TRADE LIBERALISATION AND ENVIRONMENTAL PROTECTION: WHY THE PHILIPPINE GOVERNMENT IS GOIN' BANANAS FOR ITS FAILURE TO PENETRATE THE AUSTRALIAN TROPICAL FRUITS MARKET[1]

FERNANDO SANCHEZ PENARROYO

I INTRODUCTION

An international trade agreement will always be a compromise by each of the contracting states between each other's aspiration to attain economic benefits vis-à-vis their desire to preserve optimum sovereignty. Early trade diplomacy saw the preservation of sovereignty and prevention of restrictions on courses of action, which manifested a tendency towards preferring non-binding agreements. Such agreements left the optimum freedom of action to the state by use of flexible drafting, the use of 'escape clauses' and weak enforcement procedures. Trade agreements were then regarded by contracting states as not a binding legal regime but more of a diplomatic-political framework that could provide a basis for negotiation between states for the purpose of attaining a balance between trade benefits and obligations. Recently, there appears to be the 'juridisation' of international trade relations, which arose out of a growing demand by states to regulate trade relations using norms and enforcement procedures that are legal in character but creating a significant limitation on state sovereignty.[2] What complicates the matter even more is that the purpose these trade agreements seek to achieve - trade liberalisation, seems to be locked in a cause and effect relationship with environmental degradation. International trade law and environmental law are regarded as two sides of the same coin. Despite the assurance of trade liberalist that opening markets and lifting government restrictions on trade will result in resources being consumed by the most efficient producers causing less damage in the long run,[3] many environmentalists have been unrelenting in their World

[1] International Trade Law Research Paper for University of Melbourne LLM 22 August 2002
[2] Arie Reich, 'From Diplomacy to Law: The Juridization of International Trade Relations' (Winter-Spring 1996-1997) 17 *Nw. J. Int'l L. & Bus.* 775, 775-777.
[3] Jeffrey L. Dunoff, 'Resolving Trade-Environmental Conflicts: The Case for Trading Institutions' (1994) 27 *Cornell Int'l L. J.* 607, 615.

Trade Organisation (WTO)-attacks, characterising the General Agreement on Tariffs and Trade (GATT)-WTO system as the imperialist of the new world order.

Trade restrictions pursuant to national environmental and conservation legislation have been the preferred unilateral approach to global ecological problems and whether these measures are just used to disguise protectionist aims have often been the main issue in numerous trade disputes among member countries of the WTO. As the rest of the global community will not surely have the same environmental ethics with or rigid process standards as the importing country, trade conflicts are inevitable.[4] The result is that an economically powerful country's use of trade barriers to impose its environmental agenda may only lead to international tension, especially between developing and developed countries.[5]

This paper in fact analyses one such example of an escalating trade tension arising from environmental standards imposed by Australia on Philippine tropical fruit exports. Manila has been asking Canberra to allow Philippine high-value fruit exports – mangoes, bananas and pineapples – since 1993.[6] In the 2000-2001 period, Australia exported $802 million (A$1.5 billion) worth of goods to the Philippines but imported only $273 million (A$512 million) worth of local products. The export of fresh tropical fruits to Australia is expected to narrow a trade imbalance between the two countries currently favouring Australia.

In 2000, the Philippines initiated the filing of a dispute settlement proceeding against Australia before the WTO for Canberra's refusal to allow the importation of tropical fruits. Canberra finally allowed access – but only to mangoes, and under a special commodity understanding that the fruit should come only from Guimaras Island in Western Visayas.[7] The filing of a formal complaint against Australia was

[4] Ingo Walter, 'International Economic Repercussions of Environmental Policy: An Economist's Perspectives' in Seymour J. Rubin and Thomas R. Graham (eds), *Environment and Trade: The Relation of International Trade and Environmental Policy* (1982) 24.
[5] Stephen Fleischer, 'The Mexico-U.S. Tuna/Dolphin Dispute in GATT: Exploring the Use of Trade Restrictions to Enforce Environmental Standards' (1993) 3 *Transnat'l L. & Contemp. Probs.* 515,547-548.
[6] 'RP-Australia Farm Trade Battle Nearing Deadline', *BusinessWorld* (Manila) 27 June 2002.
[7] The concession was made after the Philippine government reduced by twenty percent (20%) cattle imports from Australia. This was under a reciprocal trade policy, which provided that the Philippines

deterred only by a commitment made by Canberra to complete the import risk analysis (IRA) on Philippine bananas and pineapples by June 2002.[8] On 1 July 2002, the Australian Department of Agriculture, Forestry and Fisheries issued the draft IRA report prepared by Biosecurity Australia in response to the Philippine application to export bananas to Australia recommending against accepting the bananas on the basis that a pest known as Moko would come with them and ravage Australian fruit farms.[9] Also on the same day, Canberra also released its response to the Philippines' application to sell pineapples to Australia where the authorities also recommended against importing the pineapples unless the crown of the fruit is removed (it harbours pests) and the remaining part (the edible bit) is treated with methyl bromide.[10] Under the report, Philippine-grown pineapples will be allowed entry to the Australian market provided they also meet the following requirements: Australian accreditation of the source pineapple farm or plantation and of its fumigation facilities; scientific evidence showing the source farm is free from a strain of the disease *Fusarium subglutinans*; fumigation with methyl bromide at registered fumigation facilities; compliance with storage requirements; phytosanitary certification and documentation; on-arrival inspection by the Australian Quarantine and Inspection Service; and review of policies after the first year of trade with the exporting country.[11]

Filipino banana growers however claim that Moko infections have not been detected in Cavendish banana – the variety eyed for export to Australia. Also, leaders of the Philippine pineapple industry claim that the measures are meant to discourage Filipino producers from attempting to export pineapples to Australia since such requirements reduce the shelf life of the fruit to 15 days from harvest. They argued that it is practically pointless to sell Philippine-grown pineapples to Australia as shipping time is estimated at ten (10) days and pineapples will rot just a few days after distribution and retail in fruit stands. The IRA draft would only be finalised after sixty

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will import farm products only from countries that have also opened their markets to Philippine exports.

[8] 'Philippines Eyes New Zealand for Increase Farm Trade', *Dow Jones International News*, 11 July 2002.

[9] The DAFF said: 'Measures to deal with the black sigatoka, freckle and mealy bugs are identified. However, the report recommends that imports of bananas from the Philippines should not be permitted because there are no feasible means for reducing the quarantine risks associated with Moko to meet Australia's appropriate level of protection.' 'DA Hits Australia Move on Bananas', *BusinessWorld* (Manila) 3 July 2002.

[10] Ibid.

[11] Ibid.

days of its release when the Philippine government and Filipino fruit growers submit their response to every point raised on the draft analysis. Last-minute talks are under way on the pineapples, with a Philippine proposal to replace methyl bromide treatment with hydrocyanic acid, which Manila authorities say is already used on pineapples exported to its traditional markets, including Japan, South Korea, the Middle East and New Zealand. The Philippine government finds the use of methyl bromide, a known ozone-depleting substance that is increasingly prohibited in many countries, as unreasonable since it is considered an environmental hazard.

Australia is taking a hardline position tougher than other developed nations that import Philippine fruit because most other developed nations do not have a domestic industry that could be harmed by an imported pest.[12] Prior to the release of the draft report, Biosecurity Australia met with banana growers and wholesalers from New South Wales and Queensland to discuss the draft IRA in response to the Philippine application to export bananas to Australia. According to the Australian Banana Growers' Council (ABGC), the report raises more issues and concerns, particularly the use of chlorine dips to wash export trip. The ABGC pointed out that 'the efficacy of chlorine is variable and decrease with contamination by organic matter which is a natural consequence of the washing process.'[13] They also wonder 'whether Philippines employees can continually work with the fumes and their hands regularly dipping in the solution of that concentration.'[14] The Australian-New Zealand Chamber of Commerce also joined the fray when it issued a statement saying that 'while the Philippines is bent on its fight to remove trade restrictions on its banana exports, it should also examine the trade barriers it has placed against Australian fruits…[as] there are certain fruits from regions in Australia like citrus fruit, oranges, apricots, peaches that are allowed in other countries through a simple quarantine regime whereas the Philippines is imposing a much stricter quarantine regime than it should.'[15] The issue particularly riles the Philippines and it is likely to lead to immediate cuts in dairy imports from Australia if the final decision does not give some ground to Manila. As it is the Philippine government is now holding bilateral discussion with New Zealand on a possible expansion of trade between the two

[12] 'Banana Split Ferments into Fruity Dispute', *Australian Financial Review* (Sydney) 3 July 2002.
[13] 'Queensland Banana Growers to Discuss Philippines Imports', *AAP News*, 31 May 2002.
[14] Ibid.
[15] 'Aussie Group Urges RP Government to Play Fair, Too', *BusinessWorld* (Manila) 30 April 2002.

countries, now that Manila's bid to export tropical fruits to Australia has been practically rejected.[16] Amidst call for a 'progressive boycott' of Australian goods from some Philippine lawmakers, the Philippine Department of Agriculture has stated that local importers of Australian dairy products have committed to look for other suppliers in the event Canberra refuses to allow the entry of Philippine tropical fruits to Australia.[17] While Filipino producers have urged the Philippine government to approach the issue on a war mode, government have deemed it best to follow the path of bilateral consultations first. Meanwhile, a peasant-based research and advocacy non-governmental organisation (NGO), the Philippine Peasant Institute, argued that Australia's use of unreasonable quarantine standards clearly constitutes a de facto non-tariff barrier and urged that government to withdraw from the Cairns Group, an 18-member coalition of agricultural exporting countries which Australia heads.[18]

This paper is structured as follows: Part II discusses how ecological interdependence is perceived as a threat to state sovereignty. It also touches the conflict between two development strategies i.e., the 'right to pollute at self determined levels' and sustainable development, and the aspiration to harmonise environmental and trade concerns. Part III surveys international trade legalisms, which combines the two incompatible theory of free trade and the foreign relations theory of 'realism.' It also delves on the different competing normative approaches and visions of the proper functions of a world trade governance system. It continues with a discussion of the role of non-state parties in WTO dispute resolution and examines in more detail the Nichols-Shell debate on granting private party participation to NGOs. Part IV is directed to agricultural trade negotiations where tension between environmental standards and economic relations is greatest. It examines non-tariff barriers and discusses the Agreement on Agriculture, Sanitary and Phytosanitary Agreement, Agreement to Technical Barriers to Trade, Codex Alimentarius and the implications of pesticide regulations. Part V attempts to evaluate the Philippine government's position in the event a trade dispute with Australia over tropical fruits export restriction is lodged with the WTO on the assumption that the

[16] 'RP Eyes More Markets for Fruits', *Today* (Manila) 19 July 2002.
[17] 'Philippine Senator Calls for Boycott of Australian Goods', *Dow Jones International News*, 2 July 2002.
[18] 'PPI Criticises Australia on Banana Issue', *Philippine Peasant Institute Press Release* (Manila) 5 July 2002.

IRA becomes final. The evaluation is done in light of the Shrimp-Turtle, Beef Hormone and Salmon disputes and the agricultural agreements discussed in Part IV, although, there is no notion of binding precedents under the GATT-WTO dispute resolution mechanism as the panel or the appellate body is not oblige to follow previous decisions. This paper will concentrate on and analyse the possible legal arguments that can be presented by the Philippine government but will not deal with the Australian legal position. The author then concludes that though the Philippine government may have a case against Australia, the problem is best remedied through a negotiated institutional arrangement that will provide entry of Philippine agricultural produce to Australia and at the same time define the practicable standard of risk that Australia will take for allowing such entry.

II THE TRADE AND ENVIRONMENT CONFLICT

The modern international legal system revolves around two principles: trade and peace/war. Trade is a principle of discourse, a pathway that allows nations to move their persona (primarily for commerce and inherently for survival) beyond the territorial blocks they inhabit.[19] In this sense, trade is a moving or trans-national principle while the rest of public international law is concerned with the metaphysical notion in movement, the peace side of things with actions in and against the territorial block.[20] Due to the fundamentally different natures of the two core principles of trade and peace, the international law projects they instigate are different. In the realm of peace (public international law), the international law project is one of regulating the sovereign difference that emanates from territorial sovereignty and of managing the antinomies in search of a common accord.[21] In the realm of trade (international trade law), the project is much different as the starting point is a nebulous common accord, that of wealth maximisation and the need for trade to survive, which the project is designed to facilitate.[22] In one instance (peace), we are heading towards a common accord through regulation (to overcome sovereign difference), while in the other case

[19] Wolfgang Fikentscher, 'GATT Principles and Intellectual Property Protection, GATT or WIPO?' in Freidrich-Karl Beier and Gerhard Schricker (eds), *New Ways in the International Protection of Intellectual Property* (1989) 121.
[20] Brian F. Fitzgerald, 'Trade-based Constitutionalisms: The Framework for Universalising Substantive International Law?' (1996-97) 5 *U. Miami Y. B. Int'l L.* 111, 125.
[21] Ibid 126.
[22] Ibid.

(trade), we have a common accord and are regulating to deregulate, prosper the common accord, and open up the pathway to wealth maximisation and survival.[23]

A *TRADE AS A LIMITATION TO SOVEREIGNTY*

Trachtman suggests that in order to understand sovereignty, we must first recognise a 'law of conservation of sovereignty' which views sovereignty as an allocation of power and responsibility, is never lost, but only reallocated.[24] The attractiveness of a reallocation of sovereignty should be measured by reference to whether it allows social goals to be achieved more effectively.[25] In his discourses on international law, David Kennedy employs a framework of analysis moving through a chronological progress narrative of sources, process and substance.[26] Using Kennedy's framework, international law expanded from a role of mere coordination (coexistence) to one of substance (cooperation). With the move to substance, international law was no longer simply mediating the interaction of territorial units but was now determining the welfare of the citizens of the world. As a result however, the move from process to substance became problematic as it touched into the heart of sovereignty and placed a greater strain on universality (i.e., the degree to which states could and would agree).[27] The Uruguay Round of GATT has presented us with a trade structure that no longer seeks only to deregulate or regulate in the name of some narrow universal principle of free trade, but one that seeks to regulate sovereignties for the purpose of finding universality.

Global ecological interdependence is at least as strong a threat to state sovereignty, as is economic interdependence.[28] However, a nation's formal sovereignty does not, as an illustration, prevent the ozone layer over its territory from being depleted or limit the amount of acid precipitation caused by emissions in other

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[23] Ibid.
[24] Joel P. Trachtman, 'Reflections on the Nature of the State: Sovereignty, Power and Responsibility' (1994) 20 *Can.-U.S. L.J.* 399, 400.
[25] Ibid.
[26] David Kennedy, *International Legal Structures* (1986) 8; David Kennedy, 'A New Stream of International Law Scholarship' (1988) 7 *Wis. Int'l L.J.* 1, 30-36.
[27] Kennedy, New Stream, 35.
[28] For more on the relationship between sovereignty and international environmental issues, see Susan H. Bragdon, 'National Sovereignty and Global Environmental Responsibility: Can the Tension be Reconciled for the Conservation of Biological Diversity?' (1992) 33 *Harv. Int'l L.J.* 381; David B. Newsom, 'The New Diplomatic Agenda: Are Governments Ready?' (1989) 65 *Int'l Aff.* 29.

nations that reach its territory. Global environmental issues present 'problem[s] to which all nations contribute, by which all will be affected, from which no nation can remotely hope to insulate itself, and against which no nation can deploy worthwhile measures on its own.'[29] Thus, blissfully ignorant of state boundaries, international environmental problems are stubbornly antithetical to the doctrine of state sovereignty.

Historically, developing nations perceived a conflict between a desire to develop as rapidly as possible and a belief that the costs of environmental regulation or protection, if imposed, would slow the growth of their economies.[30] As a consequence, developing nations typically have favoured expedited development without extensive regulation and have been suspicious of pressure from developed nations to regulate their environments. Developing nations argue that they are entitled to the same benefits as developed nations, which benefited from externalising the costs of their own development.[31] Sovereignty and 'the right to pollute at self-determined levels,'[32] limited only by the principle of *sic utere*,[33] were the central principles governing the relationship between development and environmental conservation.[34] Sovereign developing nations have asserted this right to develop their resources as they see fit, and this right has been acknowledged though reluctantly, by more-developed nations. Some developing nations that have taken this approach and exercised their right to develop without regard to the environmental costs, have expanded their economies at rates that far surpass the growth of more developed nations over the past decade.[35] As there has been increasing recognition at both the national and international levels of the environmental costs of development, many

[29] See Norman Myers, *Ultimate Security: The Environmental Basis of Political Stability* (1993) 24.
[30] H. Jeffrey Leonard, 'Emergence of Environmental Concern in Developing Countries: A Political Perspective' (1981) 17 *Stan. Envt'l L.J.* 281, 283.
[31] Edward D. McCutcheon, 'Think Globally, (En)Act Locally: Promoting Effective National Environmental Regulatory Infrastructures in Developing Nations' (1998) 31 *Cornell Int'l L.J.* 395, 407-408.
[32] E.B. Weiss, 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1993) 81 *Geo. L.J.* 675, 704.
[33] This is a 'common law maxim meaning that one should use his own property in such a manner as not to injure that of another.' *Black's Law Dictionary* (6th ed. 1990) 1380.
[34] Ved Nanda, *International Environmental Law and Policy* (1995) 2.
[35] Daniel C.K. Chow, 'Recognising the Advantages of Taiwan's Direct Participation in International Environmental Law Treaties' (1995) 14 *Stan. Envt'l L.J.* 256, 257

nations have now rejected the traditional 'right to pollute' development approach and have adopted instead a sustainable development approach.[36]

The current trends in the trade vs. environment debate did not emerge in a vacuum, but obviously originated with the classic struggle between international law and domestic law. Many commentators attribute the origin of the current changes to the landmark Tuna-Dolphin Decisions.[37] These decisions led to a clearer, though more complex, understanding of the legal and political issues involved in reconciling trade with environmental concerns.

In resolving the trade vs. environment debate, different approaches have been proposed which cross over multilateral and unilateral lines: (1) the 'sticks-only' approach where individual countries or groups of countries punish polluters through trade barriers and other restrictions; (2) the 'carrots-only' approach where individual countries or groups of countries give polluters positive economic incentives to engage in more environmentally-sound activities; and (3) the mixture of 'sticks/carrots' to promote both free trade and a more protected environment.[38] To reach a more integrated approach to the trade vs. environment debate, one commentator eloquently noted four principles to keep in mind: 'commonality' or adhering to good neighbourliness; 'vitality' or recognising the ability to change one's patterns; 'sustainability' or promoting a stronger public conscience; and 'reality' or understanding that the global commons means different things to different people.[39] In addition, these approaches are subject to the problem of different perspectives and relative power differentials.

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[36] Sustainable development has been defined as 'development to meet the needs of the present generation without jeopardising the ability of future generations to meet their own needs.' This approach, unlike the traditional development approach, places a significant economic value on environmental resources consumed or degraded in the process of development. McCutcheon, above n 30, 409.

[37] Julie B. Master, 'International Trade Trumps Domestic Environmental Protection: Dolphins and Sea Turtles are Sacrificed on the Altar of Free Trade' (1998) 12 *Temp. Int'l & Comp. L.J.* 423, 425. See GATT: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 16 August 1991, 30 I.L.M. 1594 [hereinafter Tuna I]; GATT: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 20 May 1994, 33 I.L.M. 839 [hereinafter Tuna II].

[38] Howard F. Chang, 'Carrots, Sticks and International Externalities' (1997) 17 *Int'l Rev. L. & Econ.* 309, 320-323.

[39] James A.R. Nafziger, 'Integrating International and U.S. Law: Environmental and Related Problems: An Introduction' (1997) 21 *Vt. L. Rev.* 755, 756.

B *HARMONISING ENVIRONMENTAL AND TRADE CONCERNS*

The GATT-WTO rules are deeply sensitive to the fact that a national regulation that is nominally for the protection of the environment may be pretextual, that is, it may be nothing more than a thinly disguised trade protectionist measure. The Stockholm Declaration[40] does not directly address the question of the impact of environmental regulation on growth and international trade. The Rio Declaration does provide in three instances a broad framework for harmonising environmental and trade concerns, essentially giving trade issues primacy over environmental concerns in the event the two conflict.[41] In Principles 11, 12, and 16, the Rio Declaration specifically warns that pursuing aggressive environmental policies may have a potentially adverse impact on international trade.[42]

First, Principle 11 states that '[environmental] [s]tandards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.'[43] Principle 11 also admonishes developed countries to avoid 'eco-imperialism' (i.e., that act of demanding that developing countries adopt excessively stringent, costly, and arguably inappropriate environmental standards or risk import bans on shipments to developed countries).[44]

Second, principle 12 addresses the crux of the environment-trade debate, that environmental measures are disguised trade protectionism. It weighs in on the side of trade:

> States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. 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. Environmental measures addressing transboundary or

[40] Stockholm Declaration of the United Nations Conference on the Human Environment, 16 June 1972, U.N. Doc. A/Conf. 48/14 1972), 11 I.L.M. 1416 (1972).
[41] Rio Declaration on Environment and Development, 14 June 1992, U.N. Doc.A/CONF. 151/5 (1992) 31 I.L.M. 876 (1992), 31 I.L.M. 876 (1992) [hereinafter Rio Declaration].
[42] Rio Declaration, princs. 11, 12, 16.
[43] Ibid princ. 11.
[44] Ibid.

> global environmental problems should, as far as possible, be based on an international consensus.[45]

Principle 12 has a substantive and procedural message. On the substantive level, when trade measures are used in the name of environmental protection, means and ends should be linked closely and causally. On the procedural level, unilateralism and extraterritorial application of domestic laws are unacceptable. Multilateral approaches and consensus building are strongly encouraged.[46]

Third, Principle 16 counsels against the adoption of environmental policies that might distort world trade patterns: 'National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.'[47] Principle 16's 'polluter pays principle'[48] is tempered by Principle 11's warning to developed countries not to impose environmental standards on developing countries and by Principle 12's rejection of unilateralism and avoidance of trade protectionism in the name of environmental protection.[49]

III INTERNATIONAL TRADE: BRIDGING THE THEORIES OF FREE TRADE AND REALISM

All legalist conceptions of international trade governance share a common intellectual heritage. All are premised on the desirability of reaping at least some of the rewards gained from open trade between economic actors in world markets and all are elaborations of or reactions to the classic foreign relations theory of 'realism.'[50]

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[45] Ibid princ. 12.
[46] Ibid.
[47] Ibid princ. 16.
[48] The 'polluters pays' principle states that firms that pollute should be required to pay for the clean up and either absorb the costs or pass it on to the buyer in the form of higher prices for their goods (i.e. 'internalise the costs' in the jargon of the economists). See generally Candice Stevens, 'Interpreting the Polluter Pays Principle in the Trade and Environment Context' (1994) 27 *Cornell Int'l L.J.* 577.
[49] Kevin C. Kennedy, 'The Illegality of Unilateral Trade Measures to Resolve Trade-Environment Disputes' (1998) 22 *Wm. & Mary Envt'l L.& Pol'y Rev.* 375, 501.
[50] For some of the classic texts espousing the international relations theory of realism, see Robert Gilpin, *U.S. Power and the Multinational Corporation: The Political Economy of Foreign Direct Investment* (1975); Hans J. Morgenthau, *Politics Among Nations: The Stuggle for Power and Peace* (5th ed, 1973); Hans J. Morgenthau, *Scientific Man vs. Power Politics* (1946) 187-203; Joseph M. Grieco,

At the root of trade agreements is the liberal economic doctrine,[51] which aims to reduce government intervention in the flow of trade between sovereign states while recognising that free trade is economically beneficial to the acceding states. This doctrine originates in the theories of 18th and 19th century economists led by David Hume,[52] Adam Smith,[53] David Ricardo,[54] and John Stuart Mill.[55] As proposed by Ricardo in his 'Theory of Comparative Advantage',[56] a state will always prefer to specialise in industrial sectors in which it has a relative advantage (in comparison with other industrial sectors) and permit free trade with foreign countries in the remaining sectors with the aim of importing those products which it needs in return for the fruits of its most efficient labour. This theory, a refinement of the concept of specialisation referred to by Plato[57] and developed by Smith and Ricardo, provides a powerful intellectual underpinning for the policy of free trade which is the basis of international trade agreements.

However, the theory of free trade is unable to explain the necessity for reciprocity, which underlies international trade agreements and characterises most of the liberalisation achieved in recent decades in international trade.[58] Several commentators,[59] generally point to internal political failures which lead to a flawed decision-making process wherein too much weight is given to the concentrated interests of protected industries at the expense of the thinly spread interests of

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'Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism' (1998) 42 *Int'l Org.* 485.

[51] Michael J. Trebilock and Robert Howse, *The Regulation of International Trade* (1995) 20.

[52] In 1752, David Hume was the first to repudiate the claims of the mercantile economists of the 17th and 18th centuries, according to which governments should aim to limit imports and maximise exports with the purpose of increasing gold reserves. He showed the existence of a mechanism, which always tends to equalise the international balance of payments of states. Paul A. Samuelson, *The Theory of Economics* (3d ed, 1963) 648.

[53] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1890) Bk. IV, Ch. II.

[54] David Ricardo, *The Principles of Political Economy and Taxation* (1911) 77.

[55] John Stuart Mill, *Principles of Political Economy* (1848).

[56] Ricardo, above n 53, 77.

[57] See Plato, *The Republic* (Francis MacDonald Cornford trans., Oxford University Press 1941). Plato used the idea of specialisation and the division of labour in order to explain the origins of human society: 'So the conclusion is that more things will be produced and the work be more easily and better done, when every man is set free from all other occupations to do, at the right time, the one thing for which he is naturally fit.

[58] Reich, above n 1, 782.

[59] Arthur Downs, *An Economic Theory of Democracy* (1957); Mancur Olson, *The Logic of Collective Action* (1965); Charles K. Rowley and Robert D. Tollison, 'Rent Seeking and Trade Protection' in Charles K. Rowley et al. (eds), *The Political Economy of Rent Seeking* (1988) 217.

consumers who are forced to bear the costs of protection.[60] This situation is created by the superior organisational and lobbying power of protected industries in comparison to the large consumer public, whose individual per capita interests are much smaller than those of the members of the protected industries. As a result, it is very difficult to politically break down trade barriers unless compensation is offered to industry in the form of new foreign markets. These markets can be opened up to them as a result of international trade agreements that are based on reciprocal, as opposed to unilateral liberalisation.[61] A reciprocal trade liberalisation agreement is usually the only way in which export industries are guaranteed secure access to foreign markets. Export industries therefore prefer reciprocal trade liberalisation, and governments need this political support from 'their' export industries in order to overcome the protectionist resistance against trade liberalisation from import-competing producers at home. Every government is also affected by the 'prisoner's dilemma'[62] arising out of the desire to dismantle barriers in export-markets in addition to liberalisation at home.[63] If it disbands its barriers unilaterally, it will not have the wherewithal to 'pay' its partners for removing their barriers as well.[64]

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[60] For an extensive discussion of the politics of trade protection and the various economic models which have been developed to explain the political process in this connection, see Michael J. Trebilcock et al., *Trade and Transitions: A Comparative Analysis of Adjustment Policies* (1990) 171-192.

[61] Reich, above n 1, 782-783.

[62] The prisoner's dilemma is one of the most powerful analytic tools in social science for the investigation of problems of human cooperation. The original scenario depicted two prisoners charged with committing a crime but held in different cells. Police investigators approach each prisoner with the same set of choices: confess or remain silent. If either prisoner confesses and the other remains silent, the confessing prisoner goes free and the silent prisoner is sentenced to five years based on the testimony of the confessing prisoner. If both confess, they each receive a three-year sentence. If both remain silent, they each receive a one-year sentence. The problem is that neither prisoner knows what the other prisoner is going to do. If one prisoner remains silent, there is a risk that he will receive the worst result: five years in jail. Yet confessing may bring a higher jail term than if both remain silent. The safest choice is to confess, but the prisoners are both better off if they can trust each other to remain silent. See Robert E. Scott, 'Conflict and Cooperation in Long-Term Contracts' (1987) 75 *Cal. L. Rev.* 2005, 2022 n. 50.

[63] The dilemma is created because every state is likely to prefer preserving its own trade barriers, while anticipating a unilateral lowering of barriers on the part of the other state on the basis of that country's own internal interests. Thus, the state, which 'holds out' longest will ultimately succeed in opening its export markets without needing to open its own markets for imports. When both countries adopt this policy, ultimately, both loose. In this situation, it becomes worthwhile for each country to aim for co-operation in the form of an international agreement for reciprocal liberalisation. See Robert Axelrod and Robert O. Keohane, 'Achieving Cooperation Under Anarchy, in Kenneth A. Oye (ed), *Co-operation under Anarchy* (1985) 226; see also William R. Cline, 'Reciprocity: A New Approach to World Trade Policy?' in William R. Cline (ed) *Trade Policy in the 1980s* (1983) 121,152.

[64] Reich, above n 1, 783.

While economic free trade theory provides an account of how wealth increases through global trade, the foreign relations theory of realism explains how states behave in their relations with other states. Realism views states as the primary actors in world affairs and treats all states as autonomous, self-interested, and animated by the single-minded pursuit of power. The interstate competition for power, in turn creates a world that is characterised by anarchy.[65] In such an anarchic world, international law is 'but a collection of evanescent maxims or a repository of legal rationalisations,'[66] and international cooperative arrangements have an unstable existence. States that do not vigilantly protect their vital interests by taking a cautious (or even a duplicitous) approach to cooperation are severely penalised.[67] Fuelled by the savage experiences of World War II and the Cold War, realism has dominated international relations theory since 1945 and continues to be an important influence in contemporary political science and rhetoric.[68]

The problem of international trade governance arises because economic free trade theory and realism are not compatible. On one hand, international trade is useful to provide jobs, wealth, and economic stability for most states, and states that do not prosper economically fall behind in the race for international power. On the other hand, to gain wealth through international trade, states must lower economic barriers and other protective barriers that are necessary to protect states' vital interests against possible aggression from power-seeking rivals. Thus, trade means that states must cooperate in ways that expose them to potential economic and security threats.[69]

International trade governance systems structured along realist assumptions thus reflect a deep ambivalence of purpose. First, these systems assume that a state will comply with international trade regulators and adjudicators only when it is in the state's immediate self-interest to do so.[70] Second, the use of rigidly binding adjudication can actually be destructive to international relations. Such procedures

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[65] G. Richard Shell, 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organisation' (1995) 44 *Duke L.J.* 829, 855.
[66] Richard A. Falk, 'The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View' in Karl W. Deutch and Stanley Hoffman (eds), *The Relevance of International Law* (1968) 138.
[67] Grieco, above n 49, 485, 488.
[68] Ibid 485.
[69] Shell, above n 64, 856.
[70] Ibid.

force what are essentially political disagreements between power-maximising states into the legal straightjacket of formal adjudication, leaving the states ill-equipped to surface, join, and resolve the real problems and interests that have caused the dispute.[71]

A *CATEGORISING GATT-WTO LAW AND OBLIGATIONS*

There exists a great divide among Contracting Parties of the GATT-WTO as well as among commentators as to the nature of the GATT-WTO law and obligations. Over the years, there was a debate whether the GATT dispute settlement has either evolved into a judicial system or just a type of negotiation process. The parties to this debate also have argued, respectively, for an enhancement of GATT's judicial functions or called for a pure negotiating mechanism with each side declaring that the other's proposition would undermine the very nature of the GATT system.[72] The debate over the nature of GATT 'law' goes into the very heart of the greater debate over the nature of international law as Prof. Mora gives us a comprehensive list of categories into which commentators articulate their positions on the nature of international law and GATT law:

> One may draw a somewhat artificial line between those defending a 'rule oriented' approach in the conduct of international trade relations and those who defend a 'power oriented' approach [Jackson]. In the first category one would find the so-called 'legalists' [quoting Trimble] or 'rule partisans,' [quoting Koh] while the second would contain 'pragmatists' [Trimble] or 'rule skeptics' [Koh]. From the first perspective it has been said that 'GATT is both in form and practice an illuminating example of law in international relations' [Fawcett]. It is 'a model or prototype of a legalistic type system of international regulation' [Jackson & Davey]. According to this view GATT is

[71] Olivier Long, *Law and its Limits in the GATT Multilateral Trade System* (1985) 71-73.

[72] For the pro-legalist view, see William J. Davey, 'An Overview of the General Agreement on Tarriffs and Trade' in Pierre Pescatore et al. (eds) *Handbook of GATT Dispute Settlement* (1993) 5,70 [hereinafter GATT Handbook]; Andreas F. Lowenfeld, 'Preface to GATT Handbook', at xi; Ernst-Ulrich Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991) 221-244; James Fawcett, *Law and Power in International Relations* (1982) 87; John H. Jackson and William J. Davey, *Legal Problems of International Economic Relations* (Supp. 1986) 2, 282; Harold H. Koh, 'The Legal Markets of International Trade: A Perspective on the Proposed Canada-United States Free Trade Agreement' (1987) 12 *Yale J. Int'l L.* 193, 196-197. For the pro-negotiators view, see Olivier Long, *Law and its Limitations in the GATT Multilateral Trade System* (1985) 88; Philip R. Trimble, 'International Trade and the Rule of Law' (1985) 83 *Mich. L. Rev.* 1016, 1017; Hiroshi Kitamura, 'Japan in the GATT' in Reinhard Rhode (ed) *GATT and Conflict Management: A Transatlantic Strategy for a Stronger Regime* (1990) 47, 58; C.F. Teese, 'A View from the Dress Theatre of Trade Disputes' (1982) 5 *World Economics* 43, 51; David K. Tarullo, 'Logic, Myth and International Economic Order' (1985) 26 *Harv. Int'l L.J.* 533.

> law and international obligation [Henkin]. For some scholars GATT rules have even 'near-divine status' [Tarullo about Petersmann]. Others, although sceptical about the role of law in international trade relations, note that 'the international trade system looks more like a legal system than do the areas of international law' [Tarullo].[73]

Within the legal academy, the new WTO system represents a stunning victory for international trade 'legalists' in their running debate with trade 'pragmatists' over how international trade dispute resolution should be structured.[74] Pragmatists have supported formally non-binding methods of dispute resolution based on their belief that such systems provide the best means of coping with power relationships between countries. A diplomatic approach to dispute resolution, say pragmatists, renders trade politically sustainable in a rapidly changing world economy.[75] For their part, legalists have advocated the creation of rule-based trade tribunals that can move world trade toward a governance system based on 'the rule of law.'[76] They have argued that rule-based adjudication systems are fairer to both rich and poor nations and provide predictability and stability in the otherwise anarchic and volatile field of international trade.[77]

To supporters of GATT-WTO, the conversion of the GATT dispute settlement system into a binding and compulsory system with an appellate process was a significant and commendable achievement that furthered the trend from power-based to rule-based trade relations. The contrary view is that these were alarming developments that would exacerbate the negative impact of globalisation and further limit sovereign rights and powers to support meritorious non-economic values. These issues collectively became a rallying cry for a reassessment of global governance and notions of sovereignty. Calls came for the promotion of what has been described as the civil society, in which free market economic goals are integrated with and

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[73] Thomas J. Dillon, 'The World Trade Organisation: A New Legal Order for World Trade?' (1995) 16 *Mich. J. Int'l L.* 349, 392-393 citing Miquel Montan'a I Mora, 'A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes' (1993) 31 *Colum. J. of Transnat'l L.* 105, 109-110.
[74] Shell, above n 64, 833.
[75] Fred L. Morrison, 'The Future of International Adjudication' (1991) 75 *Minn. L. Rev.* 827, 838.
[76] George M. Berrisch, 'The Establishment of New Law Through Subsequent Practice in GATT' (1991) 16 *N.C.J. Int'l L. & Com. Reg.* 497, 500.
[77] Ernst-Ulrich Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991) xli-xlii.

subordinated to key values, such as environmental protection, culture and labour rights.[78]

The legalist themselves fall into two camps: one practical, the other radical.[79] The practical camp maintains that the international trading system profits from increased adherence to internationally agreed rules and more effective dispute settlement.[80] It is a more legalistic view and sustains a conviction that international rules like the WTO are something of a dynamic fusion between obligation and law. The more radical scholars maintain that international rules of law should act to restrain politics and political activity, especially activity that diverts governments away from the pursuit of national or global economic welfare in favour of protectionist and interventionist policies.[81] They realised the inherent need of the international trading system to transcend certain aspects of national sovereignty and protectionist interest in order that it may realise its goals.

B *TRADE LEGALISM MODELS*

The three competing normative approaches to, or models of, WTO trade legalism embrace differing and sometimes conflicting visions of the proper functions of a world trade governance system. Each of the models is grounded in an international relations theory of trade policy, each regards international trade policy formation as influenced, if not dictated, by domestic politics, and each has profoundly different implications for the operation of the WTO legal system.[82]

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[78] See Jan Aart Scholte, Robert O'Brien and Marc Williams, 'The WTO and Civil Society' (1999) 33(1) *J. of World Trade* 107.
[79] Dillon, above n 72, 397.
[80] Wolfgang Benedek, 'Preferential Treatment of Developing Countries in International Trade – Past Experience and Future Perspectives' in Detlev Chr. Dicke and Ernst-Ulrich Petersmann (eds), *Foreign Trade in the Present and a New International Economic Order* (1988) 98-109.
[81] Ernst-Ulrich Petersmann, 'Proposals for Improvements in the GATT Dispute Settlement System: A Survey and Comparative Analysis' in *Foreign Trade and the New International Economic Order*, above n 79, 340. Heinz Hauser, 'Foreign Trade Policy and the Function of Rules for Trade Policy Making' in *Foreign Trade and the New International Economic Order*, above n 79, 36-37.
[82] Shell, above n 64, 834-835.

The Regime Management Model derives from the 'regime theory'[83] in the international organisation literature of political science. Regime theory assumes that states are the primary factors in the international system and that states are motivated to achieve a set of sometimes conflicting, self-interested goals, such as wealth enhancement, power and domestic political control. This model views trade treaties as 'contracts' among sovereign states that help them resolve potentially conflicting interests over these diverse goals. In addition binding, rule-oriented trade adjudication is an enforcement mechanism by which states solve a multiparty 'prisoner's dilemma' arising out of trade contracts.

Legalists favouring the Regime Management Model see the WTO legal system as a means to generate legitimate normative standards around which states will bargain with one another to gain wealth through more open trade while retaining the control they need to achieve the domestic political objectives that call for limiting trade. Regime-oriented legalists assert that international legal rules can induce states to negotiate 'in the shadow of the law' rather than purely on the basis of power relationships even though international law lacks a centralised police power.[84] The WTO's authority to announce binding trade standards backed by a credible threat of economic retaliation will, these legalists hope, level and order the playing field of international trade between states.

The Efficient Market Model of legalism derives from a combination of the foreign relations of 'liberalism' and rigorous application of neoclassical economic free trade doctrines embodied as rules of law. Under liberalism, nations are not conceived of as autonomous, self-maximising actors, nor are they the ultimate subjects of international law. Rather, private actors are the 'essential players in international society who, in seeking to promote their own interests, influence the national policies of States.'[85]

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[83] Ann-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 *Am. J. Int'l L.* 205, 217-219.
[84] John H. Jackson, 'The Crumbling Institutions of the Liberal Trade System' (1978) 12 *J. World Trade* 93, 99.
[85] Linda C. Reif, 'Multidisciplinary Perspectives on the Improvement of International Environmental Law and Institutions' (1994) 15 *Mich. J. Int'l L.* 723, 738.

Legalists advocating the Efficient Market Model see binding international trade rules as instruments with which to achieve efficient international capital and consumer markets by eliminating needless government interference and intrusion in international trade.[86] Ideally, this model would give businesses direct access to both supranational and domestic dispute resolution machinery to enforce international trade rules and reduce the legal transaction costs of global trade.[87]

Shell introduces the Trade Stakeholders Model, which offers an alternative vision of the interplay between trade and other social policies. This model emphasises broader participation in trade adjudication, democratic processes for resolving trade conflict, and open dialogue regarding the goals of economic trade. Like the Efficient Market Model, the Trade Stakeholders Model is based on liberalism's insight that individuals, not states, should be the primary subjects of international law. Unlike the Efficient Market Model, the Trade Stakeholders Model sees trade legalism as an opportunity, not only for business but also, for domestic and trans-national interest groups of all kinds to participate with nations in the activity of constructing common economic and social norms that will make global trade a sustainable aspect of a larger trans-national society.[88]

Ultimately, all the domestic and trans-national political forces with a stake in trade policy deserve 'places at the table' – including standing to litigate cases – in domestic and international trade governance systems. According to this view, the WTO legal system has the potential to serve as a forum for articulating global norms on such issues as global warfare, labour rights, environmental protection, and other trade-related issues that are frequently marginalised when trade discussions focus narrowly on technical issues such as subsidies, tariffs, and non-tariff barriers.[89]

C *THE ROLE OF NON-STATE PARTIES IN WTO DISPUTE RESOLUTION*

The movement toward legalism in international trade dispute resolution has been based on separating political influences and motives from the dispute resolution

[86] Petersmann, 'Constitutional Functions and Problems', above n , 210-221.
[87] Shell, above n 64, 837.
[88] Ibid.
[89] Ibid 838.

system. A primary benefit of such an approach is that it allows private parties to more accurately predict future trade conditions, thus allowing them to maximise the value of their resources by participating in international trade.[90] Private participation also improves the quality of the WTO's interpretation of the rules as private parties will raise claims and make arguments that governments might deem politically unwise to propound on their own initiative.[91]

However, Nichols argues that the enhanced publicity that would accompany greater private participation would actually harm the cause of free trade because constituencies who oppose free trade will be more vocal in advancing their protectionist ideologies.[92] He predicts that '[t]he resulting loss of its low profile might prove disastrous for free trade'[93] as he cites as examples, the 'rancorous debates' within the United States surrounding the ratification of the WTO Charter and the North American Free Trade Agreement.[94]

Nichols is also concerned that '[a]llowing private parties that were not successful when values and goals were balanced at the national level to [participate in dispute resolution] would create an irreconcilable dissonance for countries engaged in the delicate process of trade negotiation.'[95] He fears that giving weight to the views of private parties would 'create uncertainty about a country's true position.'[96]

Although Nichols focuses on the implications of Shell's 'Trade Stakeholders Model' for WTO dispute settlement, Shell actually makes a broader point about the need for NGOs in all WTO decision-making.[97] Shell explains that 'ultimately, individuals and NGOs will need to become more deeply involved in the legislative process by which the world trade community creates rules and standards – not just the

[90] Glen T. Schleyer, 'Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System' (1997) 65 *Fordham L. Rev.* 2275, 2293.
[91] Shell, above n 64, 901.
[92] Philip M. Nichols, 'Extension of Standing in World Trade Organisation Disputes to Non-government Parties' (1996) 17 *U. Pa. J. Int'l Econ. L.* 295, 315.
[93] Ibid.
[94] Ibid 315-316.
[95] Ibid 318.
[96] Ibid.
[97] Shell, above n 64, 910, 913-915, 922-924.

adjudicative process by which these rules are applied.'[98] Furthermore, Shell believes that the trading regime must be more inclusive in order to integrate both trade and non-trade values.[99] Nichols, equally sensitive to the problem of clashing values, takes a different approach than Shell's model and proposes that 'laws that primarily reflect important underlying societal values and only incidentally impede trade should not be subjected to scrutiny by the WTO.'[100] While Shell would broaden participation in WTO review, Nichols would exempt certain laws from that review.

As it is, the WTO is already expanding if not finetuning its work into areas such as investment, competition policy, environment, labour standards, and corrupt practices, and it will certainly need a broader base of participation than just national trade ministers. However, even if the WTO were to focus only upon narrow issues of trade liberalisation, proponents argue that the case for Shell's Trade Stakeholders Model would still be strong because eradicating protectionism is an enormous task, which requires the full involvement of all stakeholders.

Nichols maintains that 'it is difficult to envisage a scheme that could equitably allow for direct participation by all the citizens of the world.'[101] Although he comments on 'standing' of NGOs to participate in the WTO dispute resolution process, this issue is far removed from the contemporary political debate. The contemporary debate addresses whether an NGO ought to be able to submit an amicus brief,[102] testify before a dispute panel in a public hearing, and more importantly gain access to government briefs.[103] At this point, NGOs are not pursuing the right to make oral arguments before a panel, or the right to cross-examine the plaintiff or defendant governments. Nevertheless, proponents of private party standing before the

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[98] Ibid 922.
[99] Ibid.
[100] Nichols, above n 91, 297.
[101] Ibid 313.
[102] The Appellate Body in the Shrimp-Turtle Case held that 'authority to seek information is not properly equated with a prohibition on accepting information which has been submitted without having been requested by a panel.' The Appellate Body was cautious, however, in retaining the WTO's discretionary power, stating that, 'A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not.' The Appellate Body affirmed the Panel's decision to allow a party to the case to attach NGO materials to its own submissions. Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, 12 October 1998, available in 1998 WL 720123 (WTO), 29-30.
[103] Robert F. Housman, 'Democratising International Trade Decisionmaking' (1994) 27 *Cornell Int'l L.J.* 699, 744-746.

WTO pointed to the fact that it is now working in the international context particularly in major international forums which include: the International Centre for Settlement of Investment Disputes; the International Labour Organisation; the European Convention on Human Rights; and the investment provisions of the North American Free Trade Agreement.[104]

There are three main justifications for NGO participation in dispute resolution. First, NGO participation will increase the information available to the panel, thereby leading to better-informed panel decisions. Pursuing this line of reasoning, Wirth points out that '[t]he presence of affected nongovernmental parties would widen perspectives on the underlying dispute, thereby reducing the likelihood of erroneous conclusions.'[105] Second, a closed dispute resolution process will undermine popular support. The general public of a country that loses a WTO dispute will be more apt to cooperate with the required legislative change if the WTO dispute resolution process seems fair.[106] Third, as the judgments affect not only the rights and obligations of states parties to the dispute, but also increasingly the rights and obligations of individuals, justice requires that NGOs representing the public interest have the opportunity to submit information and arguments to the panel. Such participation reinforces the concept of obligations *erga omnes* and can lead to enhancing the role of the panel and the long-term development of international law.[107]

Those critical of direct access by NGOs to WTO panels argue that NGOs should filter comments through their sovereign governments.[108] Proponents, however, have several problems with this argument. First, international NGOs do not fit the traditional citizen-government model. Second, a government may not want to present a point urged by one of 'its' NGOs. There could be a benign reason for this: the point could be incorrect. But, there might also be a less benign reason: a

[104] Schleyer, above n 89, 2305.
[105] David A. Wirth, 'Reexamining Decision-Making Processes in International Environmental Law' (1994) 79 *Iowa L. Rev.* 769, 790.
[106] Steve Charnovitz, 'Participation of Nongovernmental Organisations in the World Trade Organisation' (1996) 17 *U. Pa. J. Int'l Econ. L.* 331, 351.
[107] Dinah Shelton, 'The Participation of Nongovernmental Organisations in International Judicial Proceedings' (1994) 88 *Am. J. Int'l L.* 611, 642.
[108] Nichols, above n 91, 314.

government might not want to repeat an NGO point if doing so could undermine the government in another WTO case or in a domestic litigation.[109]

Nichols seems to recognise the possibility of such conflicts, but he worries instead about the spectacle of a domestic constituency opposing the position of the government that is supposed to represent that constituency.[110] By now, domestic opposition to a governmental position is quite common in domestic law litigation and is increasingly common in 'transnational public law litigation.'[111]

Charnovitz argues that the fundamental reason to move to a Trade Stakeholders Model is the failure of the WTO Agreement to recognise the global environment, which though replete with constructive rules on the topic of economic interdependence is nevertheless vacuous on the topic of ecological interdependence. He offers the proposition that NGOs be permitted to make written presentations to WTO panels and be given one day of public hearings where they could testify. An appropriate time for such NGO input would be after the panel completes a draft on the factual background of the dispute and summarises the positions of the parties. The WTO should then release these interim factual and positional drafts to the public before the hearing so that those testifying can comment on them.[112] However, Nichols worries that any such hearings would present logistical problems since 'a trade dispute panel cannot possibly hear from thousands of groups.'[113] To this, Charnovitz offered the remedy of empowering the chair of the legislative hearing to determine who will be allowed to speak or alternatively, the NGOs be required to act collectively to select their spokespersons.[114]

One of the main problems of allowing private party participation is the incorrect presumption that the world is ready for trade patterns wholly consistent with WTO norms. The reality is that no participant in the system would expect one hundred percent compliance one hundred percent of the time. Private parties, being used to treating domestic laws and legal rights in that way, could very quickly bring

[109] Charnovitz, above n 105, 352.
[110] Nichols, above n 91, 317.
[111] Harold Hongju Koh, 'Transnational Public Law Litigation' (1991) 100 *Yale L.J.* 2347, 2368.
[112] Charnovitz, above n 105, 354-355.
[113] Nichols, above n 91, 319.
[114] Charnovitz, above n 105, 355.

before the WTO a critical mass of complaints that would not only exhaust its physical resources, but could raise grave concerns in the minds of most government officials as to the value of remaining in the system.[115]

A further problem with private party rights is that, at times, the international arena could be misused as a forum for domestic political opposition. If employing efficiency arguments, one may question whether private parties should be able to seek to exert influence at both the domestic and international levels. Given the consensual nature of WTO Negotiating Rounds and the dominant influence of the US and the EC, NGOs would do better to gain an appropriate foothold into the domestic policy-making processes of those countries.[116] Relatedly, another source of concern about allowing NGOs into the WTO decision-making process is that it gives them 'two bites at the apple.'[117] Specifically, NGOs may shape national decision-making processes and, if they are unhappy with the outcome at that level, they can then go to the WTO and attempt to obtain another outcome. Esty nonetheless believes that this tension between national and international decision-making processes is good.[118] Some governmental decisions are made without regard to important positions that might have been considered but for public choice deficiencies in the national decision-making process. Moreover, some debates are best conducted at the international level where the full spectrum of the views that might inform the outcome of those debates can be aired.[119]

The granting of private rights could also act as a disincentive for new accessions by non-market economies, which do not have a tradition of providing for individual citizens' rights to challenge bureaucratic behaviour. Such an approach could make the WTO less appealing to those countries, although the reciprocal nature of trade agreements and the strong push by leading economies and international institutions towards wider participation is a strong countervailing influence.[120]

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[115] Jeffrey Waincymer, 'Transparency of Dispute Settlement Within the World Trade Organisation' (2000) 24 *Melb. U. L. Rev.* 797, 832.
[116] Ibid.
[117] Daniel C. Esty, ' Non-Governmental Organisations at the World Trade Organisation: Cooperation, Competition, or Exclusion' (1998) 1 *J. of Int'l Econ. L.* 123, 140.
[118] Daniel C. Esty, 'Linkages and Governance: NGOs at the World Trade Organisation' (1998) 19 *U. Pa. J. Int'l Econ. L.* 709, 725.
[119] Ibid.
[120] Waincymer, above n 114, 832.

Private actors will also not value externalities and public goods in deciding whether to sue. States may be overly cautious, but a caution based on an understanding of the fragile nature of the GATT-WTO system and a desire to maintain its viability at all costs has arguably been very beneficial to its survival. Private parties do not look for balanced interpretations. States know that the same rules work both for and against them. Purely private parties would behave differently, merely looking at the short-term dollar value on a cost-benefit basis of bringing a case.[121]

Other issues arise when we look at NGOs representing particular interests as opposed to private commercial parties having direct involvement. They will invariably be looking at single issues such as environmental or labour rights. Being proponents of those rights, they are admittedly expert at presenting certain perspectives, but may well be poorly placed to balance competing views about those interests.[122] Some of the resistance to allowing environmental groups into the WTO clearly arises from a fear that most NGOs are protectionists by nature.[123] Yet while some environmental groups do not serious view free trade as a policy goal, many others do.[124]

There would also be problems because different NGOs might have distinct views on a particular issue.[125] Those concerned with a particular issue, such as the environment, often have quite different philosophies and goals.[126] There are also differences in the quality and openness in NGOs themselves and in the information

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[121] Ibid 833.
[122] Ibid.
[123] Esty, NGOs at the WTO, above n 116, 139.
[124] Daniel C. Esty, *Greening the GATT: Trade, Environment and the Future* (1994) 28; Daniel C. Esty, 'Environmentalist and Trade Policy-making' in Alan V. Deardorff and Robert M. Stern (eds) *Representation of Constituent Interests in the Design and Implementation of U.S. Trade Policy* (1998); John J. Audley, *Green Politics and Global Trade: NAFTA and the Future of Environmental Politics* (1997) 35.
[125] Emotional debates over the 'Dolphin Death Act' passed by the U.S. Congress in 1997 have literally split the environmental community in half pitting the Earth Island Institute, the Marine Mammal Fund, the Sierra Club, the Defenders of Wildlife and the Humane Society against Greenpeace, the Center for Marine Conservation, the National Wildlife Federation, the Environmental Defense Fund and the World Wildlife Fund. Joshua R. Floum, 'Defending Dolphins and Sea Turtles: On the Front Lines in an "Us-Them" Dialectic' (1998) 10 *Geo. Int'l Envt'l L. Rev.* 943, 944.
[126] Nichols, above n 91, 319.

that they would provide to an international organisation. Yet unless all who wish to have standing were given it, the democratic deficit could not be overcome.[127]

Other observers argue that a greater role for NGOs at the WTO might exacerbate the existing bias toward Northern viewpoints and further weaken the voice of those advancing the needs of the developing world.[128] While perhaps more 'Northern' environmental groups would be able to afford a presence in Geneva than groups from developing countries, the 'Northern' representatives would not necessarily speak with a united 'developed' country perspective.[129] Furthermore Esty thinks that the advantage of a physical presence in Geneva is diminishing as information technologies allow groups throughout the world to monitor and contribute to WTO debates.[130]

IV AGRICULTURAL TRADE: CONTROVERSIES IN NON-TARIFF BARRIERS

The greatest tension between environmental standards and international economic relations exists in agriculture. Two reasons are identified: first, environmental and health risks are traded along with agricultural commodities in the international forum;[131] and second, environmental standards, such as pesticide regulations, can operate as trade barriers and are 'attractive candidates for disguised protectionism.'[132]

At the Millennium Round in Seattle, members of the WTO braced to set their agenda on possibly the most important round of the world trade negotiations in the

[127] Waincymer, above n 114, 834.
[128] But see William M. Reichert, 'Resolving the Trade and Environment Conflict: The WTO and NGO Consultative Relations' (1996) 5 *Minn. J. Global Trade* 219, 244-246 (arguing that a partnership approach between developed country NGOs and developing NGOs is the best solution for achieving environmental goals in developing countries).
[129] See Richard H. Steinberg, 'Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development' (1997) 91 *Am. J. Int'l L.* 231, 232 (advancing that 'wealthy states with relatively stringent environmental' standards drive the trade-environment agenda); but see Leon Gordenker and Thomas G. Weiss 'Pluralising Global Governance: Analytical Approaches and Dimensions' in Thomas G. Weiss and Leon Gordenker (eds) *NGOs, the UN and Global Governance* (1996) 25 (explaining how technological advances have expanded global communities beyond mere geographic borders).
[130] Esty, NGOs at the WTO, above n 116, 142.
[131] C. Ford Runge, 'Trade Protectionism and Environmental Regulation: The New Non-tariff Barriers' (1990) 11 *J. Int'l L. Bus.* 47, 48.
[132] Ibid 47.

agricultural arena.[133] The WTO however failed to address recurring agricultural trade irritants including agricultural tariffs and market access, export subsidies, domestic support, sanitary and phytosanitary measures (SPS), standardisation of non-tariff barriers, and state trading enterprises.[134] The WTO also failed to incorporate emerging issues in agricultural trade such as export credits, allocation of in-quota tariffs, and regulating products of biotechnology.[135] The recent adoption of the Biosafety Protocol has put added pressure on the WTO's sanitary and phytosanitary measures as well as the technical barriers to trade agreement.[136] The Codex Alimentarius, an international group aimed at developing food safety standards, may be the important missing link in resolving trade barred by sound science versus trade barred by a precautionary principle.[137]

While GATT achieved much success, most of the liberalisation of international trade came in the form of industrial products.[138] GATT was able to drastically cut tariffs on most industrial products but markedly failed vis-à-vis agricultural products.[139] As a result, most member states continued to shield agricultural products with 'high tariff and non-tariff barriers including outright import bans.'[140] During the 1970s and early 1980s, economic recessions resulted in the creation of non-tariff barriers to protect government interests facing increased foreign competition. GATT's credibility and effectiveness deteriorated as governments began to increasingly employ subsidies to maintain their agricultural trade interests.

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[133] Geoff Winestock, 'EU, US Squabble Over Agenda for WTO: Europe Wants Broad Discussions at Millennium Round', *Wall Street Journal Europe*, 25 October 1999, 4.
[134] Helene Cooper et al., 'WTO's Failure in Bid to Launch Trade Talks Embolden Protestors', *Wall Street Journal* (New York), 6 December 1999, A1, A7.
[135] Ibid.
[136] 'Caution Needed', *Economist* (London) 5 February 2000, 69.
[137] Mark A. King, 'The Dilemma of Genetically Modified Products at Home and Abroad' (2001) 6 *Drake J. Agric. L.* 241, 243. The precautionary principle, or foresight planning, has recently been frequently proposed as a justification for government restrictions on trade in the context of environmental and health concerns, often regardless of cost or scientific evidence. The precautionary principle has been interpreted by some to mean new chemicals and technologies should be considered dangerous until proven otherwise. It therefore requires those responsible for an activity or process to establish its harmlessness and to be liable if damage occurs. Daniel A. Sumner, Vincent H. Smith, and C. Parr Rosson, 'Tariff and Non-Tariff Barriers to Trade' (2002) <http://www.farmfoundation.org/2002_farm_bill/sumner.pdf>
[138] Ibid 245 citing Donald E. Buckingham, 'Emerging Issues in International Agricultural Trade (16 October 1999) 2 (unpublished manuscript presented at the American Agricultural Law Association Symposium in New Orleans, Louisiana).
[139] Ibid.
[140] Ibid.

The WTO Agreement replaced GATT by amending rules affecting trade in goods and providing new rules for trade in agricultural products. It had profound ramifications for the agricultural industry.[141] Previously, GATT 1947 allowed many loopholes for the member states to navigate through to provide protection for their domestic agricultural sector. GATT 1994 established that agriculture was subject to both the general rules outlined in GATT 1947 and specific regulations as provided in the WTO's Agreement on Agriculture.[142] Thus, agricultural products will not only be subject to the Agreement on Agriculture, but other significant agreements that may have agricultural implications.[143] The Sanitary and Phytosanitary Agreement ('SPS Agreement')[144] and Agreement on Technical Barriers to Trade ('TBT Agreement')[145] contain provisions that may apply to trade in agricultural products.

A *AGREEMENT ON AGRICULTURE*

Agricultural trade issues were most directly addressed in a multilateral trade agreement through the Agreement on Agriculture. The Agreement on Agriculture featured five guidelines to improve better market access for agricultural products: (1) converting all non-tariff barriers on agricultural products to bound tariffs, (2) binding tariffs on all agricultural products, (3) prohibiting new tariffs, (4) reducing all tariffs by 36% by the year 2001, and (5) guaranteeing each other a minimum market access equal to roughly three percent of domestic consumption and rising to 5% by 2001.[146]

The ultimate goal of the WTO is to 'establish a fair and market-oriented agricultural trading system that includes substantial reductions in agricultural support and protection.'[147] To honour these commitments, WTO countries further agreed to reduce subsidies on agricultural products bound for export and to create no new export subsidy programmes. Implementing this protocol requires existing subsidies to

[141] Kevin C. Kennedy, 'The GATT-WTO System at Fifty' (1998) 16 *Wis. Int'l L. J.* 421, 443-444, 463-464.
[142] Agreement on Agriculture, 15 December 1993, GATT Doc. MTN/FA 11-AIA-3 [hereinafter Agriculture Agreement].
[143] Kennedy, GATT-WTO, above n 140, 463, 466.
[144] Agreement on the Application of Sanitary and Phytosanitary Measures, 15 December 1993, GATT Doc. MTN/FA 11-AIA-4 [hereinafter SPS Agreement].
[145] Agreement on Technical Barriers to Trade, 15 December 1993, GATT Doc. MTN/FA 11-AIA-6 [hereinafter TBT Agreement].
[146] King, above n 136, 248.
[147] Kennedy, GATT-WTO, above n 140, 463.

be reduced by thirty-six percent by the year 2001. Additional measures also required member countries to reduce domestic subsidies by twenty percent by 2001. Domestic subsidies not subject to this requirement, known as 'green subsidies,' are those that are not trade distorting, such as crop insurance, disaster relief, food aid programmes, environmental initiatives, and certain conservation programmes.[148]

B *SANITARY AND PHYTOSANITARY AGREEMENT*

While the Agreement on Agriculture attempts to eliminate or substantially reduce tariff and quota barriers to agricultural trade, the SPS Agreement attempts to specifically safeguard world trade from non-tariff and non-quota barriers to agricultural trade. History has proven that as more traditional barriers to trade are reduced or eliminated, less traditional SPS measures will crop up with the sole purpose of protecting domestic agricultural producers from import competition. Arduous negotiation successes have resulted in utter failure as traditional barriers fall only to be replaced with suspect SPS measures.[149] The SPS Agreement provided a structure by which to assess whether a WTO member nation is merely disguising trade barriers in scientifically unfounded fears.[150]

Defined in terms of the purpose, SPS measures are those that have been adopted to protect human or animal life or health from various risks. While agricultural products are the targets of legitimate SPS measures, they are also frequently the targets of not so legitimate SPS measures. The SPS Agreement recognises the right to take legitimate SPS measures to protect human, plant, and animal life and health by creating procedural requirements. The difficult issue is whether a measure is a 'sanitary or phytosanitary measure' which is defined in terms of the purpose of the measure: to protect human or animals from food-borne risks (arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs) or from diseases carried by animals and plants; to protect animals or plants from pests or diseases; or to prevent or limit other damage from

[148] King, above n 136, 248.
[149] Kennedy, GATT-WTO, above n 140, 455-456.
[150] Terence P. Stewart and David S. Johanson, 'Policy in Flux: The European Union's laws on Agricultural Biotechnology and Their Effects on International Trade' (1999) 4 *Drake J. Agric. L.* 243, 288.

pests.[151] While not providing substantive measures, the SPS Agreement requires procedural safeguards maintaining that measures taken be scientifically based against a legitimate risk to the health of fauna and flora.[152]

The SPS Agreement applies to all SPS measures that may, directly or indirectly, affect international trade. The complaining WTO member must first establish that the measure taken is indeed an SPS measure. Second, the trade barrier must be shown to apply to imported products producing a presumed negative effect. The SPS measure taken is legitimately recognised if the measure is 'applied only to the extent necessary…based on scientific principles and is not maintained without sufficient scientific evidence,' except that such measures may be imposed temporarily when evidence is insufficient and receipt of additional information necessary for a more objective assessment of risk is pending.[153] The member nation must also present the risk or risks while the SPS measure must be based on an appropriate risk assessment.[154] Because scientific certainty is nearly unobtainable, the scientific determinations require judgments among competing scientific views making the resolution of SPS legitimacy difficult.[155]

The SPS Agreement incorporates the most-favoured nation and national treatment concepts of the GATT; WTO Members cannot use SPS measures to arbitrarily or unjustifiably discriminate between WTO Members where identical or similar conditions prevail, including between their own territory and other

[151] SPS Agreement, above n 143, Annex A, para. 1. This provision defines sanitary or phytosanitary measure as 'any measure applied: to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms; to protect human or animal life or health within the territory of the member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or foodstuffs; to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.' This approach yields the curious result that the applicability of the SPS Agreement depends on the purpose ascribed to it by the party defending it, with the anomalous possibility that a country would choose to deny that its purpose is to protect health. In most SPS situations, the historical record for the measure will be replete with references to public health concerns. Dale E. McNiel, 'Furthering the reforms of Agricultural Policies in the Millennium Round' (2000) 9 *Minn. J. Global Trade* 41, 82.

[152] Kennedy, GATT-WTO, above n 140, 455-456.

[153] SPS Agreement, above n 143, art. 2.1. See Dale E. McNiel, 'The First Case Under the WTO's Sanitary and Phytosanitary Agreement: The European Union's Hormone Ban' (1998) 39 *Va. J. Int'l L.* 89, 113-116.

[154] SPS Agreement, above n 143, art. 5.1.

[155] Kennedy, GATT-WTO, above n 140, 456.

Members.[156] This is reinforced by an exhortation to Members to avoid arbitrary or unjustifiable distinctions in the levels of protection that it finds appropriate in different circumstances.[157]

The SPS Agreement also contains two provisions with the potential to affect trade and the environment. First, SPS measures of members must be accepted as equivalent 'even if these measures differ from their own or from those used by other members trading in the same product, if the exporting member objectively demonstrates to the importing member that its measures achieve the importing member's appropriate level of sanitary or phytosanitary protection.'[158]

Deeming standards of member countries as 'equivalent' if they achieve the appropriate level of sanitary and phytosanitary protection of the importing country could accomplish the elimination of unjustified restrictions. However, to make the determination of whether the exporting countries measures are 'equivalent' to the importing countries standards, the burden is on the exporting country to objectively demonstrate their equivalency to the importing country. The right of each country to develop its own standards is protected. However, since the exporting country is left to decide whether the importing countries standards are equivalent under an objective test, there is still the possibility that such standards will be used as non-tariff barriers to trade.[159]

Another provision of the SPS Agreement provides that: 'when establishing or maintaining SPS measures to achieve the appropriate level of SPS protection, members shall ensure that such measures are not more trade restrictive than required to achieve their appropriate level of…protection…'[160] This provision also appears to be directed at eliminating unjustified restrictions on agricultural trade while preserving state autonomy in the establishment of SPS standards. However, if the

[156] SPS Agreement, above n 143, art. 2.3.
[157] Ibid art. 5.5.
[158] See U.S. General Accounting Office, 'The General Agreement on Tariffs and Trade-Uruguay Round Final Act Should Produce Overall U.S. Economic Gains,' *GAO/GGD 94-83B*, 29 July 1994 [hereinafter GAO/GGD 94-83B].
[159] Stephanie Dreckmann, 'Negotiating Environmental Standards for an Agricultural Free Trade Agreement Between Chile and the United States' (1997) 4 *Sw. J.L. & Trade Am.* 227, 242,
[160] GAO/GGD 94-83B, above n 157.

exporting country were to challenge the SPS restrictions of the importing country as being overly restrictive to trade, the exporting country has the burden of showing that 'another measure that would achieve the same level of protection is "reasonably available" and would be "significantly less restrictive to trade."'[161] Thus, the exporting country may challenge unjustified restriction; however, the exporting country again bears the burden of establishing that the importing countries standards are unreasonable.

In general, SPS measures should be based on international standards, guidelines or recommendations, such as those of the Codex Alimentarius Commission, where they exist,[162] and measures based on such international standards are immune from challenges under the SPS Agreement.[163] SPS measures must not be more trade-restrictive than required to achieve a WTO member's chosen appropriate level of SPS protection,[164] and must not constitute a disguised restriction on international trade.[165]

Finally, the definition of SPS measures in Annex A of the SPS Agreement – 'measures to protect human or animal life or health within the territory of the member'[166]- settles an issue regarding the extraterritorial application of SPS measures that arose in the unadapted GATT panel report on Restrictions on Imports of Tuna.

There were also apprehensions that as the Uruguay Round Agreement on Agriculture eliminates or reduce barriers to agricultural trade, a new set of SPS measures would be introduced as contingent protection, with the sole purpose of protecting domestic agricultural producers from import competition. To counter pre-emptively such a development the SPS Agreement was negotiated in tandem with the 1994 Agreement on Agriculture to ensure that the benefits of liberalised agricultural trade are not diluted. Indeed, Article 14 of the Agreement on Agriculture underscores the importance of not allowing unjustified measures to undermine the gains of the

[161] Ibid.
[162] SPS Agreement, above n 143, art. 3.1.
[163] Ibid art. 3.2.
[164] Ibid art. 5.6.
[165] Ibid art. 2.2.
[166] Ibid Annex A.

Agriculture Agreement. It provides: 'Members agree to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures.'[167]

C *AGREEMENT ON TECHNICAL BARRIERS TO TRADE*

Agricultural products may also find their way into a TBT Agreement dispute. "[L]abelling requirements as they apply to a product, process, or production method' are included in the definition of technical regulations as provided in the TBT Agreement.[168] The TBT Agreement, a product of the Uruguay Round, aims to prevent the technical regulations of a country from being used as an insidious and effective national trade barrier to foreign products.[169] The Agreement provides that the technical regulations of a country shall not be applied with the 'effect of creating unnecessary obstacles to international trade.' While the SPS Agreement and the TBT Agreement are both purported to be mutually exclusive, the two agreements are very similar in most respects.[170]

The SPS and TBT Agreements, while similar, have different tests to determine whether a measure is impermissibly protectionist in nature. While the SPS Agreement focuses on scientific justification and risk assessment, the TBT Agreement relies on a non-discrimination test.[171] The TBT Agreement prohibits technical regulations that are more trade restrictive than necessary to attain a legitimate objective which also include the 'protection of human health or safety, animal or plant life or health, or the environment.'[172] The TBT Agreement defines a 'technical regulation' as a '[d]ocument which lays down product characteristics or their related production processes and methods … with which compliance is mandatory.'[173] A 'standard' in turn is defined as 'document approved by a recognised body, that provides for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not

[167] Agriculture Agreement, above n 141, art 14.
[168] Stewart and Johanson, above n 149, 288-290.
[169] Kennedy, above n 140, 460.
[170] Ibid 460-461.
[171] Ibid 461.
[172] TBT Agreement, above n 144, art. 2.2; Stewart and Johanson, above n 149, 288-291.
[173] TBT Agreement, above n 144, Annex 1, para. 1.

mandatory.'[174] The difference between the two is that only a government body promulgates the former, being mandatory. The latter, being voluntary, may be issued not only by a government body but also by recognised non-governmental standardising bodies.

The TBT Agreement balances national interest in product standards against their unjustified use to protect a domestic industry. It establishes three areas to distinguish legitimate standards and conformity assessment procedures from protectionist measures and procedures which include: '(1) the preparation and adoption of technical regulations and standards; (2) conformity assessment procedures and mutual recognition of other countries' assessments; and (3) information and assistance about technical regulations, standards, and conformity assessment procedures.' While the agreement does not establish or prescribe standards, technical regulations, or conformity assessment procedures, it does establish 'general procedural requirements to be observed when adopting or using such measures in order to prevent unnecessary obstacles to trade.'[175]

The TBT Agreement establishes a number of disciplines designed to ensure that a Member's technical regulations do not create unnecessary obstacles to trade.[176] These include the fundamental obligations that products imported from the territory of any WTO Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country,[177] and technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective.[178] The national treatment provision of the TBT Agreement closely parallels the GATT.[179] Article III has been interpreted to permit governments to distinguish between otherwise like products for legitimate regulatory purposes.

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[174] Ibid Annex 1, para. 2.
[175] Kennedy, GATT-WTO, above n 140, 460.
[176] TBT Agreement, above n 144, art. 2.2.
[177] Ibid art. 2.1.
[178] Ibid art. 2.2.
[179] *General Agreement on Tariffs and Trade*, 30 October 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. III:4.

The principal mandate of the TBT Agreement requires that 'technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.'[180] Technical regulations must not be more trade-restrictive than necessary to fulfil a legitimate objective, including national security requirements, the prevention of deceptive practices, and the protection of human health or safety, animal or plant life or health, or the environment.[181] In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.

D *THE CODEX ALIMENTARIUS*

The Codex Alimentarius is a combination of the Food and Agriculture Organisation Program of the United Nations and the World Health Organisation Programme of the United Nations.[182] The Codex Alimentarius, founded in 1962, was established to 'help protect the health of consumers and to facilitate fair trade through the establishment of international food standards, codes of practice and other guidelines.' The purpose of Codex lies in developing international food standards, ensuring consumer protection, and facilitating fair trade.[183] Codex finds its role in Article 5 of the SPS Agreement, which requires risk assessment for the establishment and maintenance of SPS measures. Article 5.1 provides that the risk assessment must take into account the risk assessment processes developed by 'relevant international organisations,' such as Codex. Thus, Codex plays an integral role with the WTO in basing SPS measures in semi-objective standards.[184] Therefore, as the application of biotechnology to food processing and production gains strident worldwide recognition, Codex's scrutiny becomes even more significant.

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[180] TBT Agreement, above n 144, art. 2.2.
[181] Ibid.
[182] See Codex Alimentarius http://www.fsis.usda.gov/oa/background/codex.htm
[183] Ibid.
[184] Terence P. Stewart and David S. Johanson, 'The SPS Agreement of the World Trade Organisation and International Organisations: The Roles of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics' (1998) 26 *Syracuse J. Int'l L. & Com.* 27, 31.

E *PESTICIDE REGULATION*

Pesticide standards are often disguised restrictions to trade of agricultural commodities.[185] A free trade agreement also increases the danger that necessary pesticide regulations will be sacrificed due to the differences in regulatory approaches among nations. In response to a free trade agreement, a country whose economy is chiefly agriculturally-based may increase pesticide use in order to increase agricultural output. As a result, residue levels on agricultural imports may exceed an importing country's limit. Also, differences in the pesticides that are registered in each county impede the ability of exporters to comply with standards of the receiving country.[186]

An importing country can also establish residue tolerance levels for pesticides that are not registered in such country. Residue tolerances are the maximum acceptable levels of pesticide residue accumulation that remains on the agricultural products when they enter the market.[187] These tolerances are informally referred to as 'import' tolerances. The pesticide-regulating agency of the importing country establishes import tolerances because some agricultural imports do contain residues of pesticides not registered in the importing country.[188]

Also, companies in the importing country produce pesticides that are not registered in its jurisdiction. These pesticides could be used to control pests that are not a problem in the producing country or for use on crops that are not grown domestically. These pesticides return to the country that produced the pesticides through agricultural products that are imported together with residues of pesticide that are not allowed for domestic use.[189]

One concern with trade agreements is that contracting parties will harmonise downward or environmental standards will be lowered to match that of the country

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[185] Ibid.
[186] Dreckmann, above n 158, 228-229.
[187] Gregory J. Mertz, 'Dead But Not Forgotten: California's Big Green Initiative and the Need to Restrict State Regulation of Pesticides' (1992) 60 *Geo. Wash. L. Rev.* 506, 508.
[188] Dreckmann, above n 158, 233.
[189] Ibid.

with which another is negotiating in order to be able to accept its imports.[190] '[E]xperience in free trade such as GATT, have shown that the lowest common denominator often establishes the technical standards for regulation.'[191] Thus harmonisation may weaken the contracting parties' sovereignty to establish standards to protect their citizens and the environment.[192] Furthermore, the more specific the language in the agreement, the better chance that a matter brought before the investigative panel will be decided, allowing for necessary environmental protection.[193]

Before a pesticide regulation can be deemed an imposition on international trade, such an effect must be quantitatively demonstrated. It does not make sense to declare any regulation per se invalid as a trade barrier if it does not actually amount to a restriction on trade. A balancing test should be employed that measures the actual costs of the regulation on the foreign party who bears the cost against the benefits of the environmental policy. Time and expense that contracting parties' buyers and sellers must incur are costs and import restrictions. If the burden of the costs outweighs the environmental concerns, the regulation should be classified as disguised restrictions on international trade and deemed invalid. If the environmental policy is adopted for legitimate environmental concerns, the balancing analysis should incorporate a least burdensome alternative analysis. Using a least burdensome alternative analysis is more feasible to determine whether or not the environmental purpose is genuine, and if the measure would still have been adopted had nationals had to bear the same costs.[194] 'Such criteria can serve as a basis for the development of standards determining which environmental and health measures constitute unnecessary obstacles to trade.'[195]

[190] James E. Bailey, 'Free Trade and the Environment – Can NAFTA Reconcile the Irreconcilable?' (1993) 8 *Am. U.J. Int'l L. & Pol'y* 839, 849.
[191] Kurt C. Hofgard, 'Trade and the Environment: Is This Land Really Our Land?: Impacts of Free Trade Agreements on U.S. Environmental Protection' (Winter 1992) 23 *Envt'l L.* 635, 651.
[192] Ibid.
[193] Ibid 657.
[194] Dreckmann, above n 158, 236-237.
[195] Runge, above n 130, 58.

V DOES THE PHILIPPINES HAVE A CASE AGAINST AUSTRALIA?

For purposes of this paper, the trade restriction in the name of environmental quality employed by Australia in preventing the entry of Philippine tropical fruits to its market falls into the first category offered by Schoenbaum.[196] This category includes regulations on imports and exports adopted by nations to safeguard their domestic resources and environment which imposition of such restrictions has traditionally been considered the prerogative of each sovereign state.[197]

If the Philippine government is to mount a successful challenge before the WTO, it must allege that Australia's quarantine policies are inconsistent with its obligations under GATT 1994, particularly Articles I:1,[198] XI:1,[199] and XIII:1,[200] and that the measure could not be justified by the exception set forth in Article XX.[201]

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[196] Thomas J. Schoenbaum, 'Free International Trade and Protection of the Environment' (1992) 86 *Am. J. Int'l L.* 700, 703-704. The second category include provisions in the various international agreements to protect the earth's ozone layer, safeguard endangered species of plants and animals, restrict the international movement of hazardous waste, and stem global warning. A third set of trade restrictions for environmental purposes is even more controversial. Increasingly, states with stringent environmental controls are questioning the adequacy of environmental controls in other nations. This concern is based not only on environmental considerations, but also on apprehensiveness about unfair competition from foreign companies that are not subject to strict pollution controls. As a result, a nation may employ unilateral trade restrictions to enforce national environmental objectives and to induce other nations to adopt commensurate environmental standards. Such retaliatory measures may take the form of a surcharge or a ban on the import of certain goods. This trade restriction raises important issues of sovereignty and international law. A fourth category consists of controls on the export of hazardous products, technologies and waste.

[197] Ibid 703.

[198] *General Most-Favoured-Nation Treatment* 1. With respect to customs duties and charges of any kind imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

[199] *General Elimination of Quantitative Restrictions* 1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

[200] *Non-Discriminatory Administration of Quantitative Restrictions* 1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

[201] *General Exceptions* Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:…(b) necessary to protect …plant life or health;…(*emphasis provided*)

The author believes that the main argument for the Philippine government is that the restriction of the fruit importation violated Article XI:1 providing for the general elimination of quantitative restrictions on imports and exports. The Philippines can argue that, because the comprehensive nature of Article XI:1 requires its application to all measures instituted or maintained by a Contracting Party, its provisions therefore prohibited outright quotas and quantitative restrictions made effective through import or export licenses. It can be argued that the recommendations for entry under the IRA constituted a restriction on the importation of tropical fruits from the Philippines and were plainly not in the nature of 'duties, taxes, or other charges' as required by Article XI:1.

The arguments presented under Article I:1 can be identical to those offered under Article XIII:1 i.e., pineapples exported undergoing the fumigation process not falling under the recommendations under the IRA are 'like products' (because the process does not change the physical characteristic of the fruit); 'like products' are denied entry because of either of the following reasons - lack of Australian accreditation of the source farm or plantation, non-Australian registration of the fumigation facilities, or non compliance with Australian storage requirements; and a review of policies after the first year of trade. The Philippines can also argue that the method chosen to fumigate the fruits does not change the physical characteristics, end-uses, or tariff classifications. Furthermore, fruits that have not undergone the fumigation and handling process prescribed in the IRA (though they have undergone a different process) are perfectly substitutable for those that have gone the prescribed process. The Philippines can question the review of policies after the first year as arbitrary as there is no assurance that the country may get a favourable outcome from the review. There is also no assurance that a similar fruit exporting country can be granted the same period for review which makes such review policy all the more violative of Article XIII:1.

The last argument under the GATT rules of 1994 is that the quarantine policy cannot be justified under the provisions of Article XX, which provide that WTO Members may adopt and enforce measures that are necessary to protect among others, plant life. In this particular case, the Australian government believes that the

importation of Philippine bananas will cause the introduction of the pest known as Moko, which will put Australian fruit farms at risk of infestation. Any measures adopted by Australia must fall under the exception listed in Article XX (b) and must not run afoul of the provisions of the introductory chapter or chapeau of the article.

The chapeau of Article XX sets out that although protection measures may be adopted, those measures are: '[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade…' If the measures are in line with the requirements of the chapeau, and fit within one of the listed categories, presumably the measure will be found to be consistent with the members' WTO obligations.

Australia is sure to invoke Article XX (b) to protect its fruit plantations but the Philippines can challenge its application based on the three-pronged test certain panels have developed to determine whether a particular measure falls within the scope of measures protected by the Article.[202] The first prong of the test examines whether (1) the policy in respect of the measures for which the provision was invoked, fell within the range of policies designed to protect plant life or health; (2) the inconsistent measure for which the exception was being invoked was necessary to plant life or health; and (3) the measure was applied in conformity with the requirements of the chapeau of Article XX.[203]

The Philippine government can argue that the underlying purpose of the quarantine policies is to redress the 'competitive disadvantage of Australian fruit growers vis-à-vis their Filipino counterparts.' While it is easy to procure the commercial indicators to support this argument, the complainant will nevertheless be hard-pressed in proving that it is the paramount reason for the import restriction and not the protection of local Australian fruit farms from exotic pests. To prove this, the Philippine government needs to refer to certain policy pronouncements of Australian fruit growers about the need to protect their local fruit industry.

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[202] United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/R (29 January 1996) [hereinafter Reformulated Gasoline Panel Report].
[203] Ibid 38.

Addressing the second prong of the test, the Philippines can argue that the embargo is not 'necessary' to fulfil the policy objective; because the word necessary means that no alternative exists. It can also argue that Australia has not demonstrated that alternative GATT-consistent measures are not available to it. Furthermore, the Philippines can argue that the import restriction by Australia is not necessary because the Philippines has an adequate program in place to address the infestation by its fruits of the local Australian fruit plantations and measures other than import restrictions are available to Australia. In addition, Australia could have addressed the protection of its local fruit farms from infestation of exotic pests through a bilateral agreement with the Philippines, instead of imposing unilateral import restrictions. Such negotiations and possible agreements would achieve Australia's policy goal and at the same time be consistent with GATT.

Australia will have difficulty in proving the requirement that the measure is consistent with Article XX as it has the burden of proof to show that the import restriction is not applied in a manner that resulted in arbitrary and unjustifiable discrimination, and is not a disguised restriction on international trade.

The Philippines can also look for guidance in the interpretation of the chapeau of Article XX to determine whether a trade restriction measure ran afoul of its requirements using the Shrimp-Turtle Case.[204] Similarly situated to the United States' Section 609 measure in the Shrimp-Turtle Case, the most conspicuous flaw in the Australian quarantine measure's application relates to its intended and actual coercive effect on the specific policy decision made by the Philippine government in the use of methyl bromide as fumigant as a condition for entry of Philippine tropical fruits. In effect this is an economic embargo for the Philippines, which requires an exporter to adopt a policy that runs counter to its own.[205]

This fact combined with the inflexible nature of the other IRA recommendations essentially creates the situation in which the Philippines is forced to

[204] United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (12 October 1998) [hereinafter Shrimp-Turtle Appellate Body Report].
[205] Ibid para. 161.

adopt a regulatory programme dictated by Australia and is a totally unacceptable procedure in international trade relations.[206] The flaw in the application of the measure is the failure of Australia to 'take into consideration the different conditions that may occur in the territories of those other Members.'[207]

The Philippines needs to convince the WTO that the quarantine measure, in its application, is more concerned with effectively influencing potential fruit-exporting countries to adopt the regulatory regime imposed by Australia though these countries may be differently situated. As held by the Appellate Body in the Shrimp-Turtle Case, discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.[208]

The body that will hear the dispute may adhere to the ruling of the Appellate Body in the Shrimp-Turtle Case in considering another factor against Australia - its failure to engage in negotiations with the objective of concluding bilateral agreements with the Philippines prior to the unilateral imposition of import restriction based on the recommendations of the draft IRA.

On the issue of what constitutes arbitrary discrimination, as held by the Appellate Body of the Section 609 measure in the Shrimp-Turtle Case, certification requirements and procedures, in fact, constitute arbitrary discrimination.[209] Though at this point, it is premature to determine whether the requirements for certification under the IRA recommendations are rigid and unbending since they have yet to be released by the Australian agriculture authorities. The certification determinations, in the Appellate Body's opinion must be made in a transparent or predictable manner.[210] Nevertheless, the release of the IRA recommendations leaves much to be desired as the Philippine fruit industry has already protested the way the IRA report was prepared

[206] Ibid paras. 163-164.
[207] Ibid para. 165.
[208] Ibid.
[209] Ibid para. 184.
[210] Ibid para. 180.

as it failed to consider the submissions made by the Philippine fruit industry prior to the release of the draft.

For this purpose, the provisions of Article X:3 of GATT 1994 must be taken into account following the approach taken by the Appellate Body:

> Inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the Member imposing the measure and which effectively results in a suspension *pro hac vice* of the treaty rights of other Members.
>
> It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here.[211]

The IRA recommendations if indeed adopted by the Australian government could suffer the same legal infirmity as the Section 609 measures in the Shrimp-Turtle Case for being unjustified measures under the provisions of Article XX of GATT 1994.

Furthermore, the Philippines can also invoke the SPS Agreement in support of its position. Inasmuch as that the panel in the Beef Hormone Case[212] has held that if the SPS Agreement is applicable to a dispute, then the TBT Agreement *a fortiori* is inapplicable as the two agreements are mutually exclusive.[213] Following the panel's ruling in that case, the Philippine government as complainant, bears the burden of presenting a prima facie case on the IRA report recommendations' inconsistency with the SPS Agreement. It is for the party that initiated the dispute settlement proceedings to put forward factual and legal arguments in order to substantiate its claim that an SPS measure is inconsistent with the SPS Agreement. Once a prima facie case is made, however, the panel will consider that with respect to the obligations imposed by

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[211] Ibid paras. 182-183.
[212] GATT Panel Report, EC Measures Concerning Meat and Meat Products (Hormones) Complaint by the United States, WT/DS26/R/USA (18 August 1997) [hereinafter Hormone Beef Report – US]; GATT Panel Report, EC Measures Concerning Meat and Meat Products (Hormones) Complaint by Canada, WT/DS48/R/CAN (18 August 1997) [hereinafter Hormone Beef Report – Can.].
[213] TBT Agreement, above n 144, art. 1.5; SPS Agreement, above n 143, art. 1.4; Hormone Beef Report – US para. 8.29; Hormone Beef Report – Can. para. 8.32.

the SPS Agreement that are relevant to the case, the burden of proof shifts to the respondent party.[214]

Article 3.1 of the SPS Agreement requires Members 'to base their measures on international standards, guidelines or recommendations, where they exist…'[215] Unless a Member's measure reflects the same level of protection as the standard, it is not 'based on' that standard and violates Article 3.1. It is imperative for the Philippine government to establish that the Australian measures result in a different level of protection than would be achieved by measures based on the Codex standards, and accordingly the measures are not based on the Codex standards for purposes of Art. 3.1.

However, even though Australia's measures may not be based on international standards, they are not inconsistent with the SPS Agreement *ipso facto*. Article 3.3 of the SPS Agreement provides an exception to Article 3.1. Article 3.3 permits Members to introduce measures that result in a higher level of protection than would be achieved under international standards, if there is a scientific justification for them, or it is the level of protection a Member determines to be appropriate after making a risk assessment under Article 5 of the Agreement. There is a scientific justification if, based on available scientific information, a Member determines that the international standards are not sufficient to achieve its appropriate level of protection.[216] This concept is sometimes referred to as 'the acceptable level of risk.'[217]

Once the Philippines established that Australia's measures are not based on an international standard, the burden shifts to Australia to prove that its measures are justified under Article 3.3 and meet the risk assessment criteria of Article 5.[218] Australia then has the burden of identifying the adverse effects on its local fruit farms cause by the introduction of exotic pests brought by tropical fruit importation from the

[214] Hormone Beef Report – US para. 8.51.
[215] Ibid para. 8.56; SPS Agreement, above n 143, art. 3.1.
[216] SPS Agreement, above n 143, art. 3.3 n.2.
[217] Ibid Annex A:5; Hormone Beef Report – US, above n 211, para. 8.79.
[218] Hormone Beef Report – US, above n 211, paras. 8.87-8.89.

Philippines, and then, if such adverse effects existed, evaluating the potential or probability of occurrence of these effects.[219]

Once the risks are assessed, the next step is risk management (i.e., the decision by Australia as to what risks it can accept or its 'appropriate level of sanitary protection'). If a risk assessment is based on scientific evidence, then Australia can set its own acceptable level of risk, provided the level is not arbitrary or unjustifiable, taking into account the objective of minimizing negative trade effects, and show that is not a disguised restriction on international trade.[220]

However, following the Appellate Body's ruling in the Beef Hormone Case, assuming that Australia's measures are not based on international standards, such fact does not relieve the Philippines from the burden of establishing a prima facie case showing the absence of the risk assessment required by Article 5.1 and the failure of Australia to comply with the requirements of Article 3.3.[221]

Should there be a standard of review in evaluating the consistency of the Australian measures under the SPS Agreement that gives deference to the factual findings of Biosecurities Australia? It appears that the SPS Agreement is silent on this point. Following the Appellate Body's ruling in the Beef Hormone Case, the contending parties should turn to Article 11 of DSU which provides that 'a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements…'[222] Thus, the applicable standard of review is neither *de novo* nor one of total deference, but rather an intermediate 'objective assessment of the facts' standard.[223]

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[219] Ibid paras. 8.98-8.100.
[220] SPS Agreement, above n 143, arts. 2.3, 5.4, 5.5.
[221] Appellate Body Report, EC Measures Concerning Meat and Meat Products (Hormones), AB-1997-4, WT/DS26/AB/R, WT/DS26/AB/R, WT/DS48/AB/R (16 January 1998) [hereinafter Hormone Appellate Body Report] para. 108.
[222] Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, WTO Agreement, Annex 2, 33 I.L.M. 1226 [hereinafter DSU], art 11.
[223] Hormone Appellate Body Report, above n 220, para. 119.

The Appellate Body in the Beef Hormone Case noted that for SPS measures to be 'based on' a risk assessment, some rational nexus must exist between the supporting scientific evidence and an identifiable risk.[224]

The Philippines must establish three elements to show Australia's violation of Article 5.5 of the SPS Agreement.[225] First, it must show that Australia has adopted its own level of protection, rather than an international standard. Second, Australia's level of protection must exhibit arbitrary or unjustifiable differences in its treatment of different situations. Third, the arbitrary or unjustifiable differences must result in either discrimination or a disguised restriction on trade.[226]

In the Salmon Dispute,[227] the central question also dealt with risk assessment under Article 5.1 of the SPS Agreement. Turning to the definition of 'risk assessment' in Annex A of the SPS Agreement,[228] the Appellate Body found that a proper risk assessment must (1) identify the diseases whose entry or spread the Member wants to prevent, (2) evaluate the probability of entry of a pest or disease, not just the possibility of such entry, and (3) evaluate the likelihood of entry, establishment or spread of these diseases according to the SPS measures which might be applied.[229]

In an important dictum the Appellate Body in that case reconfirmed that Australia has the right to determine its own appropriate level of SPS protection. However, the 'appropriate level' is to be distinguished from the actual SPS measure adopted. The SPS measure adopted has to be rationally related to achieving the appropriate level of protection. Also, whatever appropriate level of protection

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[224] Ibid paras. 197, 200.
[225] Ibid para. 214.
[226] Ibid.
[227] Report of the WTO Panel, Australia-Measures Affecting Importation of Salmon, WT/DS18/R (12 June 1998) [hereinafter Salmon Panel Report].
[228] Report of the Appellate Body, Australia-Measures Affecting Importation of Salmon, AB-1998-5, WT/DS18/AB/R (1998) [hereinafter Salmon Appellate Body Report] Annex A:4 defines 'risk assessment' in part as '[t]he evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences…'
[229] Ibid para. V.10-12.

Australia chooses, it cannot choose 'zero risk' as an appropriate level of protection under the SPS Agreement. The Appellate Body clarified that:

> It is important to distinguish…between the evaluation of 'risk' in a risk assessment and the determination of the appropriate level of protection. As stated in our Report in European Communities – Hormones, the 'risk' evaluated in a risk assessment must be an ascertainable risk; theoretical uncertainty is 'not the kind of risk which, under Article 5.1, is to be assessed.' This does not mean, however, that a Member cannot determine its own appropriate level of protection to be 'zero risk.'[230]

The Appellate Body's decision is instructive in answering the question of what constitutes a proper risk assessment in the context of the spread of pests and diseases. Together with the Beef Hormones decision on what constitutes a proper risk assessment, the Salmon Dispute decision is an important addition to WTO jurisprudence under the SPS Agreement.

The WTO panel that will consider the case can make good use of scientific input though the input may not be dispositive. Although science can provide an estimate of the risk from a substance, it cannot tell the panel whether a country should bear (or should want to bear) that risk. In theory, scientific studies could be used to show whether such a ban is necessary. However, the WTO should be very careful in going down that road because the use of science in judicial review is a rapidly evolving field – one that ad hoc WTO panels would seem ill equipped to handle.

Australian fruit growers could cite a glaring disadvantage compared with their Philippine counterparts in terms of the dirt-cheap labour costs of plantation workers in the latter. To this, the Center for Labor Research and Education of the University of California can attest to.[231] The Center has even documented the use of child labour in banana plantations exposing workers to heavy doses of pesticides and chemicals.[232]

Nevertheless, the Australian government has not passed any measure imposing trade sanctions on fruit imports utilising child labour. Indirectly though, this put the

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[230] Ibid 75.
[231] David Bacon, 'Poverty and Child Labor Set Off a Banana War', *Center for Labor Research and Education Publication* (University of California at Berkeley) 15 January 1998.
[232] Ibid.

Philippine government in a tight fix as it cannot solicit much needed support from a significant segment of NGOs advocating labour rights. To these NGOs, if and when Philippine tropical fruits are able to successfully penetrate the lucrative Australian market, this would translate to more hardships for plantation workers. They will be required all the more to put in more work hours and further expose themselves to pesticides and chemicals to meet increasing demand. While the Philippine Peasant Institute may provide support to the Philippine government through the submission of an amicus curiae brief, the Australian government may have unsolicited support from various child labour right advocates.

VI CONCLUSIONS

Resorting to trade restrictions to address environmental issues may be misguided for several reasons as these restrictions when advocated by domestic business groups with the support of environmental groups for added social respectability, may have as its primary aim trade protectionism, not environmental protection.

Environmental protection, in combination with trade protectionism, can lead to an undisciplined, discriminatory use of trade restrictions. Consequently, when these restrictions are invoked on environmental grounds, they need to be used in a very disciplined and discriminating fashion. Once a country imposes them unilaterally, it may be impossible to avoid the downward spiral of retaliation and counter retaliation. An importing country's use of trade restrictions to block imports in the name of environmental protection may actually be at cross-purposes with the goal of environmental protection. Such restrictions may seek to protect less efficient manufacturers and producers from more efficiently produced imports.

The Philippines may have a case before the WTO and this is attributable to the GATT and WTO panels' broad interpretations of GATT's core obligations and their narrow interpretations of GATT's exceptions. In addition, Australia, given its tough SPS standards, uses strict ecological standards to define which agricultural products are allowed entry, while panels deciding trade disputes emphasise trade considerations.

The use of trade measures for environmental purposes has been decried as extra-jurisdictional, eco-imperialist, protectionist, and unilateralist. However, the ecosystem does not stop at political boundaries nor is it coercion for a nation to help others avoid its mistakes. Furthermore, imposing product standards and import restrictions unilaterally, as most conservation measures are by nature unilateral, can be justified if it seeks to protect the environment and not to preserve domestic production. Past experience have shown that unilateralism has been a critical step for parties before they sit down and discuss trade and environmental measures on a consensual basis.

The tropical fruit dispute episode in Australian and Philippine bilateral trade relations would prove beneficial to both countries in the final analysis. Through a bilateral trade agreement, both governments can agree on standards and technical regulations, consistent with the provisions contained in the WTO SPS and TBT Agreements. It would address the concerns of Australian tropical fruit growers as to the appropriate level of protection needed to counteract the threat of infestation by exotic diseases of local fruit farms. Filipino fruit producers will only have access to the lucrative Australian market on the condition that they have first to comply with the formulated standard harmonised at the highest practicable level of protection for Australian fruit farms so that the Philippines cannot make its policy to impose a lower standard (if indeed it is scientifically shown as such), a feature of its comparative advantage. The negotiations of the trade agreement will also be an opportune time to put into agenda the plight of Filipino fruit plantation workers. Both governments must guarantee the effective participation of the private sector, both from industry and NGOs in the negotiating process and ensure their active cooperation with the public sector in reviewing and harmonising standards, technical regulations and conformity assessment procedures. Australian consumers will of course benefit by being able to purchase alternative products whose price reflects the internalised costs.