, 1992, art. 104, http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=80#A104 (last visited Nov. 14, 2004) [hereinafter NAFTA].

24. Under GATT article XXVIII, developing states can provide subsidies for export industries that are otherwise illegal for industrialized states. GATT 1994, *supra* note 19.

25. WTO, *Whose WTO Is It Anyway?*, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm (last visited Sept. 23, 2004).

26. UNDP, HUMAN DEVELOPMENT REPORT 2002: DEEPENING DEMOCRACY IN A FRAGMENTED WORLD 121 (Oxford University Press 2002), available at <http://www.hdr.undp.org/reports/global/2002/en/> (last visited Sept. 24, 2004) (illustrating that many developing countries have no voice at all, for example, "[i]n 2000, as many as 15 African countries did not have a representative at WTOP headquarters in Geneva . . . While Mauritius, a very small country, had five").

27. Robert E. Scott, *Soaring Imports from China Push U.S. Trade Deficit to New Record*,

The imbalance between the U.S. imports and exports is the most telling indicator of the asymmetry in the international trading system. The aggregate U.S. trade deficit in February 2003 was \$489 billion, equivalent to 5% of the U.S. gross domestic product.²⁸ U.S. imports are now almost 50% larger than U.S. exports.²⁹ With this deficit comes wage stagnation, underemployment,³⁰ increased national debt,³¹ stock market advances that exceed actual earnings, and an overvalued dollar.³²

Asymmetry facilitates the relocation of MNC production facilities by making it relatively easier to import goods into the United States than into more closed countries. Once MNCs transfer their forces of production abroad, American production declines, and the United States exports fewer products. Because the developing countries where MNC production facilities relocate are not subject to the vigorous export restrictions to which the United States has

Economic Policy Institute, http://www.epinet.org/content/cfm/webfeatures_econindicators-trade/pict20040813 (Feb. 13, 2004) (last visited Sept. 24, 2004).

The U.S. trade deficit with the Pacific Rim increased 7% in 2003, reflecting deep changes in the structure of trade with Asia. The U.S. deficit with Japan fell 6%, but Japan's global trade (current account) surplus increased by 12%. Increasingly, Japan and other newly industrializing countries in Asia are exporting their component products to the United States through low-wage assemblers in China, Mexico, and elsewhere in Latin America.

Id.

28. *See id.*

29. *Id.*

30. Joel R. Paul, *The New York University-University of Virginia Conference on Exploring the Limits of International Law: Do International Trade Institutions Contribute to Economic Growth and Development?*, 44 VA. J. INT'L L. 285, 302, n.30 (2003) (The threat of job loss weakens workers' collective bargaining powers and ability to organize unions and illustrates that NAFTA contribute to this phenomenon. Since NAFTA was signed in 1993, the rise in the United States' trade deficit with Canada and Mexico through 2002 has caused the displacement of production that supported 879,280 U.S. jobs—resulting in net job losses in each of the 50 states). Paul states that “[m]any [U.S.] industries have relocated their manufacturing from industrialized countries with high-wage union labor to developing countries with low-wage non-union labor. U.S. workers usually end up with lower-paying jobs in the services sector.” *Id.* *See also* ROBERT E. SCOTT, ECONOMIC POLICY INSTITUTE BRIEFING PAPER #147, THE HIGH PRICE OF 'FREE' TRADE: NAFTA'S FAILURE HAS COST THE UNITED STATES JOBS ACROSS THE NATION (Nov. 17, 2003), at http://www.epinet.org/content/cfm/briefingpapers_bp147 (last visited Sept. 25, 2004).

31. Council of Economic Advisors, *Economic Report of the President*, Table B-78, <http://www.gpoaccess.gov/eop/download.html> (Feb. 2004) (last visited Sept. 26, 2004) (showing that the U.S. gross federal debt has nearly doubled in the last ten years, from about \$4.6 trillion in 1994 to about \$7.5 trillion in 2003).

32. Scott, *supra* note 27.

The gain in the real value of the dollar between 1995 and 2002 helps explain the rapid growth of the U.S. trade deficit results. The dollar began to rise significantly in 1997 and peaked in 2002. . . . It usually takes twelve to eighteen months for the . . . trade balance to respond to a change in the value of the currency. However, the U.S. trade deficit has continued to rise in real terms and as a share of GDP, through the ninth quarter after the dollar peaked in February of 2002. The dollar, however, must fall much more to help the trade deficit reach a sustainable level of the trade deficit.

Id.

conceded, MNCs are able to export the finished products from their host countries back to Americans with relative ease. This means that Americans are importing more foreign goods and exporting more consumer dollars.

The result is a vicious cycle in which Americans increasingly import (spend) more than they are capable of producing (earning). American consumers have no incentive to break this cycle, as long as they are paying low prices for cheap imported goods. The "consumer culture" is engrained in the population not only by the constant barrage of product advertisements from the media, but also by the ease with which individuals can obtain credit or declare bankruptcy. Foreign countries that have favorable import access to this market likewise have no incentive to break the cycle. The refusal of many net exporter countries to devalue their currencies in order to balance trade affirms their desire to maintain this asymmetry.³³

While the United States is becoming more dependent on MNC imports, developing countries are becoming accustomed to inflows of foreign capital from MNC investment in their countries.³⁴ Further, the advantage that MNCs in developing countries have over domestic industries³⁵ discourages the development of local corporations. Once domestic corporations go out of business, countries are left with industries that may not have the best interests of the domestic populous in mind.

33. Japan took active measures to prop up the dollar. In the fall of 2001, Japan spent the equivalent of 2.3 trillion yen (approximately \$18 billion) during ten different interventions, boosting the dollar against the yen and helping its export producers. *Dollar is Expected to Consolidate or Rebound Slightly This Week*, DOW JONES NEWSWIRE, May 27, 2002. Between mid-May and early June 2002, Japan intervened in the foreign exchange markets to slow the dollar's decline. *Japan Intervenes in FX, Sells Yen – MOF Source*, DOW JONES NEWSWIRE, June 2004.

34. Press Release, Trade and Foreign Direct Investment (Oct. 9, 1996), http://www.wto.org/english/news_e/pres96_e/pr057_e.htm (last visited Sept. 25, 2004) (urging greater WTO involvement in foreign direct investment, and stating that the financial crises of the 1990s in Latin America and Asia impeded the access of many developing countries to syndicated bank loans. Many countries have come to rely more on foreign direct investment, which is more permanent and dependable than the other forms of capital transfer). The amount of net capital flows to developing countries in terms of direct investment increased more than ten-fold between 1990 and 2000. MICHAEL MELVIN, INTERNATIONAL MONEY & FINANCE 122 (2004).

35. PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 15 (1995). MNCs have a greater capacity to locate productive facilities across national borders, to exploit local-factor inputs and to trade factor inputs between affiliates in different countries. MNCs are better able to exploit know-how in foreign markets without losing control of the technology, and are capable of organizing their managerial structures globally along the most suitable lines of divisional authority. *Id.* P. R. Brahmananda, *Macro Effects of Tax Reforms*, BUSINESS LINE, Nov. 23, 2002, available at <http://www.blonnet.com/2002/11/23/stories/2002112300060800.htm> (last visited Sept. 26, 2004) ("Because of their size and scope of operations, there are other types of non-competitive advantages, which such large companies and MNCs can obtain, including the relatively high influence they can wield on governments and the personnel in developing countries.").

This imbalance places the United States in a delicate position because ultimately the value of the dollar will crash, and many of the United States' own forces of production will go out of business. Thus, the United States faces not only a goods-production crisis,³⁶ but also the total loss of its ability to regulate the processes that produce its consumer goods. When the forces of production leave the United States, the environmental and social controls that the United States would impose on them leave, too.

C. *The WTO Overrides the National Political Process.*

The governing interests of the WTO do not necessarily match national interests. In agreeing to GATT principles, such as the most favored nation clause, the United States and other national governments relinquished the power to condition trade and investment on their own (often popularly elected) societal standards. Trade controls under the WTO extend far into the core of what previously seemed to be entirely domestic decisions. The Government Procurement Code, for instance, prevents a state from discriminating against foreign companies who provide the government with any sort of purchase, lease, or the combination of products and services.³⁷ This agreement could hinder "green government procurement" practices such as those that are currently being developed in the United States and Europe.³⁸

The United States has a federal scheme to control its states' participation in an environmental race-to-the-bottom to attract industry. There is no such control in the WTO.³⁹ Whereas the U. S. federal government sets the minimum

36. Scott, *supra* note 27. ("A rapid, uncontrolled decline in the dollar could push the U.S. economy into a sharp recession."). In his testimony before the House Committee on Financial Services on February 11th, normally circumspect Federal Reserve Chairman Alan Greenspan acknowledged this risk: "[G]iven the already substantial accumulation of dollar-denominated debt, foreign investors, both private and official, may become less willing to absorb ever-growing claims on U.S. residents." Alan Greenspan, Chairman, Federal Reserve, Testimony Before the House Committee on Financial Services (Feb. 11, 2004) (transcript on file with author).

37. The original 1947 GATT did not contemplate regulated government services. The Agreement on Government Procurement (1994) was signed in Marrakesh in 1994 at the same time as the Agreement Establishing the WTO. It is a pluri-lateral agreement, such that not all WTO Members are bound by it. See WTO, *Government procurement: The plurilateral agreement*, at http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (n.d.) (Last visited Nov. 18, 2004).

38. Douglas F. Brennan, *Trade and Environmental Goals at a Crossroads: Challenges for Global Treaties and National Environmental Regulation*, 20 INT'L ENV'T REP. 133, 134 (1997).

39. NAFTA, on the other hand, makes an explicit attempt to prevent the race-to-the-bottom by providing that the members should not seem to attract or retain investments by waiving, offering to waive, derogating from, or offering to derogate from domestic health, safety, or environmental measures. NAFTA, *supra* note 23, at art. 1114.. In practice, however, NAFTA disputes have not made use of these provisions in an environmentally beneficial manner. An example is *Metalclad Corp. v. United Mexican States* brought under Chapter 11's provision for foreign investors to challenge environmental or other government regulations that

standards that states may choose to supplement (as in the Clean Air Act), the WTO sets de facto ceilings on standards.⁴⁰ Domestic standards on health, the environment, and public safety that go beyond international standards must pass a stringent test to fit within the exceptions to GATT.⁴¹

Lesser-developed countries may benefit from being able to send more exports to the United States, but they lose the ability to control their own macro-economic policy. WTO members are not permitted to provide specific domestic subsidies that aid any specific import-competing industry or any export subsidies for non-primary products, such as manufactured goods or processed foods.⁴² Thus, the domestic industries of developing countries do not enjoy the same advantage that U.S. domestic industries benefited from when the United States was developing.⁴³

interfere with their investments. 40 I.L.M. 36 (I.C.S.I.D. 2001). The Tribunal incorporated three objectives of NAFTA that it believed were relevant to interpreting Chapter 11, including increasing transparency, increasing investment opportunities, and ensuring a predictable commercial framework for investors. The Tribunal even stated that it was the objective of Chapter 11 to ensure the successful implementation of investment initiatives, even though nothing in NAFTA states this. The Tribunal ignored NAFTA's environmental objectives to pursue economic development in a manner consistent with environmental protection and conservation, and to promote sustainable development. *Id.*

40. The WTO takes the position that its encouragement of international standards "does not mean that these constitute a floor on national standards, nor a ceiling," and that "the SPS Agreement explicitly permits governments to impose more stringent requirements than the international standards." However, governments that do not adhere to international standards "may be required to justify their higher standard if this difference gives rise to a trade dispute." WTO, *Understanding the WTO Agreement on Sanitary and Phytosanitary Measures*, http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm (n.d.) (last visited Nov. 8, 2004). In fact, the outcome of all disputes under the SPS Agreement thus far indicates that higher standards are de facto impossible to justify. See GATT Dispute Panel Report on Japan – Measures Affecting the Importation of Apples, WT/DS245/R (July 15, 2003); GATT Dispute Panel Report on Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches, WT/DS238/R (Feb. 14, 2003); GATT Dispute Panel Report on Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products, WT/DS207/R (May 3, 2002); GATT Appellate Body Report on Japan – Measures Affecting Agricultural Products, WT/DS76/8 (Mar. 19 1999); Appellate Body Report on Australia – Measures Affecting Importation of Salmon, WT/DS18/AB/R (Nov. 6, 1998); GATT Appellate Body Report on European Communities – Measures Affecting Meat and Meat Products, WT/DS26/17 – WT/DS48/15 (Jan. 14, 1999).

41. LORI WALLACH & MICHELLE SPORZA, *THE WTO: FIVE YEARS OF REASONS TO RESIST CORPORATE GLOBALIZATION* 18 (1999).

42. See GATT 1994, *supra* note 19, at art. XVI; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, http://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm [hereinafter Subsidies and Countervailing Measures]; see also Press Release, World Trade Organization, Burkina Faso (November 1998), at http://www.wto.org/english/tratop_e/tptr_e/tp89_e.htm (last visited Sept. 25, 2004) (making the strange argument that Burkina Faso's tariffs on imported manufacturing goods are not favorable to the development of Burkina's manufacturing sector).

43. MNCs with production facilities in developing countries are not at the same disadvantage, because they do not need subsidies as much as the domestic industries do. Their financial situation is less closely linked to the host country than that of the domestic industries. Further, the operation of MNCs in these poor countries does not guarantee that profits will trickle down into the general populous. See Kay Treake, *Ecuador: Structural Adjustment and*

While the United States has allowed the WTO and its international trade mandate to overshadow domestic U.S. environmental policies, it has refused to allow the internationally agreed-upon Kyoto Protocol to change domestic policy. On November 12, 1998, the United States signed the Kyoto Protocol, which calls for a reduction of greenhouse gases. But President Bush reneged this agreement later, stating in a March 13, 2000 letter to four Republican senators that his administration would not seek to restrict the emission of carbon dioxide by power plants.⁴⁴ Bush cited a U.S. Energy Department report stating that such restrictions would lead to higher energy costs.⁴⁵

D. The WTO Enables MNCs to Reap the Benefits of Intellectual Property at the Expense of People in Developing Countries.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provides exclusive patent protection for the products of many MNCs, including pharmaceutical and agricultural chemical products,⁴⁶ new plant and seed varieties,⁴⁷ and production processes. An MNC can acquire a monopoly over the natural resources of a developing country if it can demonstrate that it has created a "new" chemical or species variety. The MNC is then entitled to WTO-enforced patent protection for twenty years.

Although Article 27(2) contains a limited exception allowing members to refuse patents for exploitative inventions in their territory if "necessary" to protect "public order or morality," and if exclusion of the invention from patentability is the only way to prevent its commercial exploitation, it does not extend either patent or geographic protection to the traditional knowledge of indigenous people. And like other aspects of the WTO agreement, TRIPS prevents lesser-developed countries from passing protectionist laws.

Under the WTO rules, nearly one thousand patents have already been granted for genetically modified versions of five major crops, the food staples of poor countries: rice, wheat, maize, soybeans and sorghum.⁴⁸ Nearly 70% of these patents are held by six MNCs (Aventis, Dow, DuPont, Mitsui, Monsanto and Syngenta), which control 30% of the global seed market.⁴⁹ Many of the "new" varieties are virtually identical to the strains grown in poorer countries

Indigenous and Environmental Resistance, in THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS, AND GRASSROOTS MOVEMENTS 219 (Jonathan A. Fox & L. David Brown eds., 1998); Chantell Taylor, *NAFTA, GATT, and the Current Free Trade System: A Dangerous Double Standard for Workers' Rights*, 28 DENV. J. INT'L L. & POL'Y 401, 411-12 (2000).

44. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 AM. J. INT'L L. 626, 649 (2001).

45. *Id.*

46. TRIPS, *supra* note 13, at art. 27.

47. See *International Union for the Protection of New Varieties of Plants (UPOV)*, at <http://www.upov.int/> (last visited Sept. 25, 2004).

48. *Seeds of Change*, JAPAN WKLY MONITOR, Mar. 4, 2002, available at 2002 WL 17033039.

49. *Id.*

for centuries.⁵⁰ But poor farmers, who cannot afford to prove that their traditional strains are distinct from patented strains, face having to pay royalties on their products that pass through international trade.⁵¹

A recent example from India concerns efforts by an American MNC, W. R. Grace & Co., to develop a biopesticide from the seeds of the neem tree. Indian farmers and environmentalists opposed allowing Grace to patent the product, partly because of fears that the supply of neem seeds would be reduced in India so that locals will have to purchase the MNC product.⁵²

E. The WTO's Dispute Resolution System is Skewed to Advance the Interests of Trade and MNCs.

Another source of controversy in the WTO is the very process that was designed to resolve controversies—the dispute panel system and the appeals body.⁵³ Any member of the WTO who has a dispute with another member over an environmental issue or other policy may invoke a WTO dispute resolution panel.⁵⁴ Members may use the WTO's dispute settlement process to acquire permission to impose trade sanctions on other members that fail to comply with the SBS or TBT agreements. Dispute Panel Resolutions require unanimous agreement for reversal.⁵⁵

1. The decision-making process is secretive and unchecked.

Dispute panels lack the transparency that would be found in a U.S. court. There is no way for an outsider to determine which panelist expressed an opinion in the panel report.⁵⁶ Nor is there any provision for open information exchange. The only way for Non Governmental Organizations (NGOs) or concerned parties to offer input is to submit an amicus curie brief that the governing country of the party has approved.⁵⁷ Furthermore, there is no provision for a neutral expert to assist a dispute panel with technical or

50. *Id.*

51. Michael Woods, *Food for Thought: The Biopiracy of Jasmine and Basmati Rice*, 13 ALB. L.J. SCI. & TECH. 123, 130 (2002).

52. *Kanataka Farmers Target Cargill Again*, DOWN TO EARTH, Aug. 31, 1993, at 16 (referring to the destruction of a processing unit in India owned by the TNC Cargill Seeds).

53. The present system was established in the Uruguay Round's Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, available at http://www.wto.org/english/docs_e/legal_e/53-ddsu_e.htm (last visited Nov. 15, 2004).

54. Legal Texts: The WTO Agreements, Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Understanding (last visited Sept. 6, 2004).

55. See Final Act *supra* note 4.

56. Annex 2 of the WTO Agreement, Article 14(3), Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DSB/RC/1, (December 11, 1996).

57. See WALLACH & SFORZA, *supra* note 41, at 24.

scientific information. WTO panels are allowed, but not required, to use experts, and the names of these experts are kept secret until the end of the case.⁵⁸

The WTO lacks an effective process to avoid conflicts of interest. Disclosure of conflicts of interest is voluntary, and concern is geared towards preserving the personal privacy of panelists.⁵⁹ Such a conflict emerged when the WTO appointed to a panel an International Chamber of Commerce representative who also served on the board of Nestlé. The case dealt with the WTO's challenge of the Helms-Burton sanctions against foreign investors in Cuba, where Nestlé has a plant.⁶⁰

The Appellate Body, which consists of permanently appointed officials, experiences another conflict of interest. This panel must decide in every case whether to apply domestic law or the law of their employers, the WTO, which empowers specific, named international standard-setting agencies to create rules for food and product safety, and health. But these outside agencies are no less subject to charges of agency capture. For instance, the Codex Alimentarius, which sets forth the model food safety standards,⁶¹ and the International Organization on Standardization, an observer organization that establishes technical, product, and environmental standards, are private, industry-operated organizations that are closed to public scrutiny. The standards that these bodies set tend to be weaker than those of the governments of developed countries.⁶²

58. *Id.*

59. See GATT Secretariat, *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, art. 6, WT/DSB/RC/1 (Dec. 11, 1996).

Panelists shall disclose any information that could reasonably be expected to be known to them at the time which . . . is likely to affect or give rise to justifiable doubts as to their independence or impartiality These disclosure requirements shall not extend to the identification of matters whose relevance to the issues to be considered in the proceedings would be insignificant. They shall take into account the need to respect the personal privacy of those to whom these Rules apply.

Id. Significantly, a conflict of interest in itself is *not* grounds for disqualification:

[F]ailure to disclose, as such, shall not be a sufficient ground for disqualification unless there is also evidence of a material violation of the obligations of independence, impartiality, confidentiality or the avoidance of direct or indirect conflicts of interests and that the integrity, impartiality or confidentiality of the dispute settlement mechanism would be impaired thereby.

Id.

60. See WALLACH & SFORZA, *supra* note 41, at 23. For a record of this dispute, see GATT Appellate Body Report on U.S. – Section 211 Omnibus Appropriations Act of 1998, WT/DS176/AB/R (Jan. 2, 2002).

61. Governments that were members of the 1979 TBT Agreement agreed to use relevant international standards (such as those for food safety developed by the Codex) except when they considered that these standards would not adequately protect health.

62. One example is Codex's lower standards for permissible levels of DDT, which is banned in the United States. Public Citizen, BRIEFING BOOK FOR THE 103RD CONG, WHY VOTERS ARE CONCERNED: ENVIRONMENTAL AND CONSUMER PROBLEMS IN GATT AND NAFTA 24 (Nov. 1992). See also *Symposium on Issues Confronting the World Trading System* --

2. *The burden of proof reflects the WTO's pro-trade bias.*

Given that there is a heavy burden of proof on a country to justify trade restrictions based on environmental protection policies, the "environmental" aspects of the WTO Agreement are often not functional.⁶³ The record of cases resolved by WTO dispute panels concerning challenges under Article XX of GATT, the SPS Agreement, and the TBT Agreement demonstrates that the challenger has the advantage. Of eight cases relating to environmental and health safety significance over the last eight years, only one was resolved in favor of the respondent.⁶⁴ In that case, there was no technical violation; rather, the challenger was claiming a non-violation injury.⁶⁵

Summary Reports by the Moderators, http://www.wto.org/english/forums_e/ngo_e_symp2001_repsps_e.htm (July 6-7, 2001) (last visited Sept. 25, 2004).

63. The WTO agreement itself does not establish a burden of proof. The most relevant articles are Article 2.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures ("A country adopting a measure to protect human, animal or plant life or health has the burden of proving that the measure is based on 'sufficient scientific evidence.'"), Article 5.6 of the SPS Agreement ("[M]embers shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility."), and Article 2.2 of the Agreement on Technical Barriers to Trade (standards and labels that constitute a technical barrier to trade must be justified with "available scientific and technical information, related processing technology or intended end-uses of products."). SPS Agreement, *supra* note 4, at arts. 2.2 and 5.5; TBT Agreement, *supra* note 17. However, Dispute Panels have established their own mechanism for allocating the burden of proof. Once the complainant makes a *prima facie* case of a violation, the burden shifts to the country with the challenged measure to prove that its measure is justified. See *Tuna-Dolphin I and II*, *supra* note 20, at para. 5.22 ("[T]he practice of panels has been to interpret Article XX narrowly, to place the burden on the party invoking Article XX to justify its invocation.").

64. These cases are as follows:

1. GATT Dispute Panel Report on Japan- Measures Affecting the Importation of Apples, at 155.
2. GATT Dispute Panel Report on Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches, WT/DS238/R (Feb. 12, 2003).
3. GATT Dispute Panel Report on Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products, WT/DS207/R (May 3, 2002).
4. GATT Appellate Body Report on Japan – Measures Affecting Agricultural Products, WT/DS76/8, (Mar. 19 1999).
5. GATT Dispute Panel Report on Australia – Measures Affecting Importation of Salmon, WT/DS18/R (June 12, 1998).
6. GATT Appellate Body Report on European Communities – Measures Affecting Meat and Meat Products, WT/DS58/AB/R (Nov. 6, 1998).
7. GATT Dispute Panel Report on U.S. – Import Prohibition of Shrimp and Shrimp Products, DS58/AB/R (Nov. 6, 1998).
8. GATT Appellate Body Report on U.S. – Standards for Reformulated and Conventional Gasoline, WT/DS2/A13/R (May 20, 1996).

See WTO, *Index of Disputes Issues*, at http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#bkmk1 (n.d.) (last visited Nov. 15, 2004).

65. Europe survived Canada's claim against its health protection measures only because the measures did not technically constitute a violation of the TBT Agreement. Rather, Canada had claimed injury from a non-violation. The Panel specifically did *not* support Europe's

The threat of a successful WTO challenge results in a chilling effect on countries' inclinations to initiate new environmental or human rights laws.⁶⁶ Moreover, MNCs can pressure lesser-developed countries to change their laws before a matter ever comes under the consideration of the WTO.

F. The WTO Rewards Members for Attacking the Environmental Policies of Other Members.

The WTO decisions are fair to the extent that they even-handedly put an end to all attempts to unilaterally regulate the environmental policy of foreign countries. The United States does not get to impose its standards for tuna on Europe, and Europe does not get to impose its stance against beef hormones on the United States. Australia is not allowed to quarantine raw salmon imports to protect its indigenous fish population, and the United States is not allowed to protect its publicly inspected beef market against the introduction of Australia's privately inspected beef. The fact that each of these members has only taken the "environmental" stance when its regulation is being challenged makes it easy for a WTO dispute panel to put a flat ban on any environmental measure that could also have a protectionist objective. In the race to the bottom, there is no room for pious, self-promoting environmentalism.

What has led to a system in which a country acts as an environmentalist one day and an "anti-protectionist" the next? It is the peculiar manner in which the present international trade system gives no rewards for championing the environmental cause, even if the cause is popularly elected in a given democratic country. The only rewards come from championing the anti-protectionist cause.

For example, even though the United States does not produce bananas for export, it went to bat for Chiquita Brands International against the European Union's the Lomé Convention.⁶⁷ This convention, which gave preference to the banana producers from former E.U. colonies, was struck down under the principle of most favored nation. When the European Union delayed implementation of the WTO ruling, the United States imposed trade sanctions against the European Union worth \$190 million annually.⁶⁸

The results of this perverse system of rewards are that environmental standards sink to the lowest common denominator, while the principles of Most Favored Nation and non-discrimination assume the highest denominator. MNCs may sit back and watch while potential host countries battle each other

position that "there cannot be a 'legitimate expectation' in the case of a measure that concerns the protection of human health." GATT Dispute Panel Report on European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R (Sept. 18, 2000).

66. Ralph Nader, *Introduction* to WALLACH & SFORZA, *supra* note 41, at 10.

67. GATT Appellate Body Report on U.S. – Import Measures on Certain Products from the European Communities, WT/DS165/13 (Jan. 19, 2001).

68. Press Release, U.S. Mission to the E.U., WTO Authorizes U.S. to Retaliate in Banana Dispute, (Apr. 20, 1990) (on file with author).

in the name of removing protectionist barriers. The result is a frenzy to tear down trade barriers and erect MNC production facilities. In the end, the MNC quietly settles down in the country that has won the race to the bottom in a desperate attempt to attract it.

IV. BALANCING TRADE IS THE FIRST STEP TO CONTROL MNCs

If the United States corrected its trade imbalance by matching the value of its imports to that of its exports, then it would import fewer MNC goods made under sub par environmental and labor standards. Instead, the United States would be forced to produce more of its own goods, which would be subject to American environmental and social controls.

The solution of balancing the system of imports and exports as a whole is preferable to piecemeal sanctions that only address isolated environmental problems. Another benefit of balancing the entire trade system is that it avoids policy trade-offs between the competing interests that are injured by MNC practices (i.e., environmental protection, wages, consumer protection, health and welfare, social responsibility, and macro-economic unsustainability). It is less controversial for a decision-maker to call for balancing the United States' current accounts deficit than to advocate a unilateral measure to address environmental problems.

A. *The United States Should First Consider Remedies Within the WTO System.*

1. *The United States could get limited support under provisions for the balance of payments.*

The United States could balance its trade deficit under articles XII and XVIII of GATT, and the Balance of Payments Declaration. Under Article XII, a WTO member may impose quantitative restrictions that are otherwise prohibited in order to "safeguard its external financial position and its balance of payments," where these restrictions are required either "to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves," or if the member has "very low monetary reserves, to achieve a reasonable rate of increase in its reserves."⁶⁹

However, this method of balancing trade has its limits. The measures that the United States would use would have to be as minimal as possible in order to address the imbalance. The measures could not discriminate between different countries, would have to avoid unnecessary damage to commercial and economic interests of other contracting parties, and would eventually have to be

69. GATT art. XVIII sets forth more lenient criteria for developing countries. It does not require that the threat of a serious decline in the member's monetary reserves be "imminent" or "very low." Rather, reserves must be "inadequate." GATT 1994, *supra* note 19, at art. XVIII.

phased out.⁷⁰ Also, this method would require consultation with the International Monetary Fund (IMF), which has the final say as to what qualifies as a decline in the member country's monetary reserves.⁷¹ Just because the IMF finds that the United States has balance of payments difficulties does not mean that the WTO would allow the United States to impose trade-based corrective measures.⁷² A further problem is the extent to which the United States could rely on the IMF for funding. The IMF has nowhere near what is needed to correct the US imbalance.⁷³

Thus, while the United States could rely on IMF funding to a limited extent, the IMF would play a more important role in making the necessary factual findings that would allow the United States to take trade measures to correct the balance itself. Significantly, the United States has a great deal more influence over the IMF than it has over the WTO because of the IMF's financially weighted voting scheme (in which the United States has about seventeen percent of the vote⁷⁴).

2. *The United States could get limited support under provisions for tariffs, safeguards, and subsidies.*

The United States could impose an overall, non-discriminatory tariff of ten percent to fifteen percent on imports. This would give U.S. industry an advantage over MNCs whose production forces are based in other countries. But the tariff would have to meet the GATT 1994 requirements: (1) the tariff is "equivalent to an internal tax" of a "like domestic product;" (2) the tariff is a

70. *Id.*

71. GATT Article XV provides that in the context of balance of payments problems, contracting parties "shall consult fully with the International Monetary Fund [and] shall accept the determination of the Fund as to what constitutes a serious decline in the contracting party's monetary reserves, a very low level of its monetary reserves, or a reasonable rate of increase in its monetary reserves." *Id.* at art. XV.

72. This happened to the United States in 1971, when the IMF had found that the United States was experiencing balance-of-payments difficulties, but the GATT panel did not approve the particular measure chosen by the United States to respond to those difficulties. Thus, while the IMF is the finder of fact, the WTO panel is the applier of the law. See Deborah E. Siegel, *Legal Aspects of the IMF/WTO Relationship: The Fund's Articles of Agreement and the WTO Agreements*, 96 AM. J. INT'L L. 561, 579 n.86 (2002).

73. The total amount of SDRs that the IMF had available for lending as of March 2004 was 212.8 billion SDRs, which is about U.S. \$280 billion. International Monetary Fund, *IMF Members' Quotas and Voting Power, and IMF Board of Governors*, <http://www.imf.org/external/np/sec/memdir/members.htm> (last updated Nov. 12, 2004) [hereinafter *IMF Quotas*]. While in theory this could cover the United States' current account balance (which was -\$135.0 billion as of 2003, according to the 2004 Economic Report of the President, Table B-103), only those currencies generally accepted for settlement of international accounts are useful for drawings by states. ANDREAS E. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 512 (2002). Typically, states receive initial payments of 25% of the member state's quota in the IMF (which would be less than 1 billion SDRs, since the U.S.'s quota is about 17%), and later drawings are allowed with increased conditionality. *Id.* at 513.

74. *IMF Quotas*, *supra* note 73.

justifiable “anti-dumping or countervailing duty,” or (3) the tariff consists of “charges commensurate with the cost of services rendered” (for instance, the cost of transporting or handling a product).⁷⁵

Additionally, the tariffs the United States could impose would have to be consistent with the concessions it has made in its schedule. The United States’ schedule not only sets forth its tariff commitments, it is a common agreement among all WTO members.⁷⁶ Once a country has committed to a schedule, it can change its commitment only after negotiating with its trading partners, which could mean compensating them for loss of trade.⁷⁷ If the United States were to adopt a new tariff that differs from the type mentioned in its schedule, or results in higher charges, other members who have become accustomed to their present levels of exports would have grounds for protesting. A WTO panel could then invalidate the tariff.⁷⁸ However, the United States could survive a dispute panel if it could prove that it imposed the same “tariffs” on its own industry. Thus, “tariffs” would have to take on a form similar to sales tax.

The United States might be able to impose temporary tariffs to correct its trade imbalance if it could pass the tariffs as “safeguards” under Article XIX of GATT 1994 and the Safeguards Agreement. But the United States would have to show that U.S. industry is experiencing serious injury, and that the serious injury is caused by increased imports.⁷⁹ Even then, the remedy is limited. The duration of the safeguard measure typically cannot exceed four years,⁸⁰ and requires that the imposing country grant some sort of compensation to affected members.⁸¹

Finally, the United States could grant non-industry-specific subsidies (in the form of grants or tax breaks) to its own domestic producers under GATT Art. III(8)(a). But this would be less desirable than tariffs, since subsidies would drain U.S. government reserves rather than bring revenue. Also, to avoid prejudicing another WTO member, any specific subsidization of a product could not exceed five percent.⁸²

75. GATT 1994, *supra* note 19, at art. II, para. 2(a).

76. *Id.* at art. II, para. 1(b)(ii).

77. WTO, *Members’ Commitments*, at http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm (last visited Sept. 6, 2004).

78. GATT Appellate Body Report on Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WT/DS56/11 (Apr. 23, 1998).

79. Agreement on Safeguards, Apr. 15, 1994, WTO Agreement, http://www.wto.org/english/docs_e/legal-e/25-safg.pdf (last visited Sept. 26, 2004) [hereinafter Safeguards].

80. *Id.* at art. 7.

81. *Id.* at arts. 8, 12.

82. Agreement on Subsidies and Countervailing Measures, *supra* note 42.

B. The United States has a Limited Ability to Apply its own Trade Remedies in Conjunction With WTO Rules.

1. If justified, the United States can impose sanctions for unfair trade practices.

U.S. trade law allows for additional remedies to the trade imbalance, which do not necessarily conflict with the WTO.⁸³ These measures could also stand on their own in the absence of a regulatory force like the WTO. Under the WTO Agreement, however, these measures usually must be justified as remedies for unfair trade practices (i.e., countervailing duties against foreign subsidies and anti-dumping measures). The United States has to make a strong showing that the foreign country actually used a subsidy or discriminatory price, and that the resulting substantial injury threatens U.S. industries.⁸⁴ Recently, the only private U.S. trade remedy with fairly strong prospects is the Section 337 proceeding for infringement of U.S. domestic intellectual property rights.⁸⁵

2. The United States can devalue the dollar.

A different approach involves devaluing the dollar to increase exports and discourage imports. The over-valued dollar under the current system acts like a tax on U.S. exports and a subsidy to U.S. imports.⁸⁶ Devaluation lowers the

83. See Trade Act, 19 U.S.C. §§ 2101-2495 (2000). The act targets disruptive acts by foreign industrial policies without the need to show evidence of dumping or subsidies. This law strengthened the President's authority to impose sanctions unilaterally by eliminating the requirement that the President observe international obligations before taking action against unfair trade practices. It expanded the President's authority to impose tariff and non-tariff import restrictions. The only showing must be unfairness on the part of a foreign government and injury of U.S. interests. Section 203 provides for trade restrictions in the form of tariffs, quotas, or marketing agreements when increased imports are substantial cause of injury to domestic injury. Section 122 provides for balance of payments emergencies. Section 125 allows the President to terminate international agreements. Section 321 provides antidumping remedies, and Section 331 provides countervailing duties for subsidies. See also Agriculture Adjustment Act of 1933, 7 U.S.C. §§ 601-624 (1994) (allows restrictions to protect U. S. agriculture price supports); Agriculture Act of 1956, 7 U.S.C. § 1854 (1982) (authorizes international agreements to regulate trade in agriculture commodities).

84. William A. Lovett, *Current World Trade Agenda: GATT, Regionalism, and Unresolved Asymmetry Problems*, 62 FORDHAM L. REV. 2001, 2031 (1994) [hereinafter Lovett, *Current World Trade Agenda*].

85. *Id.*

86. Robert A. Blecker, *The Benefits of a Lower Dollar, How the High Dollar has Hurt U.S. Manufacturing Producers and Why the Dollar Still Needs to Fall Further*, Economic Policy Institute, http://www.epinet.org/content.cfm/briefingpapers_may03bp_lowerdollar (May 30, 2003) (last visited Nov. 15, 2004). A 30% fall in the dollar from 1985 to 1988 was required to reduce the real trade deficit from about 2% of GDP to 1% of GDP by 1989. The dollar stayed down in that range through 1997, and the deficit stayed around 1% of GDP (except when the recession of 1990-91 pulled the deficit down to zero). *Id.*

price of domestic exports to foreigners in order to increase the demand for exports (provided that demand is elastic). It also raises the price of imports, reducing the demand for foreign goods.

Even though the dollar fell about 16% in 2002, this was not enough to offset its 51% gain on other major currencies (such as the Japanese yen, British pound, the Euro and its predecessors) between April 1995 and February 2002.⁸⁷ To bring down the 2003 deficit of 5% of GDP will require a much larger devaluation of the dollar.⁸⁸ The Federal Reserve could either increase the money supply enough to erase the dollar's over-valuation, or raise interest rates to increase the overseas demand for dollars.

Devaluation is not likely to be popular, especially since it is paid for by the middle class electorate.⁸⁹ However, of all the remedies, it is most directly connected with the American problem of over-consumption—the ultimate fuel for MNC growth.

C. *The United States may Have to Rely on Trade Remedies Outside of the WTO.*

Because the United States acquiesced to the established asymmetrical trade regime, most foreign governments regard their privileges relative to the United States (in terms of tariffs on U.S. goods, for instance) as status quo. Few nations (and few Americans) appreciate that the imbalance is unsustainable. Moreover, other indebted nations are unable to change the system in order to accept more U.S. goods. The fact that many countries have financial debts to the United States only strains what are already poor trade relations. At the same time, debt finance proceeds from these countries are not enough to correct trade balance.

The United States is not forever bound to be part of an asymmetrical trade regime. The United States, or any other country, has the right to withdraw from the WTO Agreement by giving six months notice.⁹⁰ The United States could then impose general, across-the-board tariffs⁹¹ on imports without concern for violating its WTO schedule, or compensating other members for any reduction in trade. Without the pressure of the unconditional Most Favored Nation

87. *Id.*

88. Scott, *supra* note 27.

89. Lower economic classes more often depend on domestic goods, while the uppermost classes tend to retain their wealth through a variety of holdings in spite of the general economic situation.

90. See General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XV, 61 Stat. A-3, 55 U.N.T.S. 187 (allowing WTO withdrawal for any member after six months notice to the Director General). Professor William Lovett cautions that timing for withdrawal is crucial: The United States would not want to withdraw at a time it would be expecting to call on allies in the war against terrorism. William A. Lovett, *Reflections on the WTO Doha Ministerial: Bargaining Challenges and Conflicting Interests: Implementing the Doha Round*, 17 AM. U. INT'L L. REV. 951, 986 (2002) [hereinafter Lovett, *Reflections*].

91. Lovett, *Current World Trade Agenda*, *supra* note 84, at 2028.

clause, individual countries or groups of countries could then negotiate with the United States for bilateral or regional trade agreements based on reciprocal terms.⁹² The default trade regime would impose an indiscriminate tariff against imports, assuring that the United States would not be more open than any of its partners.

As a substitute for safeguards or tariffs, some have advocated voluntary restraint agreements (VRAs).⁹³ VRAs bar producers in one nation from exporting more than a specified amount of a product to another nation. Unlike safeguards or general tariffs, VRAs limit the restrictive measures to a particular country (or set of countries). The restricted country readily accepts the agreement if it reduces supply enough to raise the price of the limited goods. In that case, however, the exporting country would reap the benefits of the raised prices. Tariffs are preferable in this sense, because the proceeds from raising the price go to the importing nation that has assessed the tariff.⁹⁴

In addition to levying tariffs, the United States would also need to focus on its industry, and renewal industry to the extent that much of its production has gone abroad.⁹⁵ The government could develop a list of significantly disrupted U.S. industries that qualify for subsidies in the form of loan guarantees⁹⁶ and technology grants.

V. ENVIRONMENTAL MEASURES ARE ALSO NECESSARY TO CONTROL MNCs.

The trade imbalance is an important key to the MNC problem, but there are other keys that are less tangible. One of the most important troublemakers

92. Professor Lovett notes that most of the U.S. trade-current account deficit problem arises out of only a few relationships: U.S.-Japan trade; U.S.-China Trade; U.S.-ASEAN trade; and, to a lesser extent, U.S.-EU trade and U.S.-NAFTA trade. "This is a short and manageable list of bilateral-regional relationships." Lovett, *Reflections*, *supra* note, 90 at 984.

93. Safeguards, *supra* note 79.

94. Daniel J. Gifford, *Antitrust and Trade Issues: Similarities, Differences, and Relationships*, 44 DEPAUL L. REV. 1049, 1085 (1995).

95. The United States could find itself in a situation similar to that of Argentina. After Argentina pegged its peso to the dollar, Argentine consumers were able to afford more foreign goods. They consumed foreign goods to the point that many Argentine industries (including Grundig, an internationally significant electronics manufacturer) went out of business. Now that Argentines can no longer afford foreign goods, they will have to find a way to revitalize their own industries. See Eduardo Conesa, *La Dolarizacion: Costos y Beneficios*, Macroconsul No. 41, Apr. 1999, available at <http://www.cess.org.ar/macro/40-abr99/0499doc1.htm> (last visited Nov. 11, 2004).

96. Loan guarantee programs have the most value for industries that produce non-market benefits. Presumably, private lenders and investors already receive the normal market benefits of credit transactions. The non-market benefits would have to be significant enough to risk taxpayers' money in the event that the firms that receive guarantees but later fail. See Governor Edward M. Gramlich, *The Federal Reserve Board, Remarks before the National Economists Club* (April 24, 2003), at <http://www.federalreserve.gov/boarddocs/speeches/2003/20030424/default.htm> (last visited Sept. 26, 2004).

is an old adversary to environmentalists - apathy. Neither the consumer who enjoys the short-term benefit of cheap "made-in-Taiwan" goods, nor the MNC that is reeling in the profits, has an immediate concern about the long term environmental and social damage wrought by MNCs.

There is more than one method in the international regulatory scheme to raise the environmental "common denominator" and reduce apathy. One strategy has been to develop international laws that bind countries in spite of their apathetic constituencies. Another more voluntary strategy has been to target consumers directly, and allow MNCs to court them with their environmental righteousness. Finally, a somewhat shaky international judicial system has emerged alongside national judiciaries to right past wrongs and increase public access to justice.

A. International Laws Target States, but are not Powerful Enough to Overshadow Compete With the WTO or Affect MNCs.

1. Hard law is binding but difficult to achieve.

"Hard law" norms, found in treaties such as the WTO Agreement, are binding international laws that create legal duties. Because countries are likely to suffer negative consequences for breaking these legal duties, they will probably comply. Hard law is useful where effective compliance requires intrusive verification and the application of sanctions, and where that can be achieved only through a treaty instrument.⁹⁷ Problematically, it is very difficult to get countries to agree on multi-lateral treaties, particularly when they address something as controversial as environmental protection.

Customary international law is another type of hard law. It often lies outside of treaties. An action violates customary international law when no state condones the action, there are normative criteria that define violations of the law, and the law is nonderogable.⁹⁸

There is very little customary international environmental law. Declarations of substantive environmental rights such as those found in the Stockholm Declaration⁹⁹ and the Rio Declaration¹⁰⁰ are often considered

97. See also Richard L. Williamson, Jr., *Is International Law Relevant to Arms Control?: Hard Law, Soft Law, and Non-Law in Multilateral Arms Control: Some Compliance Hypotheses*, 4 CHI. J. INT'L L. 59, 71 (2003).

98. See *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 370 (E.D. La. 1997); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) ("A customary norm binds all States if it comes from the general and consistent practice of States and is followed by States out of a sense of legal obligation.").

99. Declaration of the U.N. Conference on the Human Environment, U.N. Doc. A/CONF.48/14 (1972), reprinted in 11 I.L.M. 1416, 1417 (1972) [hereinafter Human Environment].

100. U.N. Conference on Environment and Development: Rio Declaration on Environment and Development, U.N. Doc. A/Conf.151/5/Rev.1 (1992), reprinted in 31 I.L.M. 874 (1992) [hereinafter Rio Declaration].

aspirational rather than normative.¹⁰¹ Conventions that do recognize environmental rights do so with qualifications.¹⁰² U.S. courts have often been hostile to the idea of inherent environmental rights.¹⁰³ The only universal recognition at this time seems to be a prohibition against trans-boundary pollution.¹⁰⁴ Thus, hard law has not yet become an effective tool for controlling environmental abuses committed by MNCs.

2. *Soft law is less binding but easier to achieve.*

Because of the great difficulty in achieving the unanimous consensus that a treaty requires, international environmental law-making has shifted toward "soft law." Soft law generally consists of nonbinding resolutions that authorize conduct by states that might otherwise be questioned (i.e., extra-territorial assertions of environmental norms), but do not mandate particular actions. Soft law ranges from the very general, aspirational declarations of United Nations conferences to the more functional multi-lateral environmental agreements (MEAs) that allow for the creation of norms.

The more general soft law-establishing conferences have not been very useful in the realm of international trade law, although they may eventually serve as testimony to international consciousness of environmental obligations.¹⁰⁵ The Stockholm Conference of 1972 established a mantra for

101. Andy Weiner, *The Forest and the Trees: Sustainable Development and Human Rights in the Context of Cambodia*, 151 U. PA. L. REV. 1543, 1574 (2003).

102. One example is the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, which is qualified to the extent that resources are available for a state to take protective measures. Additional Protocol to the American Convention on Human Rights In the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador" (Nov. 17, 1988), <http://www.worldpolicy.org/globalrights/treaties/achr-esc.html> (last visited Nov. 15, 2004).

The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol.

Id.

103. *E.g.*, *Ullonoa Flores v. S. Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003).

104. *See, e.g.*, *Trail Smelter Arbitration*, 3 REP. INT'L ARBITRAL AWARDS 1911 (1941) [hereinafter *Trail Smelter Arbitration*].

[N]o state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."

Id. *See also* *Corfu Channel Case*, 1949 I.C.J. 4, 21; *Lake Lanoux Arbitration* (*Affaire du Lac Lanoux*), 12 REP. INT'L ARBITRAL AWARDS 281 (1957).

105. A. KISS, *THE INTERNATIONAL PROTECTION OF THE ENVIRONMENT IN THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 1069 (R. Macdonald & D. Johnston eds., 1983).

environmental conservation,¹⁰⁶ but did not refer to GATT, or discuss how the projects contemplated in the Stockholm Action Plan might meld with trade law.

The Rio Conference of 1992 made more progress in terms of making the environment a worldwide media event. It directed contracting countries toward environmental responsibility, but lacked a system of obligations or enforcement mechanisms. However, the Rio Conference drew the line at interfering with GATT measures to prevent protectionism.¹⁰⁷

3. *Framework conventions are a semi-hard law alternative.*

An interesting development in international environmental law is the emergence of framework conventions. These conventions achieve broad consensus among member states on the basic principles while leaving the normative standards and enforcement mechanisms to be set later by majority vote.¹⁰⁸ It is in this context that relatively successful agreements on the regulation of chlorofluorocarbons (CFCs),¹⁰⁹ hazardous waste,¹¹⁰ and endangered species¹¹¹ have developed.

The Montreal Protocol provides an encouraging example. Activists from the United States in conjunction with the United Nations Environmental Programme, initiated a framework convention under which parties committed themselves to research the ozone-depleting effects of CFCs, and to harmonize policies on CFCs. In later meetings, participating states agreed to a gradual phase out of CFCs. Member states could trade CFCs with each other, as long as they conformed to the overall standards of the Protocol.¹¹² But member states

106. The first principle of Stockholm is that "man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being." Human Environment, *supra* note 99.

107. See Rio Declaration, *supra* note 100. ("Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided."). See also United Nations Framework Convention on Climate Change, art. 3(5), May 9, 1992, *reprinted in* 31 I.L.M. 849 (1992) ("Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.").

108. While the basic principles become "hard law" for the signatories, the same "soft law" problems arise when countries fail to agree on particularized norms and methods of enforcement.

109. U.N.: Protocol on Substances that Deplete the Ozone Layer, Doc. A/Conf.146/4/Rev.1 Sep. 16, 1987, *reprinted in* 26 I.L.M. 1550 (1987) [hereinafter Montreal Protocol].

110. U.N. Environment Programme Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes: Final Act and Test of Basel Convention, U.N. Doc. A/Conf.123/3/Rev.1 (Mar. 22, 1989), *reprinted in* 28 I.L.M. 649 (1989).

111. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

112. Montreal Protocol, *supra* note 109, at art. 4A.

could not accept products containing CFCs or products produced using CFCs from non-member states.¹¹³

These trade restrictions on states outside of the Protocol were arguably subject to challenge under GATT. First, allowing trade of CFCs within the Protocol, but excluding this treatment to non-members, would violate GATT's Article I Most Favored Nation clause (under which a concession granted to one party has to be granted to all parties). Second, restricting a like product based solely on the manner in which it was made would violate Article III, which requires like treatment of like products no matter how they were made. But interestingly, no challenges have been raised, and members of the Montreal Protocol have successfully applied their own environmental law to non-members of the Protocol. The fact that these provisions have not been challenged by a WTO member probably reflects the degree of global consensus on this issue, suggesting that multi-lateral, negotiated agreements (when possible) will always be more successful than unilaterally imposed sanctions (as in the Tuna-Dolphin cases).

But whether MEA-made law could work for products other than CFCs is unclear. The Montreal Protocol enjoyed success, first, because there was already substantial and alarming evidence of the problem, and second, because there were adequate (although slightly more expensive) substitutes for CFCs. An MEA to stop global warming would have to deal with those who still contend that there is no problem, as well as the huge lobbies and market forces that want to continue to use fossil fuels.

4. *Neither hard law nor soft law has directly targeted MNCs.*

Instruments of soft law and hard law target states rather than non-state entities. When liability is assigned in cases of trans-border pollution for instance, the liability is placed on the state that houses the polluting entity.¹¹⁴ Except for those cases in which the polluting industry has come forward voluntarily to accept responsibility,¹¹⁵ it is up to the state to indemnify the offending MNC. But, a poor developing country may not want to stunt its production by sanctioning the MNC to which it is host. Thus, while conventions such as the Montreal Protocol have enjoyed some success in streamlining the environmental regulatory capacity of states, they have not been able to specifically target MNCs.

113. *Id.*

114. See Trail Smelter Arbitration, *supra* note 104.

115. An example is the case of the Sandoz facility in Switzerland, which caused a fire and chemical toxin release into internationally shared waters. Sandoz received, and paid, substantial claims for damages. The specific amount of international compensation was settled privately and paid without judicial action. See Astrid Boos-Hersberger, *Transboundary Water Pollution and State Responsibility: The Sandoz Spill*, 4 ANN. SURV. INT'L & COMP. L. 103 (1997).

B. Standards That Directly Target MNCs and Consumers are Slowly Developing.

1. International standards for MNCs are voluntary.

International efforts regarding self-regulatory schema for MNCs date back to 1976, when ten countries under the banner of the Organization for Economic Cooperation and Development (OECD) agreed upon the Declaration on International Investment and Multinational Enterprises. This Declaration included the Guidelines for Multinational Enterprises, which were revised in 2000.¹¹⁶ These guidelines establish principles and standards with respect to the environment and other areas. Similarly, The Global Compact between the U.N. and the world business community (proposed by U.N. Secretary-General Kofi Annan at the 1999 World Economic Forum in Davos) “asks” companies to support a precautionary approach to environmental challenges, undertake initiatives to promote greater environmental responsibility, and encourage the development and diffusion of environmentally friendly technologies.¹¹⁷ But while these statements may eventually form a basis for soft law, they might just as easily remain the platitudes of global officials patting each other on the back.

ISO 14001, another standard for environmental management, is commonly cited by corporate and government officials as the most important international environmental standard for MNC operations.¹¹⁸ ISO 14001 was adopted in 1996 by the International Standards Organization (ISO), an NGO that promotes international standardization for technologies, in order to “help rationalize the international trading process.”¹¹⁹ Rather than impose substantive requirements, ISO 14001 is a procedural checklist for a management system. To be certified under ISO 14001, a company must: (1) establish an environmental policy to comply with national laws and a commitment to work towards continual improvement and pollution prevention; and (2) develop an internal process to manage and review that policy. Transparency is not required.

Problematically, MNCs have a clear advantage when it comes to comprehending environmental technology and international standards, and may use and dispense with this knowledge at their benefit. This explains why

116. See Organization for Economic Cooperation and Development, *OECD Guidelines for Multinational Enterprises: Focus Responsible Supply Chain Management*, ANNUAL REPORT 2002, <http://www1.oecd.org/publications/e-book/2002011e.pdf> (last visited Nov. 15, 2004).

117. See The Global Compact, at <http://www.unglobalcompact.org> (last visited Nov. 15, 2003). The Global Compact was formally launched as a coalition of global leaders from the world of business, labor, and civil society organizations at the U.N. Headquarters on July 26, 2000. *Id.*

118. *Environmental Management Systems - Specifications with Guidance for Use*, AMERICAN NATIONAL STANDARDS INSTITUTE/INTERNATIONAL ORG. FOR STANDARDIZATION, Sept. 1, 1996.

119. International Organization for Standardization, *About ISO: Introduction*, at <http://www.iso.org/iso/en/aboutiso/introduction/index.html> (last modified Feb. 16, 2004).

companies such as Occidental Petroleum in Ecuador have refused to publicly disclose the precise standards that govern its operations, and why government officials are not fully informed about the company's standards and practices.¹²⁰ Further, without enforcement mechanisms or support from States or their consumers, voluntary standards are unlikely to be successful.

2. *Environmental labeling schemes have had mixed results.*

Environmental labeling consists of mandatory or voluntary government schemes to advertise environmentally important information to the consumer. A government could require labels stating that a good contains an environmentally harmful substance, or was produced with an environmentally harmful method. Under more content-neutral schemes, certain products must be labeled in order to disclose information to the consumer that the government has determined to be of importance.¹²¹ The information may or may not reveal negative facts concerning the product.

Voluntary labeling schemes may convey a single attribute about a product, for example, that it is "biodegradable," "recyclable," or "ozone friendly."¹²² Voluntary "multi-criteria" eco-labeling programs are more common. This type of program uses a "seal of approval" or a content-neutral "report card."¹²³ The labeling is either government-sponsored or operated solely by a private, third-party certification organization.

Proponents of free trade object to labeling programs, asserting that they will act as non-tariff trade barriers in contravention of the WTO Agreement.¹²⁴ The question of whether an environmental labeling program constitutes an illegal, non-tariff trade barrier will probably depend on whether it is mandatory or voluntary, and whether it governs a product characteristic or a PPM.¹²⁵ The WTO Agreement will not support the unilateral attempt by one country to impose its environmental or conservation PPM laws on another through use of a mandatory labeling scheme that enforces an import ban.¹²⁶ It will, however,

120. Judith Kimerling, *International Standards in Ecuador's Amazon Oil Fields: The Privatization of Environmental Law*, 26 COLUM. J. ENVTL. L. 289, 337 (2001).

121. Atsuko Okubo, *Environmental Labeling Programs and the GATT/WTO Regime*, 11 GEO. INT'L ENVTL. L. REV. 599, 604 (1999).

122. *Id.*

123. Elliot B. Staffin, *Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labeling and Its Role in the "Greening" of World Trade*, 21 COLUM. J. ENVTL. L. 205, 220 (1996).

124. E.g., UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS, STATEMENT OF THE U.S. COUNCIL FOR INTERNATIONAL BUSINESS ON TRADE BARRIERS WHICH ARISE FROM GOVERNMENT-SPONSORED ECO-LABELING PROGRAMS 1 (1995).

125. Staffin, *supra* note 123, at 220.

126. GATT Secretariat, *Trade and the Environment*, MTN.TNC/W/7 (1992).

support a labeling program that applies equally to all countries based on the actual circumstances of production, rather than the country's policies on production.¹²⁷

3. *Some MNCs have imposed codes on themselves for the purpose of public relations.*

In response to pressure for transparency, some MNCs have come up with their own codes of conduct (often in the context of hazardous waste disposal). Dow Chemical and the Chemical Manufacturers' Association (CMA) have produced some of the most exemplary codes. "The Dow codes address plant safety, product stewardship, public communications, regulatory compliance, and waste reduction in considerable detail and prescriptive language."¹²⁸ The CMA codes apply to the association's 180 member firms and currently address community awareness and emergency response, pollution prevention, process safety, distribution, and employee health and safety.¹²⁹ Some federal agencies have offered additional incentives for developing environmental codes. For instance, the U.S. Environmental Protection Agency (EPA) offered regulatory deferrals as an incentive for firms that voluntarily reduce their use of certain toxic chemicals.¹³⁰

Although they are voluntary and heterogeneous, private codes are proliferating throughout the developed world. However, environmental codes used by MNCs in their countries of origin, and other developed nations, do not have similar influence over MNC activities in developing nations.¹³¹ This suggests that the driving force behind codes is pressure from educated consumers and government regulation.

Codes pledging uniform practices and environmental technologies among developed and developing countries could mitigate this problem, but would also create new conflicts and problems. First, there is something inherently suspicious about delegating the power to write environmental law to a foreign oil company. Environmental law should not be based on negotiations between special interests and a small group of officials who belong to a discredited and distrusted political class.¹³² Second, "MNCs would be likely to object to this solution, claiming that it unduly limits management discretion and that it would

127. Tuna-Dolphin I, *supra* note 20; Tuna-Dolphin II, *supra* note 20.

128. Michael S. Baram, *Multinational Corporations, Private Codes, and Technology Transfer for Sustainable Development*, 24 ENVTL. L. 33, 47-48 (1994).

129. *Id.*

130. See NOTICES ENVIRONMENTAL PROTECTION AGENCY Pollution Prevention Strategy, 56 Fed. Reg. 7,849, 7,861-64 (Feb. 26, 1991).

131. For instance, CMA's codes say nothing about application beyond the U.S. subsidiaries operating in developing nations that lack comparable associations. These codes allow for a good deal of discretion to use practices and technologies that might not be consistent with the industry codes of developed countries.

132. See Kimerling, *supra* note 120, at 392-394.

promote 'unnecessarily expensive' methods of environmental protection."¹³³ Third, host countries that have independently determined their requirements for environmental protection might also object to this solution.¹³⁴ Close collaboration between a public international organization and MNCs in each of several industrial sectors is needed to produce consensus codes setting forth uniform practices and technology transfer obligations for all MNCs involved, irrespective of their home and host countries.¹³⁵

C. *Judicial Controls Have Emerged as a Measure of Last Resort.*

1. *International panels on the level of the WTO dispute system have yet to evolve.*

While WTO panels do not provide injured individuals the standing needed to pursue claims against MNCs, there are other international and regional enforcement systems with the capacity to review individual claims. Among these are the United Nations International Court of Justice, the Permanent Court of Arbitration, and the European Court of Justice.¹³⁶ United Nations and regional human rights fora have also begun to consider whether certain environmental claims amount to human rights violations in the United Nation's Human Rights Committee, the European Court on Human Rights, and the Inter-American Court for Human Rights.¹³⁷ However, because there is a lack of customary international environmental law that these courts can rely on, litigants are often unable to state a claim. Those who have cast environmental injuries as human rights violations by states have been far more successful.¹³⁸

The 2002 Rome Treaty for an International Criminal Court (ICC) explicitly acknowledges environmental crimes, but only in the context of war.¹³⁹ Given this narrow jurisdiction, litigants may be more successful

133. Baram, *supra* note 129, at 58.

134. *Id.*

135. *Id.*

136. Peggy Rodgers Kalas, *International Environmental Dispute Resolution and the Need for Access by Non-State Entities*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 191, 207 (2001).

137. *Id.*

138. *E.g.*, Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Inter-Am. C.H.R., Ser. C/doc. 79 (2001), <http://www.law.arizona.edu/Journals/AJICL/AJICL2002/vol191/KJudgment.pdf> (asserting property rights of indigenous tribes and human rights violations against Nicaragua); Lopez Ostra v. Spain, App. No. 16798/90, 20 Eur. Hum. Rts. 20 Eur. Ct. H.R. (ser. A) at 303 (1994), http://www.indianlaw.org/IACHR_Judgment_Official_English.pdf (last visited Sept. 26, 2004) (asserting health violations against Spain regarding air pollution).

139. The court has jurisdiction over an intentional attack launched with "the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated . . ." The Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 37 I.L.M. 999, art. 8(2)(b)(iv), http://www.un.org/law/icc/statute/99_corr//.htm (last visited Sept. 26, 2004) [hereinafter Rome Statute of ICC].

framing an act as a crime against humanity under article 7(1)(k), which prohibits actions "causing great suffering, or serious injury to body or to mental or physical health."¹⁴⁰ Unlike the International Court of Justice,¹⁴¹ the International Criminal Court may assert jurisdiction over non-state actors¹⁴² such as MNCs.

2. *National justice systems are more evolved than international panels but there are often jurisdiction problems.*

In the United States, private civil law has been the overwhelming force for inducing compliance with environmental laws, and deterring the derogation of these laws. Both injured victims and shareholders have the opportunity to directly target MNCs.

a. *Injured foreign plaintiffs have not had much success in the United States*

Given that many judiciaries in the host countries of MNCs are weak, plaintiffs have often tried to bring suit in U.S. courts. However, foreign plaintiffs have thus far had little success in bringing tort claims against MNCs. A number of Alien Torts Claims Act (ATCA)¹⁴³ cases against MNCs for international environmental rights violations have just begun to make their way through the U.S. court system. As of yet, none have found an MNC liable for a massive environmental tort.

Courts have some discretion to accept cases involving foreign plaintiffs and domestic defendants. However, they have tended to dismiss such cases on bases of forum non conveniens, failure to join indispensable parties, or lack of subject matter jurisdiction.¹⁴⁴ Other problems with the ATCA relate to its narrow application, with respect to the types of actions¹⁴⁵ and the actor.¹⁴⁶

Another difficult aspect of international torts is assigning liability among the various actors. "For instance, in the case of the 1990 Iraqi invasion of

140. *Id.*

141. See Statute of the International Court of Justice, *opened for signature* Oct. 24, 1945, art. 34, para. 1 ("Only states may be parties in cases before the Court.").

142. See Rome Statute of the ICC, *supra* note 139, at art. 1 (The Court "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern.").

143. 28 U.S.C. § 1350 (2003).

144. In re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd in part and rev'd in part*, 809 F.2d 195 (2d Cir. 1987).

145. Courts have construed the statute narrowly, finding that it "applies only to shockingly egregious violations of universally recognized principles of international law." Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983).

146. See Doe v. Unocal Corp., 963 F. Supp. 880, 890 (C.D. Cal. 1997). While the ATCA has been found to apply to private corporations, at present, judicial interpretation requires that a corporation act in concert with a State for liability to incur under ATCA. *Id.*

Kuwait, many of the chemicals responsible for environmental and human harm are considered "dual use," meaning they could be used both for military as well as agricultural and industrial purposes.¹⁴⁷ In that case, the MNCs of many industrialized nations provided the Iraqi government with the chemicals that caused the damage. This leads to complex questions of joint liability between multiple MNCs and between MNCs and their host countries.

b. Shareholder actions are a largely unexplored avenue.

Injunctive shareholder actions are possible if the shareholders discover that their corporation is engaging in unlawful activity, and that the enforcement entity has declined to take the appropriate action.¹⁴⁸ Likewise, shareholders may be able to take action if they learn that the corporation is engaging in a series of torts and that the victims of such torts are unlikely to bring actions against the corporation, "perhaps because, as in the case of many environmental torts, the injuries will become obvious only years later."¹⁴⁹ In that case, shareholders could bring an ultra vires suit against the corporation to enjoin its unlawful activity.¹⁵⁰ In practice, however, it is difficult to bring such actions against MNCs. Not only are MNCs often in compliance with the laws of the jurisdiction that is hosting its production facilities, they may have an easier time concealing their actions in these jurisdictions (depending on disclosure laws).

An innovative method to gain management's attention would be for shareholders to propose and vote on binding amendments in company bylaws that would direct company policy. *International Brotherhood of Teamsters v. Fleming Cos.*¹⁵¹ tested the validity of this process. In that case, the Oklahoma Supreme Court upheld the Teamsters' amendment of a bylaw to prevent the board from issuing a poison pill without shareholder approval. The Teamsters had submitted a proxy proposal for the annual board meeting concerning the proposed amendment, which included a provision for majority vote by shareholders. When the board refused to include the resolution in its proxy statement, the Teamsters sued. The Oklahoma Supreme Court held that "under Oklahoma law there is no exclusive authority granted boards of directors to

147. Kalas, *supra* note 136, at 207.

148. In 1855, the Supreme Court said that it was:

no longer doubted, either in England or the United States, that courts of equity . . . have a jurisdiction over corporations, at the instance of one or more of their members; to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals and profits.

Dodge v. Woolsey, 59 U.S. 331, 341 (1855).

149. Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1353 (2001).

150. *Id.*

151. *International Bhd. of Teamsters Gen. Fund v. Fleming Cos.*, 975 P.2d 907 (Okla. 1999).

create and implement shareholder rights plans, where shareholder objection is brought and passes through official channels.”¹⁵² Shareholders concerned about environmental abuses could act as a class to first attempt to amend a bylaw, and then to bring suit if MNC management fails to accept the amendment.

VI. WHAT IS THE OPTIMUM COMBINATION OF TRADE AND ENVIRONMENTAL MEASURES TO CONTROL MNCs?

The environmental abuses of MNCs can best be addressed with a system of controls directed at balancing the U.S.’s trade deficit, supplemented with environmentally oriented measures to target specific abuses and raise consumer awareness. In terms of pure efficacy, trade remedies that direct national economic policies are likely to have greater force in an international arena than “soft law” controls oriented towards greater environmental protection. It is easier and faster for the United States to reduce its imports than it is for the United States to convince other countries to join in international environmental agreements, or face the criticism that comes with unilateral environmental measures. But trade remedies alone are not enough to break through the apathy that the average consumer experiences, to foster a spirit of international environmental cooperation, or to remedy past environmental wrongs. With these concerns in mind, there are several fresh “environmental” solutions that might be used to supplement trade remedies.

A. *Some Environmentally Oriented Remedies Could be Implemented With Small Changes to the Existing Trade Structure.*

1. *Public access could be increased.*

The heads of member states in the WTO have an overwhelming interest in preserving their positions in the world trade regime. Accordingly, states tend to bring action against “anti-environmental” policies only when these measures disadvantage the complaining state’s trade position. Given the burden of proof and the pro-trade slant of the dispute panels, there is no one to act simply on behalf of environmental interests. Member states should resolve the conflict of interest they have between protecting the environment and promoting trade by establishing separate entities to act as ombudsmen for environmental interests.

A model for these “environmental ombudsmen” is the system found in Italy, where the national government gives standing to NGOs to bring environmental claims.¹⁵³ The NGOs must be present in all five regions of the country, be established prior to the cause of action, be certified by the

152. *Id.*

153. Istituzione del ministero dell’ambiente e norme in materia di danno ambientale, 162 Supplemento ordinario alla Gazz. Uff. [Presidential Decree 349, July 8, 1986].

government, and have democratically elected board members. Certified NGOs may initiate suit or intervene in existing suits without having to allege particular injury. This relieves the state from the burden of environmental guardianship and provides a measure of balance.

2. *Multilateral Environmental Agreements could be created within the WTO.*

The WTO already permits groups of states to form side agreements known as "codes," which address a wide range of issue-areas not directly touched on by the GATT.¹⁵⁴ Codes operate as independent treaties by "binding signatories and creating independent obligations and compliance mechanisms."¹⁵⁵

An environmental code would be most successful if it could change the basis for conveying most favored nation status by allowing countries to adopt more stringent environmental standards than allowed by the WTO, and according corresponding benefits only to the other countries in the code. For instance, member states in the code could impose countervailing duties on products manufactured by non-member countries that fail to meet the code's environmental standards. Similarly, countries within the code could allow anti-dumping remedies on the basis that the total social costs in the producing country, including pollution as well as ordinary product costs, are greater than the price charged within the importing state. Such a code would be similar to the Montreal Protocol, which actually allows members to assert controls over non-members (thus far without WTO-based challenges). Perhaps the fact that these agreements are multi-lateral means that they are less likely to be challenged by the "anti-protectionists" than similar, unnegotiated restrictions imposed unilaterally by individual countries.

154. The following agreements were negotiated during the Tokyo Round of GATT negotiations: Tokyo Round Agreements, Understandings, Decisions and Declarations; Agreement on Government Procurement; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Antidumping Code); Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (Customs Valuation Code); Agreement on Import Licensing Procedures; Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (Subsidies Code); Agreement on Technical Barriers to Trade (Standards Code); Agreement on Trade in Civil Aircraft; Declaration on Trade Measures Taken for Balance-of-Payments Purposes; Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (Enabling Clause); International Dairy Agreement; International Bovine Meat Agreement; Safeguard Action for Development Purposes; Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance. Most of these agreements were superseded by new agreements negotiated during the Uruguay Round. For the full texts, see WorldTradeLaw.net, *Tokyo Round Agreements, Understandings, Decisions and Declarations*, at <http://www.worldtradelaw.net/tokyoround/> (n.d.) (last visited Nov. 19, 2004).

155. Brett Frischmann, *A Dynamic Institutional Theory of International Law*, 51 BUFF. L. REV. 679, 771 (2003).

The duties suggested here could, in theory, become part of the WTO as a whole if a country were able to successfully frame the less stringent standards of the exporting country as an export subsidy.¹⁵⁶ After all, environmental standards cost, and where governments fail to impose them, they allow manufacturers to save on compliance costs.¹⁵⁷ Likewise, where governments fail to enforce fines for environmental violations, they are foregoing a revenue, (and therefore offering a subsidy).¹⁵⁸ However, a challenger seeking to use these theories would have to prove that the "subsidy" is impermissible under the WTO. If the "subsidy" is framed as non-specific general industrial support, it would probably survive a challenge.¹⁵⁹

Significantly, the proposed reforms discussed here address only state actions. They do not directly target MNCs. Judicial instruments are better able to target MNCs because they can deal with different situations on an ad hoc basis more effectively than a political process can.

B. *Judicial Remedies are Needed to Directly Target Individual MNCs.*

1. *Judicial remedies would be far more likely to work if environmental rights were considered part of customary international law.*

One of the main reasons why the ATCA has not been a successful tool for redress against MNCs in U.S. courts is the hesitance of judges to bring environmental rights under the banner of rights that makes up the law of nations.¹⁶⁰ But, there are many reasons why environmental rights and the trade

156. If the proposed duties are found to violate the WTO Agreement, their proponents may seek to pursue them under a general exception to the WTO Agreement, or an amendment. Article IX of the WTO Agreement allows for a waiver of WTO obligations in "exceptional circumstances" provided that "any such decision shall be taken by three fourths of the Members unless otherwise provided for." However, waivers typically last only a year, and cannot cover cases that fall under any other exceptions or escape clauses of the GATT. Policy objectives do not constitute exceptional circumstances since such objectives are based on achieving future circumstances. See Understanding in Respect of Waivers of Obligations under the GATT 1994, Apr. 15, 1994, WTO Agreement, http://www.wto.org/english/docs_e/legal_e/11-25_e.htm. The procedure for amending the WTO Agreement under Article XXX, which also requires a three-fourths vote, would be no more difficult and could guarantee a more sustainable result. *Id.*

157. See generally Richard B. Stewart, *International Trade and Environment: Lessons from the Federal Experience*, 49 WASH. & LEE L. REV. 1329, 1353-57 (1992) (discussing further the cost of compliance with environmental standards).

158. See Agreement on Subsidies and Countervailing Measures, *supra* note 42.

159. *Id.* at art. 8.

160. *E.g.*, *Ullonao Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 146-47 (2d Cir. 2003). The hesitance of courts to accept the briefing of Professor Jordan Paust from the Law Center of the University of Houston, and Professor Gunther Handl from Tulane University Law School, who cited numerous international documents as evidence of the rights asserted by plaintiffs under international law, is disturbing. It appears that the court improperly tried to apply *Ullonao Flores* as precedent even though the facts and claims in that case were distinguishable from those in *Ullonao Flores*. See *id.*

of products that harm environmental rights—generate sufficient international concern to warrant treatment under customary international law. First, provisions for environmental protection have found their way into the major laws and constitutions of a number of representative states. There are a number of constitutions that provide the right to a clean environment, ranging from Argentina¹⁶¹ to Russia¹⁶² to the Philippines,¹⁶³ with corresponding national supreme court cases upholding these rights. Further, it can be argued that environmental rights are of mutual concern because one nation's actions can have an impact on the rest of the world. In particular, trade has trans-boundary effects and may unfairly disadvantage members of one country (the host country) as a result of its lesser-developed status.

If the right to a clean environment is recognized as a law of nations, then (1) countries would have a more legitimate basis for using trade measures to protect their environment, and (2) individuals and countries injured by abusive MNC practices would have a cause of action against the MNCs in an international court, as well as in many national courts.

2. Injured individuals should have a right of action against MNCs in their countries of incorporation, with an appeal to an international WTO/UN committee.

At the time of the original GATT, the nation-state was the largest player in the international arena, and corporations were "creatures of the state" in which they were incorporated.¹⁶⁴ Today, corporations exist in an international context with the specific intent to transact business worldwide. Unlike the

161. Const. Arg. art. XXXXI, http://www.hrcr.org/docs/Argentine_Const/First_Part.html (last visited Sept. 25, 2004); see Katan c/ P.E.N. (Secretaría de Intereses Marítimos) s/ Amparo (La Ley 1983-D-567).

162. KONST RF art. XXXXII, <http://www.fipc.ru/fipc/constit/ch2.html> (last visited Sept. 25, 2004); see Petition of the Social-Ecological Union, and others, to void orders of the Government of the Russian Federation and others about the removal from protection of woods of "First Group," May 12 1999, *decided* December 5, 1999], <http://webcenter.ru/~ecojuris/RJURIS/vsles3.htm>.

163. PHIL CONST. art. 2, §§ 15-16; see *Minors Oposa v. Sec'y of the Dep't of Env't & Natural Res.*, 33 I.L.M. 173 (1994).

164. See, e.g., *Yazoo & Mississippi Valley R.R. Co. v. Clarksdale*, 257 U.S. 10, 26 (1921) ("The corporation is completely a creature of a state, and it is usually within the function of the creator to say how the creature shall be brought before judicial tribunals."); *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906).

[T]he corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers.

Id. at 75.

restrictive charters of the 1800s, today's charters allow corporations to conduct any form of business not prohibited.¹⁶⁵ At the same time, the power of the nation-state has declined relative to international organizations, cultural divisions within states, and MNCs. The notion that corporations can only be governed by the rules of their places of incorporation must be modified to reflect the shift in powers and functions. National borders should not allow international players to escape liability. MNCs should be prepared to respond to international law.

Currently, injured plaintiffs have no meaningful forum where they can bring a claim against an offending MNC.¹⁶⁶ Recognizing that neither their workers nor their environment benefits from unchecked MNC activity, developed countries should form a treaty that grants standing to a foreign plaintiff to bring an action against an MNC in the parent company's state of incorporation.

The treaty would first have to define MNC, for example as an economic entity in whatever legal form, which owns, controls, or manages operations, either alone or in conjunction with other entities in two or more countries. The treaty should set the minimum number of employees needed to constitute an MNC, and clarify the term "employment" to include independent contractors or anyone who receives material compensation from an MNC.

The treaty should also establish an appeals court with representatives from both the WTO and the U.N. When a plaintiff has exhausted the remedies of the MNC's company of incorporation, the plaintiff would have standing to make an appeal before this court. NGOs that could demonstrate an injury resulting from a particular MNC would have the same access as an injured individual. The court must be allowed to impose fines against the MNC sufficient to make the plaintiff whole.

VII. WHAT IS THE OUTLOOK FOR THE GLOBALIZED ENVIRONMENT?

This paper has analyzed the increasing lack of social and environmental controls under the present trade regime, and how MNCs have benefited from and contributed to this system. It has presented measures to correct the trade imbalance, thereby reducing MNCs' incentives to relocate production forces in developing countries with inadequate social and environmental controls. Some reforms are possible within the existing system, but others may require withdrawal from the WTO. Because large-scale trade-balancing reforms may

165. See Gregory A. Mark, *Crisis in Confidence: Corporate Governance and Professional Ethics Post Enron* Sponsored by Wiggins & Dana: *The Legal History of Corporate Scandal: Some Observations on the Ancestry and Significance of the Enron Era*, 35 CONN. L. REV. 1073, 1079 (2003); Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 426-427 (2003).

166. It is difficult to argue that injured plaintiffs, often indigent and without the benefit of contingency fees, should take advantage of the weak judicial institutions of the lesser-developed country that is host to the offending MNC.

not target all of the factors that allow MNCs to commit environmental abuses, reforms that are specifically oriented to environmental protection may be necessary. This paper has analyzed the existing proposals for reform and offered additional suggestions.

At the heart of the problem is the degree to which consumers want cheap products, and are not prepared to make sacrifices for vague and broad goals like balancing deficits and protecting the global environment. But with the realization that the United States needs to match its imports to its exports should come the realization that there may be less choice for its consumers. Clearly, this could be a big disappointment for people who have come to rely on cheap clothing made in MNC-owned overseas sweatshops. At the same time, American manufacturers could seize on the patriotic idea of doing more with less as a selling point. The concept is similar to environmental labeling because the consumer is pacified by knowing she has selected a morally superior product. One example is the decision of Patagonia, an outdoor equipment manufacturer, to limit the number of different styles of ski pants they manufacture. Patagonia's rationale was that since all of their different products come at some environmental costs limiting the number of styles pants they make would eliminate some of these costs.¹⁶⁷ Yvon Chouinard, the founder of the company, explained the rationale as follows: "Last year, when we decided to limit our growth, we also committed ourselves to a life-span of a hundred years. A company that intends to be around that long will live within its resources, care for its people, and do everything it can to satisfy its community of customers."¹⁶⁸ After all, do people really need more than two styles of ski pants from which to choose?

167. PATAGONIA CATALOG 2 (Winter 1992).

168. *Id.*