

What is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate

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Abstract

This article argues that a fundamental question, "What is free trade?," lurks behind the ongoing debate about the relationship between international trade law and competing legal regimes. It also lurks behind much of the confusion in the Supreme Court's dormant commerce clause jurisprudence under the United States constitution, sometimes mentioned as a model for international trade law. Yet, the literature has remarkably little to say about free trade's definition, although it contains volumes about the reasons for free trade.

This article explores three possible concepts of free trade, trade free from discrimination against foreign companies, trade free from coercion, and trade free from restraint, i.e. laissez-faire, primarily in the context of trade and environment disputes. Only free trade defined as trade free of discrimination offers a legitimate conception of free trade that the World Trade Organization (WTO) can credibly administer. The misunderstandings between environmentalists and free traders reflect trade law's tendency to amalgamate the anti-discrimination, anti-coercion, and laissez-faire concepts. Free traders tend to think of trade law as primarily aimed at policing discrimination, while environmentalists tend to think of it as aimed at laissez-faire, the least legitimate concept. The trade law provides some support for both views. Indeed, prominent trade and environment cases combine holdings moving toward laissez-faire and anti-coercion concepts with dicta disavowing any such move.

Recognizing the conceptual question lurking behind "trade and" debates opens up the possibility of thinking about the debates as searches for an appropriate definition of free trade. Until now, most scholarship on the subject has treated these debates as a search for the scope of permissible exceptions to free trade, assuming (wrongly) that "free trade" has a simple agreed upon meaning.

A concept of free trade as trade free from discrimination will only appear legitimate if the definition of discrimination is reasonably intelligible. The WTO has used a very ad hoc approach to discrimination. This article develops a concept of bright line discrimination to show that a more coherent approach is at least possible. Adoption of bright line discrimination would require some narrowing of the scope of free trade in order to enhance its legitimacy.

The search for an appropriate definition of free trade is absolutely central to making progress in understanding "trade and" debates. This article seeks to spark a debate about this neglected question.

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Introduction

A large literature addresses relationships between free trade and other policy areas that trade law increasingly affects, including environmental law,¹ intellectual property,² labor relations,³ human rights,⁴ and competition policy.⁵ These materials rarely include a precise definition of "free trade."⁶

¹ See e.g. DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE* (1994); TRADE AND THE ENVIRONMENT: THE LAW, ECONOMICS, AND POLICY (Durwood Zaelke et al. eds. 1993)[hereinafter TRADE & ENVIRONMENT]; C. FORD RUNGE, *FREER TRADE, PROTECTED ENVIRONMENT: BALANCING TRADE LIBERALIZATION AND ENVIRONMENTAL INTERESTS* (1994).

² See e.g. Frank J. Garcia, *Protection of Intellectual Property Rights in the North American Free Trade Agreement: A Successful Case of Regional Trade Regulation*, 8 AM. U. J. INT'L L. & POL'Y 817 (1993); Special Issue, *Trade-Related Aspects of Intellectual Property Rights*, 1 J. INT'L ECON. L. 497 (1998).

³ See e.g. Virginia Leary, *Workers Rights and International Trade*, in 2 FAIR TRADE AND HARMONIZATION 175 (Jagdish Bhagwati & Robert E. Hudec eds. 1996) [hereinafter, FAIR TRADE].

⁴ See e.g. James F. Smith, *NAFTA and Human Rights: A Necessary Linkage*, 27 U.C. DAVIS L. REV. 793 (1994); Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1 (1996).

⁵ See e.g. Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1 (1997).

⁶ Most of the materials cited in this article contain no definition of free trade. Tom Walthen defines free as "the unlimited exchange of commerce between buyers and sellers across national borders." Tom Walthen, *A Guide to Trade and Environment*, in TRADE & ENVIRONMENT, *supra* note 1, at 5. He then states that "free trade . . . does not necessarily. . . require the elimination of" regulations, because it aims only to avoid discrimination against "foreign companies." *Id.* Similarly, Steve Charnovitz rejects a laissez-faire definition of trade and suggests that it involves the absence of tariffs

They do not answer a crucial question, what precisely must trade be free of in order to be "free" rather than inappropriately shackled? This article addresses that question.

Instead of defining free trade, scholars seem to assume that "free trade" has an obvious (although unspecified) meaning.⁷ Decisions interpreting the General Agreement on Tariffs and Trade (GATT)⁸ and academic writing use vague phrases like "trade barriers,"⁹ "trade restrictions,"¹⁰ and

and "special border restrictions," both of which are usually discriminatory. See Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT'L L. J. 459, 471-72 (1994). This article addresses the tension implicit in free trade under a laissez-faire definition and a more limited definition focusing upon non-discrimination.

⁷ See e.g. Esty, *supra* note 1, at 3, 33-35 (discussing, but not defining free trade); FAIR TRADE, *supra* note 3 (same). Cf. Brian Alexander Langille, *General Reflections on the Relationship of Trade and Labor (Or Fair Trade is Free Trade's Destiny)*, in 2 *id.* at 236 (questioning the "assumption that there is a natural or noncontroversial mode of economic ordering" which trade theory can police); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1097 (1986) (explaining that the ambiguity of the phrase "free trade" encourages conflating opposition to protectionism with a commitment to laissez-faire).

⁸ October 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

⁹ See Jagdish Bhagwati, *Introduction in I FAIR TRADE*, *supra* note 3, at 1 (referring to the "simple elimination of trade barriers").

¹⁰ See e.g. Daniel A. Farber & Robert E. Hudec, *GATT Legal Restraints on Domestic Environmental Regulations*, in II FAIR TRADE, *supra* note 3, at 64.

“protectionism,”¹¹ to describe that which trade should be free of. But these phrases, absent clarification, may be broad enough to collectively embrace almost any regulation or commercial tax serving competing values, as demonstrated below.¹²

This failure to articulate a normatively attractive and clear legal concept of free trade leaves the World Trade Organization (WTO), the administrator of the GATT and related multilateral trade agreements,¹³ unable to defend its legitimacy in a convincing manner.¹⁴ Increasing tension between the WTO and other legal regimes has made the question of the WTO's legitimacy quite salient.¹⁵ Decisions

¹¹ See e.g. *id.* at 75 (noting that it would have been easy to find U.S. corporate average fuel economy standards “protectionist”); VED P. NANDA, *INTERNATIONAL ENVIRONMENTAL LAW & POLICY* 44 (1995) (the controversy surrounding the use of environmental trade measures (ETM) “centers on the possibility of a state imposing an ETM as a protectionist measure.”). Cf. Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1, 3-5 (1999) (providing a definition for this otherwise vague term).

¹² Cf. Regan, *supra* note 7, at 1094-95 (defining protectionism and not using it as a synonym for “trade restrictions” or “trade barriers.”); Sykes, *supra* note 11, at 3-7 (clarifying “protectionism”).

¹³ The relevant agreements are set out in Annexes to the agreement establishing the WTO. Marakesh Agreement Establishing the World Trade Organization, April 15, 1994, art. II, reprinted in GATT SECRETARIAT, *THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS* 6-7 (1994) [hereinafter URUGUAY RESULTS]. The annexes themselves appear in this same volume. See *id.* at 19-439.

¹⁴ On the concept of legitimacy see THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); Martti Kokenniemi, Book Review, 86 AM J. INT'L L. 175 (1992).

¹⁵ See Kenneth W. Abbott, *Economic Issues and Political Participation: The Evolving Boundaries of International*

holding environmental and public health regulations contrary to GATT have contributed to paralyzing division among WTO member governments and triggered a campaign by non-governmental organizations (NGOs) to stop new trade talks.¹⁶

A decade that witnessed the WTO's creation and a significant expansion of international trade law¹⁷ has brought the WTO into conflict with international and domestic environmental law.¹⁸ During

Federalism, 18 CARDOZO L. REV. 971, 975 (1996) (pointing out risk of trade regimes losing legitimacy and public support unless noneconomic interests have a role in WTO policy and dispute settlement); Jeffrey L. Dunoff, "Trade and": *Recent Developments in Trade Policy and Scholarship-And Their Surprising Political Implications*, 17 NORTHWESTERN J. INT'L L. & BUS. 759, 764-768 (1996-97) (expansion of trade law into "new substantive areas threatens to undermine international and domestic support for the trade regime"); Jeffrey L. Dunoff, *Resolving Trade-Environment Conflicts: The Case for Trading Institutions*, 27 CORNELL INT'L L. J. 607 (1994) (arguing against allowing GATT to settle trade and environment disputes); Jeffrey L. Dunoff, *Rethinking International Trade*, 19 U. PA. J. INT'L ECON. L. 347 (1998) (arguing that "linkage issues" raise serious practical and theoretical challenges to the trade regime).

¹⁶ See *NGOs From 60 Countries Team Up to Halt Next WTO Round on Environmental Grounds*, 22 Int'l Env't. Rep. (BNA) 446 (May 26, 1999); *A Global Disaster*, THE ECONOMIST at 19, December 11, 1999.

¹⁷ See *The Beef Over Bananas*, THE ECONOMIST at 65, March 6, 1999 (the WTO has "dealt with 163 disputes since the WTO was set up in 1995"); Robert E. Hudec, *The New WTO Dispute Settlement Procedure*, 8 MINN. J. GLOBAL TRADE 1, 21 (1999) (growth in legal obligations from WTO administered trade law explains "substantially all" of the increased case load).

¹⁸ See generally ESTY, *supra* note 1.

this decade, the WTO became increasingly concerned with "non-tariff trade barriers."¹⁹ This creates enormous potential for conflict, because, in a globally integrated world, most regulations and commercial taxes might be described as non-tariff trade barriers, since they burden commercial activity, some of which is international.

In the early 1990s, two GATT panels held the unilateral imposition of a ban on tuna imports caught in a manner that unduly endangers dolphins contrary to GATT.²⁰ More recently, WTO dispute resolution panels held an import restriction aimed at protecting endangered sea turtles contrary to GATT and a European ban on the sale of beef injected with growth hormones contrary to the Agreement on Sanitary and Phytosanitary Measures (SPS),²¹ another WTO administered trade agreement.²² A stream of articles and books addressing the proper relationship between free trade and environmental protection followed the "Tuna/Dolphin" decisions, but rarely addressed the definition of

¹⁹ See Langille, *supra* note 7, at 235.

²⁰ See U.S. Restrictions on Imports of Tuna, September 3, 1991, GATT B.I.S.D. (39th Supp.) at 155 (1993)(unadopted); General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994)(unadopted).

²¹ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, *reprinted in* URUGUAY RESULTS, *supra* note 13, at 69 [hereinafter SPS Agreement].

²² See Report of the Appellate Body of the World Trade Organization on United States-Import Prohibition of Certain Shrimp and Shrimp Products, October 12, 1998, 38 I.L.M. 118 (1999); Report of the Appellate Body: EC Measures Concerning Meat And Meat Products (Hormones), 1998 WL 25520.

free trade.²³

This inattention to first principles may reflect the formal legal structure of GATT, which imposes a set of trade disciplines upon contracting parties, rather than explicitly requiring free trade (whatever that is). Nevertheless, free trade provides the normative justification for the WTO and the agreements it administers, and, as this article shows, concepts of free trade sometimes help explain the results of cases interpreting trade agreements. Hence, an adequate legal concept of free trade would greatly enhance the debate about the WTO.

An analysis of possible definitions shows that the ad hoc and uncertain nature of trade law

²³ See Frank J. Garcia, *The Trade Linkage Phenomenon: Pointing the Way to the Trade Law and Global Social Policy of the 21st Century*, 2 U. PA. J. INT'L ECON. L. 201, 202 n.3 (1998) (tuna/dolphin decisions widely believed to have spurred public opposition to the WTO and concern with linkage issues); Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM J. INT'L L. 268, 268 (1997) (Tuna/Dolphin I produced an "explosion of rhetoric" in "learned journals"). See e.g. ESTY, *supra* note 1; TRADE & ENVIRONMENT, *supra* note 1; Mark Edward Foster, Note, *Trade and Environment: Making Room for Environmental Trade Measures within the GATT*, 71 S. CAL. L. REV. 393 (1998) (arguing that the WTO should consider environmental trade measures legal under GATT Article XX); Annick Emmenegger Brunner, *Conflicts Between International Trade and Multilateral Environmental Agreements*, 4 ANNUAL SURVEY OF INT'L & COMP. LAW 74 (1997); Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution*, 26 ENVTL. L. 841 (1996); Howard F. Chang, *An Economic analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L. J. 2131 (1995); Charnovitz, *supra* note 6; Steve Charnovitz, *Green Roots, Bad Pruning: GATT Rules and Their Application to Environmental Trade Measures*, 7 TUL. ENVTL. L. J. 299 (1994); Edith Brown Weiss, *Environment and Trade as Partners in Sustainable Development: A Commentary*, 86 AM. J. INT'L L. 728 (1992).

stems from a failure to choose a clear, limited, and coherent concept of free trade from among the available alternatives, rather than from theoretical necessity.²⁴ Current trade law amalgamates three different ideas about what trade should be free of. Article III of GATT's text reflects a concept of free trade as trade free of laws, both taxes and regulations, that discriminate between foreign and domestically produced goods.²⁵ But, this article will argue, the Tuna/Dolphin and Shrimp/Turtle decisions implicitly rely upon an anti-coercion concept of free trade - as trade unimpeded by efforts to enforce even non-discriminatory environmental law (or other bodies of non-trade law) against non-complying nations.²⁶ The WTO took a step toward an even broader concept of free trade, as trade free of national regulation - a broad laissez-faire concept, when it adopted the SPS agreement during

²⁴ See WTO Committee Report Claims Success in Furthering Trade, Environment Talks, 21 INT. ENV'T. REP. 1127, 1128 (November 11, 1998)[hereinafter UNEP Criticism](citing United Nations Environment Program's charge that uncertainty in international trade law "may have hampered several environmental conventions."). Cf. Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1404 (1994) (arguing that "lack of clarity may be a necessary characteristic" of law addressing free trade).

²⁵ See Farber & Hudec, *supra* note 24, at 1406 (characterizing free trade policy as a principle of evenhandedness); Dunoff, *Rethinking*, *supra* note 15, at 370-72.

²⁶ I use the term "coercion" with some reservations. Trade measures do not in fact force foreign nations to change their conduct as a military invasion or the arrest of a person might. See Belinda Anderson, *Unilateral Trade Measures and Environmental Protection Policies*, 66 TEMPLE L. REV. 751, 755 (1993). On the other hand, trade measures involve more force than negotiation. *Id.*

the Uruguay round of trade negotiations.²⁷

Since trade law conflates three different ideas of what free trade is, trade law appears quite ad hoc and difficult to justify. Because these ideas are not equal in their normative attractiveness and their implications for other legal regimes, free trade becomes something of Rohrsach test. Commerce fans tend to identify free trade with the most normatively appealing idea, that of non-discrimination, and environmentalists tend to identify it with the least normatively appealing idea, laissez-faire government.

Part one of this article begins by identifying the roots of the ambiguity in the legal concept of free trade in the classical economics of Adam Smith and David Ricardo. It then develops three models of free trade, a model based on the principal of non-discrimination, a model based on an international non-coercion principle, and a model based on a principle of laissez-faire government. This part describes the theoretical support for these models, identifies some of their sources in international trade law, and elucidates their implications for focusing efforts to expand free trade. It closes by using the models to help explain why the concepts of "trade barriers" and "trade restrictions" cannot adequately substitute for a definition of free trade.

Part two analyzes the legitimacy of WTO adjudication of each model's key policy issues.²⁸ It

²⁷ See John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903, 916 (1996) (the competition for trade resulting from GATT imposes limitations on national regulatory power similar to those imposed upon "states in nineteenth-century America.").

²⁸ See generally *At Daggers Drawn*, THE ECONOMIST at 17, 20 (May 8, 1999) (questioning whether the WTO has the legitimacy to arbitrate intensely political matters).

shows that application of these models yields fresh insights into the most important trade and environment cases, helps explain continued misunderstandings between free traders and environmentalists, and reframes the ongoing trade and environment debate. It concludes that a non-discrimination model offers the most hope for advancing acceptance of the WTO beyond the world of economists and trade specialists.

Part three will explore the implications of selecting a non-discrimination model. It explains that the WTO must develop a reasonably consistent and convincing view of discrimination in order to gain the legitimacy that the non-discrimination concept may bring. This part discusses why anti-protectionism does not provide a coherent legal concept. It also shows that attention to the problem of defining free trade helps explain the incoherence of Supreme Court precedent under the dormant commerce clause, which Professor Esty has proposed as a model for GATT.²⁹ It also develops a narrow concept of bright-line discrimination to show that a more coherent definition of discrimination is possible.

Much of the scholarly commentary about the trade and environment issue has framed the debate as one about "exceptions" to free trade. The inquiry into the meaning of free trade invites more critical thinking about the GATT and SPS trade disciplines themselves, not just the exceptions to GATT disciplines. This article focuses on trade and environment issues in order to make the topic manageable, but the analysis offered here will contribute to the broader "trade and" debate.

Hopefully, this article will spark further discussion about what free trade should be. In the long

²⁹ See ESTY, *supra* note 1, at 111-118. Cf. Farber & Hudec, *supra* note 24.

run, this issue is critical to the WTO's legitimacy.³⁰

I. The Law and Theory Supporting the Non-Discrimination, International Non-Coercion, and Laissez-Faire Models

The idea that the legal concept of free trade is ambiguous will surprise many economists, who may assume that free trade has a clear uncontested meaning in economic theory. This part will show that the ambiguity that the model identifies in the legal concept of free trade has its roots in the writings of David Ricardo and Adam Smith.³¹ It will then sketch out the three models and their sources.

A. Classical Roots of the Ambiguity

Economists write volumes about the reasons for "free trade," but often say very little about its definition.³² Adam Smith in "The Wealth of Nations" advanced the argument that efforts to protect a

³⁰ See generally McGinnis, *supra* note 27, at 918-924 (explaining why the regime of "international federalism" may be unstable because "interest groups" may oppose laissez-faire policies); Abbott, *supra* note 15, at 975 (pointing out risk of trade regimes losing legitimacy and public support unless noneconomic interests have a role in WTO policy and dispute settlement); Dunoff, *supra* note 15, at 764 (expansion of trade law into "new substantive areas threatens to undermine international and domestic support for the trade regime"); Daniel Esty, *Linkages and Governments: NGOs at the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 709, 715 (1998) (questioning WTO legitimacy to make regulatory judgments).

³¹ See ADAM SMITH, *THE WEALTH OF NATIONS* (Modern Library 1994); DAVID RICARDO, *ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION*, IN I THE WORKS AND CORRESPONDENCE OF DAVID RICARDO (1962).

³² See DOUGLAS A. IRWIN, *AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE* (1996) (describing a history of debates about free trade's merits, rather than its definition). See e.g. PAUL R. KRUGMAN, *RETHINKING INTERNATIONAL TRADE* (1990) (theories about why international trade exists, the effects of "protectionism" and optimal trade policy, building in insights about economies of

country's producers by banning or levying high tariffs upon imports would not only harm the nation making the taxed or banned goods, but also the nation imposing the restriction.³³ David Ricardo refined Smith's insights into a more nuanced theory of comparative advantage.³⁴ The theory holds that free trade would allow each country to make that which it is best suited to make, thereby increasing world wide production and lowering costs.³⁵ This theory articulates the reasons for free trade.³⁶

Smith and Ricardo's work have less to say about what exactly free trade is. Smith's theories constitute an extended argument against the mercantilist system of his day.³⁷ This system levied high protective tariffs or banned imports outright as an economic strategy.³⁸ Smith's work showed that this strategy was economically counterproductive.³⁹

The dominant view of Smith's and Ricardo's work holds that it articulates a laissez-faire theory of free trade.⁴⁰ Their work provides some support for this view. Smith, for example, characterizes his

scale).

³³ See SMITH, *supra* note 31, at 485-86.

³⁴ See RICARDO, *supra* note 31, at 128-149.

³⁵ *Id.* at 133-34.

³⁶ For a brief review of the theory as it has evolved to date see Alan O. Sykes, *Comparative Advantage and the Normative Economics of International Trade Policy*, 1 J. INT'L ECON. L. 49 (1998).

³⁷ See SMITH, *supra* note 31, at 456-480.

³⁸ *Id.* at 479.

³⁹ See *id.* at 481-502.

⁴⁰ See e.g. DANIEL R. FUSFELD, *THE AGE OF THE ECONOMIST* 22-56 (1968); *ECONOMIC JUSTICE IN PERSPECTIVE: A BOOK OF READINGS* 69-70 (Jerry

endorsement of the navigation acts (trade restrictions to advance national security) and compensatory taxation (taxation of imports compensating for other country's taxation of exports) as "limitations" upon the principle of free trade.⁴¹ Similarly, Ricardo discusses a "system of perfectly free commerce" implying trade with no burdens whatever.⁴² This suggests that the free trade principle really involved absolute license to trade without any impediments or restrictions. This would imply no commercial taxes or regulations, at least upon goods traded internationally and the processes produce such goods.

Analysis of Smith's policy recommendations, however, shows that they fit a model of non-discrimination in trade relations better than they fit a laissez-faire model. The import bans and high protective tariffs that Smith opposed discriminated against imports, since they applied to imports, but not to competing domestic industry. Smith endorsed compensatory taxation and general taxation for legitimate public purposes, positions at odds with strict laissez-faire, but consistent with anti-discrimination.⁴³

Ricardo's work focuses more on the mechanics of comparative advantage and less on policy recommendations. Since he does not adamantly oppose taxes, Ricardo too does not really endorse laissez-faire in a strict sense either. In discussing taxes upon produce, for example, he states that "the

Combee and Edgar Norton eds., 1991); ROBERT L. HEILBRONER, *THE WORLDLY PHILOSOPHERS: THE LIVES, TIMES, AND IDEAS OF THE GREAT ECONOMIC THINKERS* (4TH ed. 1970).

⁴¹ See *id.* at 494 (describing compensatory taxation as "the second limitation of the freedom of trade")

⁴² See RICARDO, *supra* note 31, at 133. *Cf. id.* at 318, 338 (referring to "universally free trade" and "free trade" respectively)

⁴³ See SMITH, *supra* note 31, at 494-496, 790, 876.

sum required by the taxes must be raised."⁴⁴ He then claims that a produce tax would not "materially interfere with foreign trade."⁴⁵ At the same time, he strikes a laissez-faire note in stating that the tax "would . . . prevent the very best distribution of the capital of the whole world. . ."⁴⁶ On balance, he treats taxation as necessary, not as a trade restraint to be abolished.

This analysis reveals a problem with the classical foundation for free trade. A principle different from the laissez-faire principal that Smith and Ricardo are known for best accounts for their policies. This problem matters a great deal for legal theory, because a definition of free trade must help guide institutional policy decisions to function as a useful legal concept.

Either a laissez-faire or a non-discrimination principle justifies abandonment of mercantilist policies, which involve discriminatory government activism. The ambiguity, therefore, mattered little to the argument against mercantilism.

The two concepts, however, diverge sharply in their implications for modern environmental and health regulations. And Smith and Ricardo, not surprisingly, have little to say about modern regulation that addresses health and environmental concerns.

Neoclassical economic principles would suggest that the benefits of environmental and health regulations should equal their costs.⁴⁷ This, however, seems like a concept of welfare economics,

⁴⁴ RICARDO, *supra* note 31, at 167.

⁴⁵ *Id.* at 172.

⁴⁶ *Id.* at 172.

⁴⁷ See David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 *ECOLOGY L. Q.* 545, 577-579 (1997); E. J. MISHAN, *COST-*

rather than a definition of free trade.⁴⁸ In addition, application of this principle poses numerous practical and theoretical problems.⁴⁹

This summary suggests two possible definitions of free trade. One might think of free trade as trade free of burdens, a broad laissez-faire principle. One might, on the other hand, think of free trade as trade free of discrimination.

B. GATT Article III: Trade Free from Discrimination

Since its negotiation in 1947, GATT has formed the basis for international trade law.⁵⁰

BENEFIT ANALYSIS 154-61 (1982).

⁴⁸ See generally MISHAN, *supra* note 47.

⁴⁹ See e.g. Driesen, *supra* note 47 (administrative cost-benefit analysis does not help evaluate most important economic questions about cost or accomplish any of the other goals proponents have outlined); DAVID W. PEARCE & R. KERRY TURNER, *ECONOMICS OF NATURAL RESOURCES & THE ENVIRONMENT* at 122-23 (1990) (noting temptation to "downgrade" environmental benefits because they are "soft" variables); THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* (1996); MARK SAGOFF, *THE ECONOMY OF THE EARTH* (1988) (arguing that environmental policies should be based on ethical, esthetic, cultural and historical consideration rather than aggregate personnel preferences); Duncan Kennedy, *Cost Benefit Analysis of Entitlement Problems: A Critique*, 33 *STAN. L. REV.* 387 (1981) (outcomes of CBA indeterminate in theory); Lawrence A. Tribe, *Policy Science: Analysis or Ideology*, 2 *PHIL. & PUB. AFF.* 66, 70 (1972) (same).

⁵⁰ On its status under U.S. domestic law see John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 *MICH. L. REV.* 250 (1967); C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 *Vand. J. Transnat'l L.* 243 n. 160 (1997); Uruguay Round Agreement

Currently, some 133 countries have agreed to abide by the GATT agreement.⁵¹

GATT article III supports "free trade," defined as trade free of discrimination against foreign goods as a tool of economic policy.⁵² Article III read in isolation would suggest that GATT seeks to facilitate international trade - and thereby spread prosperity - by establishing a principle of non-discrimination against foreign goods.⁵³ GATT's preamble and its trade liberalization program emphasize non-discrimination.⁵⁴ The WTO provides a forum for lowering tariffs, taxes that apply to

Act of Dec. 8, 1994, P.L. 103-465, 108 Stat. 4809, *codified at* 19 U.S.C. §§ 3511-3512 (approving GATT and the Uruguay Round agreement, but providing that these agreements do not amend federal laws protecting workers, the environment, and health and safety).

⁵¹ Andrew L. Strauss, *From Gattzilla to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization*, 19 U PA. J. INT'L ECON. L. 769, 815 (1998). This figure includes countries who assented to GATT prior to the formation of the WTO and those who subsequently became members of the WTO.

⁵² John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1231 (1992).

⁵³ See Farber & Hudec, *supra* note 10, at 108 (claiming that GATT has "made a major contribution to alleviating poverty in the postwar era."); Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices in II FAIR TRADE*, *supra* note 3 ("The GATT's economic goal is to promote, through liberal international trade policies, the greater effectiveness of national economies.").

⁵⁴ See GATT, *supra* note 8 preamble. The preamble speaks of the "elimination of discriminatory treatment" [emphasis added], but only the "substantial reduction" of trade barriers generally.

imports but not domestically produced goods.⁵⁵ WTO member governments commit themselves to the principle of "national treatment" for imports, a requirement that taxes and regulations not discriminate between foreign and domestic goods absent an adequate non-economic justification.⁵⁶ Members must provide other GATT contracting parties with the same treatment they provide the "most-favored" nation with which they trade, a limited principle of non-discrimination between foreign trading partners.⁵⁷

Although GATT's text lacks a definition of discrimination, a working definition will help clarify the model. One might define discrimination as imposition of a standard or restriction on imports that one does not impose upon one's nationals.⁵⁸ A concept of free trade as trade free of discrimination against foreign producers implies a focus upon tariff reduction, elimination of regulations and taxes that expressly discriminate between foreign and domestic goods, termination of subsidies that apply to only domestic manufacturers of products (thereby discriminating against imports), and abolition of import quotas.⁵⁹

⁵⁵ See *id.* (citing substantial reduction of tariffs as a reason the parties to GATT have agreed to it); GATT, *supra* note 8 XXVIIIbis (providing for negotiation of tariff reductions). Under the auspices of the WTO, the parties to GATT periodically negotiate schedules that reduce tariffs, which constitute an integral part of the GATT agreement.

⁵⁶ *Id.* arts. III, XX.

⁵⁷ *Id.* art. I.

⁵⁸ I posit this simple model as a means of framing discussion of free trade's meaning. This model does not capture every feature of GATT.

⁵⁹ See *generally*, THE URUGUAY ROUND & BEYOND 255 (Jagdish Bhagwati & Mathias Hirsch eds. 1998) (advocating elimination of subsidies for coal production).

C. The Sanitary and Phytosanitary Agreement, Article XI, and Article XX's Evisceration: The Laissez-Faire Model

One can define free trade more broadly than trade free of discrimination. We might mean by free trade, trade unencumbered by national laws that might increase prices, such as taxes and regulation.⁶⁰

GATT Article XI:1 offers the potential for a substantial move toward laissez-faire government. Article XI generally prohibits "quantitative restrictions" upon exports or imports. One might construe this article narrowly to embrace import quotas and little else, rendering it consistent with a non-discrimination principle. But the WTO has interpreted it broadly to apply to any border measure imposing any burden upon international trade.⁶¹ This implies that any violation of the laissez-faire principle administered at the border offends GATT Article XI:1.

While article XI in isolation would go far toward establishing a laissez-faire concept, the note ad article III should limit article XI's push toward laissez-faire. Trade experts agree that the note ad article III acts as a defense to claims that product regulations applied at the border are per se violations of article XI.⁶² It subjects such regulations to article III's national treatment obligation in lieu of the rule of

⁶⁰ *Cf.* Regan, *supra* note 7, at 1096 (distinguishing being against protectionism from being in favor of total economic laissez-faire).

⁶¹ See WTO Dispute Settlement Report on India-Quantitative Restrictions on Imports of Agricultural, Textile & Industrial Products, April 6, 1999, 1999 WTO DS Lexis 5, ¶ 5.142 (construing article XI to include "a limitation on action . . . condition or regulation.").

⁶² See e.g. Robert E. Hudec, *The Product-Process Doctrine in GATT/WTO Jurisprudence* at 5 (1999) (unpublished manuscript on file with the author).

per se invalidity that generally applies to trade restrictions under article XI.⁶³ Hence, the scope of article III and its ad note determines the limits that apply to article XI's push toward laissez-faire government.

GATT contains a set of defenses in Article XX that arguably reflects a conscious choice to leave decisions about the appropriate scope of national regulation to advance at least citizens' non-commercial welfare to national governments.⁶⁴ These defenses, assuming that they have meaning, would allow a country to impose otherwise GATT illegal trade restrictions when they meet Article XX's requirements.⁶⁵ In other words, article XX would allow quantitative restrictions on trade and discriminatory regulation of foreign commerce under some circumstances. These exceptions apply to environmental laws.⁶⁶

Trade panels, however, have usually construed these provisions very narrowly.⁶⁷ As a result,

⁶³ See *id.*

⁶⁴ GATT, art. XX.

⁶⁵ See U.S. Restrictions on Imports of Tuna, September 3, 1991, GATT B.I.S.D. (39th Supp.) at 155, ¶ 5.27 (1993) (unadopted) [hereinafter Tuna/Dolphin I].

⁶⁶ See GATT, art. XX(b),(g); Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37 (1991); WTO Report of the Appellate Body on U.S. Import Prohibitions of Certain Shrimp and Shrimp Products, October 12, 1998, 38 I.L.M. 118, ¶¶ 127-34 (1999) [hereinafter Shrimp/Turtle Appellate] (article XX applies to efforts to protect endangered species).

⁶⁷ See Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes, adopted on November 7, 1990, B.I.S.D. 36S/200 ¶¶ 74-75 (using a least restrictive means test under article XX); Tuna/Dolphin I ¶¶ 5.28, 5.33 (same); General Agreement on Tariffs and Trade: Dispute Settlement

no panel has ever upheld a health or environmental regulation under an article XX defense.⁶⁸ While GATT does not expressly embrace a laissez-faire philosophy, the evisceration of article XX defenses makes it quite difficult to identify meaningful limits to a WTO panel's ability to pursue a broad laissez-faire agenda indirectly.

The Shrimp/Turtle case rejected a very broad anti-coercion rationale that might automatically eliminate any possibility of an article XX defense.⁶⁹ But this decision struck down the measure before it

Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839, ¶ 5.35 (1994)[hereinafter Tuna/Dolphin II ¶](unadopted)(same); Canada-Measures Affecting Exports of Unprocessed Herring and Salmon, adopted on March 22, 1988, B.I.S.D. 35S/98 ¶ 4.7 (same); Charnovitz, *supra* note 66, at 49-50 (showing why this test is difficult to meet); Farber & Hudec, *supra* note 10, at 81 (recognizing that "it is always possible to imagine *some* less restrictive alternative," but arguing that GATT tribunals have in practice exercised "good judgment and common sense in this exercise."); Steve Charnovitz, *Pelly Amendments*, *supra* note 120, at 778-79 (contrasting a literal approach the article XX's chapeau with the case law's approach).

⁶⁸ Charnovitz, *Defogging*, *supra* note 6, at 494. See WTO Report of the Appellate Body on United States-Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 603, 618-23 (1996)[hereinafter Reformulated Gasoline] (eschewing a least restrictive means type approach, but still finding law illegal under article XX); Shrimp/Turtle Appellate, ¶¶ 135-42 (same). See also Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test*, 32 INT'L LAWYER 619, 622 (1998) (interpretation of article XX has made its requirements "exceptionally demanding.").

⁶⁹ The Appellate Body held erroneous the panel's conclusion that conditioning access to a market upon the exporter's compliance with the importer's unilaterally required policies necessarily violated article XX. Shrimp/Turtle Appellate, ¶¶ 121-122. In so doing, it stated that a per se rule against unilateral requirements might

and it is too soon to tell whether subsequent panels will allow article XX defenses to validate otherwise GATT illegal environmental measures.⁷⁰

Even if a government regulation complies with all relevant GATT trade disciplines or somehow manages to satisfy the WTO's interpretation of article XX, the recent SPS agreement invites WTO panels to second guess national governments claims that the problem a regulation addresses warrants a regulatory remedy.⁷¹ And a recent WTO panel decision did precisely that, declaring illegal a European community restriction on beef from cattle injected with hormones, some of which had been found to cause cancer in laboratory animals.⁷² A panel of trade experts with no expertise in public health

systematically make much of article XX "inutile." Id. ¶ 121.

⁷⁰ In spite of the Appellate Body's rejection of a general rule against unilateral action, it cited the coercive effect of the measure before it as its "most conspicuous flaw." Id. ¶ 161. It then developed a novel and expansive concept of discrimination in order to invalidate the measure under the chapeau of article XX. Id. ¶¶ 161-186. The opinion suggests that clear, simple, uniform requirements, cannot be imposed unilaterally, but complicated discretionary judgments may be permissible, at least if preceded by fruitless negotiations and adequate administrative process. Id. This would call into question a lot of existing law and raises critical questions of administrative feasibility. Also, it remains to be seen whether subsequent panels will follow Shrimp/Turtle's approach or the more generally hostile approach of the Tuna/Dolphin cases.

⁷¹ For background and a preliminary assessment of the SPS agreement see Donna Roberts, *Preliminary Assessment of the Effects of the WTO Agreement on Sanitary and Phytosanitary Trade Regulations*, 1 J. INT'L ECON. L. 377 (1998).

⁷² See Report of the Panel: EC Measures Concerning Meat And Meat Products (Hormones), 1997 WL 569984 (August 18, 1997) [hereinafter Beef/Hormone Panel]. This decision establishes that the WTO would declare illegal "sanitary" measures that

concluded that the European Community had failed to show that the banned hormones posed a significant risk.⁷³ The WTO's Appellate Body affirmed the Panel decision, while reversing some of its subsidiary rulings.⁷⁴

The new SPS agreement, as interpreted so far by the WTO, creates hurdles for governments applying non-discriminatory, but strict standards, to protect public health.⁷⁵ Governments wishing to enact stricter standards than existing advisory international standards must base their standards on a risk assessment.⁷⁶ WTO panels will scrutinize national regulations determine whether risk assessments

did not discriminate. The panel opinion states that WTO panels may invalidate laws that fully comply with GATT's non-discrimination principles, if they fail to comply with the SPS. *Id.* ¶¶ 8.36-8.41.

⁷³ See Vern R. Walker, *Keeping the WTO from Becoming the "World Trans-science Organization": Scientific Uncertainty, Science Policy, and Fact-finding in the Growth Hormones Dispute*, 31 CORNELL INT'L L. J. 251, 301-303, 308-309 (1998) (discussing Panel fact-finding and the appellate body's approval of the findings).

⁷⁴ See Report of the Appellate Body: EC Measures Concerning Meat And Meat Products (Hormones), January 16, 1998, 1998 WL 25520 ¶ 253 (1998)[hereinafter, Beef/Hormone Appellate].

⁷⁵ See Steve Charnovitz, *The World Trade Organization, Meat Hormones, and Food Safety*, 14 Int'l Trade Rep. (BNA) No. 41, 1781 (1997). Cf. Ryan David Thomas, Note, *Where's the Beef? Mad Cows and the Blight of the SPS Agreement*, 32 VAND. J. TRANSNAT'L L. 487 (1999)(arguing that the SPS agreement does not go far enough toward harmonizing regulatory measures).

⁷⁶ Beef/Hormone Appellate ¶ 186. Cf. David A. Wirth, *International Trade Agreements: Vehicles for Regulatory Reform*, 1997 U.CHI. LEGAL FORUM 331, 339 n. 22 (questioning the Beef/Hormone panel's approach).

"reasonably support" the regulatory measure at stake.⁷⁷ The Beef/Hormone Appellate Body acknowledged, in dicta, national governments' right to regulate on the basis of minority scientific views.⁷⁸ But it held that the single divergent opinion of a well respected scientist could not justify the regulatory program before it, because the scientist did not himself carry out research directly addressing hormone residues in beef fattened with hormones.⁷⁹ It also apparently held that a government cannot regulate carcinogens without scientific studies addressing the specific **application** of the carcinogen it banned, at least in the face of studies of expert opinion finding the disputed application "safe."⁸⁰ Finally, it rejected an apparently undisputed body of research identifying misapplication of growth hormones as a problem. The Panel found the handful of studies on this issue "insufficient" to constitute a risk assessment of that issue.⁸¹ This would suggest that governments cannot, under the SPS agreement, permanently regulate any problem that has not been studied extensively, even when there is little scientific controversy about it.

The Appellate Body stated in dicta that the SPS does not require quantification of risk.⁸² But its holdings, both in Beef Hormone and subsequent cases, cast doubt on whether any measure based on

⁷⁷ Beef/Hormone Appellate ¶ 193.

⁷⁸ Id. ¶ 194.

⁷⁹ Id. ¶ 198.

⁸⁰ Id. ¶¶ 196, 199-200. See Walker, *supra* note 20, at 303 (faulting the Appellate Body for requiring an assessment so specifically focused that the "risk determination itself must clear a high threshold of specificity.").

⁸¹ Beef/Hormone Appellate ¶ 207.

⁸² Id. ¶¶ 187

a qualitative assessment of limited information could pass muster.⁸³

Article 5.7 of the SPS agreement does authorize provisional adoption of measures on the basis of “available pertinent information.” No WTO panel has interpreted this language yet. But for reasons set out in the margin, this provision may do very little to preserve regulatory programs.⁸⁴

Judicial scrutiny of scientific justifications can cripple regulatory programs where great scientific uncertainty exists.⁸⁵ Because of ethical limitations on controlled human experimentation, precise data

⁸³ See e.g. *Australia-Measures Affecting Importation of Salmon*, 1998 WL 731009, October 20, 1998 (reversing Panel assumption that a document containing “some evaluation” of risk is a risk assessment under the SPS agreement).

⁸⁴ Most serious deficits in scientific understanding of environmental problems last a very long time. This raises an issue as to whether authority to “provisionally” adopt measures on the basis of available information provides authority to keep a measure in place for a long period of time when information is lacking.

Furthermore, authority to regulate “on the basis of available pertinent information” might be interpreted very strictly to cripple the provision. A panel might construe “pertinent” information narrowly to prohibit inferences from information that only indirectly bears on the necessity for the measure. It might also interpret the requirement for a “basis” in available information to require a rather direct relationship between the information and the precise regulatory decision. When real data gaps exist, such precision will often be impossible.

⁸⁵ See Thomas O. McGarity, *Substantive and Procedural Discretion in the Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 *Geo. L. J.* 729, 780 (1979) (no regulatory program is possible if it must be based solely upon accepted “facts”); Wirth, *supra* note 76, at 343 (discussing the chilling effect judicial application of science-based test may have upon regulation).

about the effects of contaminants at all levels on human beings usually does not exist.⁸⁶

In this context, burdens of proof can become critical.⁸⁷ Whichever party bears the burden of proof in a case with very incomplete data has a good chance of losing.⁸⁸

The WTO has placed the burden of proof on regulating governments. The Beef Hormone Appellate Body reversed a Panel decision that imposed the burden of proof upon regulating governments in all cases.⁸⁹ But the Appellate Body's decision may still support regular application of the burden of proof to regulators. The Appellate Body endorsed shifting the burden to the regulating party once the complaining party establishes a prima facie violation of the SPS Agreement.⁹⁰ While the Appellate Body did not articulate a set of principles defining a prima facie violation, the case may support finding a prima facie violation any time a bona fide scientific dispute exists about the relationship

⁸⁶ See *id.* at 733-736 (explaining why direct data about the effects of widespread exposure to low doses of carcinogens is rarely available); Walker, *supra* note 75, at 258-261 (describing nature of some of the uncertainties in risk assessment); David A. Wirth, *The Role of Science in the Uruguay Round and NAFTA Trade Disciplines*, 27 CORNELL INT'L L. J. 817, 837-840 (1994) (discussing uncertainty and the precautionary principle); Wirth, *supra* note 76, at 340 (quantitative risk assessment involves the application of policy choices to uncertain data).

⁸⁷ Beef/Hormone Appellate ¶ 97 (issue of burden of proof of particular importance).

⁸⁸ See Walker, *supra* note 75, at 313 ("the party with the burden of persuasion has a difficult burden of proof" because of scientific uncertainty).

⁸⁹ Beef/Hormone Appellate ¶¶ 99-108.

⁹⁰ *Id.* ¶ 98.

between a risk assessment and an adopted measure.⁹¹ Because such disputes are inevitable when little direct data exists about human exposure at various levels (a very common situation), a *prima facie* case of a violation may exist frequently.⁹²

Subsequent WTO panels may regularly require regulators to affirmatively prove that specific evidence directly supports their standards, rather than require complaining parties to show that regulated substances are safe or showing some defense to government inferences from incomplete data.⁹³ If this occurs the SPS agreement could significantly impede regulation, because complete data exists about very few potentially significant public health problems.⁹⁴

⁹¹ The Appellate Body stated that its finding that the burden of proof shifts upon finding a *prima facie* violation "does not deal with the quite separate issue of whether the United States actually made a *prima facie* case. . ." *Id.* ¶ 109 n. 71. The Appellate Body concluded that the United States and Canada established a *prima facie* case, but did not explain why. *Id.* ¶ 197 n. 180. See Walker, *supra* note 75, at 317 (it's not clear what generalizable definition of a *prima facie* case emerges). The Appellate Body effectively treated a range of scientific disputes as establishing a *prima facie* case.

⁹² A subsequent decision supports finding against a regulating nation when the complaining nation has not made a *prima facie* case. See Japan-Measures Affecting Agricultural Products, February 22, 1999, 1999 WL 83966, ¶¶ 109-114, 136-137 (holding that Japan's application of varietal testing requirements to apricots, pears, plums, and quince conflicts with the obligation to base measures on a risk assessment, even though the United States made no *prima facie* case that the measure lacked a scientific basis).

⁹³ See Walker, *supra* note 75, at 318 (Appellate Body may have required evidence "sufficiently specific and probative . . . to overcome a presumption of no risk.").

⁹⁴ See *id.* (Appellate Body may have placed a "substantial burden indeed" upon defending countries); Wirth, *supra* note

In addition, the SPS agreement generally requires WTO members to use the least trade restrictive means available to protect public health.⁹⁵ This least restrictive means test also provides a significant laissez-faire element.⁹⁶

Defining free trade as trade free of government regulation and/or taxes would mean that efforts to expand free trade should focus on weakening regulation and taxes designed to protect the public health or advance other values that might compete with expanded sales of goods at lower prices. Preliminary steps might involve creating burdens governments must meet in order to impose regulations - precisely what the SPS agreement has done. While the WTO has not embraced laissez-faire

86, at 833 (science can inform the regulatory process, but cannot determine results with particularity); Roberts, *supra* note 71, at 396-397 (discussing evidence that enunciation of the SPS has prompted unilateral reconsideration of health protection measures). Roberts, however, believes that fears that SPS disciplines would occasion an "intolerable assault on . . . food safety and environmental standards have likely been overdrawn." *Id.* at 399. She cites the fact that most of the disputes to date involve developed countries as support for this view. *Id.* at 398-399. She does not explain why SPS disciplines might not undermine food safety and environmental standards in developed countries.

Prior to the Beef Hormone decision a number of scholars believed that the SPS agreement did not interfere with standard setting. *See e.g.* Schoenbaum, *supra* note 23, at 286. Obviously, the Beef Hormone decision requires reevaluation of these views.

⁹⁵ SPS Agreement, *supra* note 21, art. 5.6.

⁹⁶ *See infra*, at 108-110. *Cf.* Japan-Measures Affecting Agricultural Products, ¶¶ 96-100, ¶ 126 (complaining party must show that an alternative measure meets the level of stringency desired by the regulating government to invoke the last trade restrictive means test).

government as an explicit goal, it has taken some substantial steps in that direction.⁹⁷

D. The Tuna/Dolphin and Shrimp/Turtle Decisions: Trade Free from International Coercion

Governments frequently employ trade restrictions for reasons other than protection of domestic industry. International institutions usually lack coercive power to enforce international legal obligations. Hence, national governments must generate solutions to international problems.

Governments generally seek to resolve disputes about a wide range of matters, including national security, natural resource conservation, public health and safety, international trade, and human rights, through negotiation. Negotiation does not always solve the problems it addresses and countries may feel compelled to use various forms of coercion to achieve results.

Many countries employ trade restrictions instead of war when negotiation fails.⁹⁸ Trade restrictions have played an important role in the development of international law and in international policy.

Trade sanctions have encouraged governments to further develop GATT, to become GATT

⁹⁷ See Steve Charnovitz, *Environment and Health Under WTO Dispute Settlement*, 32 Int'l Law. 901 (1998)(reviewing cases).

⁹⁸ See Hudec, *supra* note 53, at 113 (trade restrictions "seem to offer the right blend of coercion and civility" when diplomacy fails). See e.g. Amy Blackwell, *The Humane Society and Italian Driftnetters: Environmental Activists and Unilateral Action in International Law*, 23 N.C. J. INT'L L. & COM. REG. 313, 314-315 (1998) (explaining that the High Seas Driftnet Fisheries Enforcement Act prohibits imports of fish from nations using driftnets because several countries have not complied with U.N. resolutions calling for a moratorium on driftnetting).

contracting parties, and to comply with its terms.⁹⁹ GATT reflects a specific decision to countenance unilateral trade measures to encourage non-parties to undertake GATT commitments. GATT's drafters could have specified that GATT's requirements apply to all goods that a GATT contracting party imports. This would have required GATT contracting parties to persuade non-parties to sign GATT through negotiation. But GATT requirements only apply to imports from GATT contracting parties.¹⁰⁰ Contracting parties remain free to restrict imports from non-parties. Hence, GATT's drafters deliberately decided to allow GATT contracting parties to restrict imports from non-parties, instead of drafting a provision forbidding restrictions against any country's exports.

This feature of GATT played an important role in its development. The possibility of imposition of trade restrictions against non-parties coupled with the promise of escape through signature of GATT induced many countries to become parties.

GATT contracting parties, however, may not always honor their GATT obligations. Hence, the regime has needed an enforcement mechanism.

Prior to the recent creation of the WTO, GATT incorporated a dispute settlement process that

⁹⁹ See Taylor, *supra* note 50.

¹⁰⁰ Id. Article III provides for national treatment of the "protects of the territory of any contracting party" [emphasis added] upon import into the territory of another contracting party. Id. Art. III. Similarly, article XI bars quantitative restrictions on imports and exports from a "contracting party." Id. Art. XI. Hence, these disciplines apply only to those who have contracted to abide by GATT.

relied upon consensus adoption of dispute resolution panel decisions.¹⁰¹ As a result, the losing party generally could block implementation of GATT panel decisions by simply opposing its adoption.¹⁰²

The United States increased its reliance on unilateral trade restrictions to leverage favorable resolution of trade disputes under section 301 of the Trade Act of 1974,¹⁰³ in part, to address failures to enforce GATT panel decisions.¹⁰⁴ Partially in order to escape the pressures from unilateral imposition of trade sanctions, GATT contracting parties agreed to create the WTO in 1994.¹⁰⁵ Hence, unilateral trade sanctions have played an important role not just in attracting new GATT contracting parties, but also in securing international agreement to strengthen GATT enforcement.¹⁰⁶

¹⁰¹ See Taylor, *supra* note 50, at 245-246; Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689, 719 (1998).

¹⁰² Hudec, *supra* note 53, at 9 (discussing defendant's veto rights under GATT dispute settlement practice).

¹⁰³ Pub. L. No. 93-618, §§ 301-310, 88 Stat. 1978 (1975) (codified as amended at 19 U.S.C. § 2411-20 (1988))

¹⁰⁴ See Taylor, *supra* note 50, at 228; Hudec, *supra* note 17 at 13. See generally Kenneth W. Abbott, *Defensive Unfairness: The Normative Structure of Section 301 in 2 FAIR TRADE*, *supra* note 3, at 420-22.

¹⁰⁵ Hudec, *supra* note 17, at 13.

¹⁰⁶ Professor Robert Hudec points out that GATT did not approve of the unilateral United States trade restrictions that led to the WTO's establishment. Hudec, *supra* note 53, at 114-115. This does not answer the point that these unilateral restrictions may nevertheless be an appropriate model for other bodies of law, because they demonstrate that trade restrictions may help marshal support for strengthening an international regime. Professor Hudec's argument suggests that unilateralism's importance in the development of the WTO

The principle procedural difference between the WTO and the prior GATT organization involves the nature of dispute settlement. The Dispute Settlement Understanding adopted as part of the Uruguay round of GATT negotiations requires GATT's contracting parties to adopt a WTO panel decision (or an appellate decision following a panel decision), unless the parties reach consensus against adoption.¹⁰⁷ This means that WTO decisions will generally bind WTO members.

The agreement creating the WTO explicitly authorizes the use of trade sanctions, called "suspension of concessions," to enforce decisions of panels established under the WTO to resolve disputes regarding alleged breaches of GATT obligations.¹⁰⁸ Hence, the WTO itself adopts the principle of using coercion to achieve trade goals.¹⁰⁹

does not demonstrate formal inconsistency in WTO policy toward unilateral measures. I do not mean to suggest that the WTO's opposition to unilateral environmental trade measures indicates formal inconsistency.

¹⁰⁷ Understanding on Rules and Procedures Governing Settlement of Disputes, April 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multinational Trade Negotiations, Annex 2, app. 1, arts. 16(4), 17(14), in URUGUAY RESULTS, *supra* note 13, at 417, 419 (1994)[hereinafter, DSU Understanding].

¹⁰⁸ *Id.* art. 22.

¹⁰⁹ Taylor, *supra* note 50, at 259 (discussing "WTO goal of coercing the offending country into compliance with its GATT obligations."). Professor Hudec, a leading GATT expert has opined that the "strength of the GATT legal system" does not rest "on the GATT's power to authorize trade sanctions." Hudec, *supra* note 53, at 114. Rather, "the force of GATT law has rested, first, in its ability to make objective legal rulings, and second, in the tendency of such rulings to elicit community pressure for compliance." *Id.* The agreement creating the WTO, however, reflects a judgment that such pressures are not

As global integration proceeds, national governments experience a loss in their power to assure adequate environmental quality for their own people, unless they can influence conduct abroad that harms their environment or that of the global commons (e.g. oceans) upon which they depend.¹¹⁰ This has led to the growth of international environmental law. Governments have threatened import restrictions (and occasionally export restrictions) to encourage the development of agreed upon international environmental standards and compliance with the terms of adopted standards.¹¹¹ None of these uses of trade sanctions necessarily involves a protectionist economic strategy. Rather, they involve using trade restrictions as a strategy to meet non-economic goals.¹¹²

always adequate, since the Dispute Settlement Understanding authorizes trade restrictions to enforce WTO panel decisions.

Some international environmental treaties reflect similar judgments. For example, the Montreal Protocol on Ozone Depleting Substances authorizes trade restrictions, but relies primarily upon information and diplomacy to encourage participation. See

RICHARD BENEDICK, *OZONE DIPLOMACY* (1992) (describing how diplomacy and information helped treaty development); Elizabeth P. Barratt-Brown, *Building a Monitoring and Compliance Regime Under the Montreal Protocol*, 16 *YALE J. INT'L L.* 519, 534-37 (1991) (discussing incentive structure and its effects). The potential threat of sanctions, while not necessarily the sole mechanism for securing compliance, may play a subtle and important role in encouraging compliance with both GATT and the Montreal Protocol.

¹¹⁰ See Eyal Benvenisti, *Exit and Voice in The Age of Globalization*, 98 *MICH. L. REV.* 167, 168, 201 (1999).

¹¹¹ See David M. Driesen, *The Congressional Role in International Environmental Law and its Implications for Statutory Interpretation*, 19 *B.C. ENV'T'L AFF. L. REV.* 287, 303-308 (1991).

¹¹² See Hudec, *supra* note 53, at 136, 149 (environmental trade measures usually are directed at genuine environmental

Steve Charnovitz has pointed out that unilateral trade restrictions aimed at encouraging multilateral action have preceded the adoption of most significant health and environmental treaties (just as they preceded the formation of the WTO).¹¹³ Multilateral agreements to impose trade sanctions have also encouraging parties to join international environmental treaties. Parties to the Montreal Protocol on Ozone Depleting Substances, for example, included a provision that barred imports of ozone depleting chemicals from countries that did not agree to limit their production of ozone depleters under the Protocol.¹¹⁴ This provision, in combination with other provisions providing more positive incentives for compliance, tended to discourage transfer of ozone depleting chemical production from parties to the Protocol countries to rapidly growing non-parties.¹¹⁵ Such a transfer might have otherwise defeated efforts to control ozone depleting chemicals, destroyed the stratospheric ozone

concerns).

¹¹³ See Charnovitz, *Defogging*, *supra* note 6, at 493. See e.g. Driesen, *supra* note 111, at 303-305 (discussing example of trade restrictions helping create strengthened international standards for oil pollution from ships).

¹¹⁴ See BENEDICK, *supra* note 109, at 91-92 (diplomatic history and nature of provisions); Montreal Protocol on Substances that Deplete the Ozone Layer, Concluded at Montreal, September 16, 1987, entered into force January 1, 1989, 26 I.L.M. 1550, art. 4 (1987).

¹¹⁵ See Barratt-Brown, *supra* note 109, at 534-37 (discussing incentive structure and its effects). CFC production in the developing countries has not grown at rates high enough to offset the cuts in developed countries. See *Montreal Treaty Seen as Major Success in Effort to Protect Stratospheric Ozone Layer*, 28 ENV'T'L REP. 778 (BNA) (August 29, 1997). Yet, some contraband exports continue to bedevil implementation of the protocol. See *Environmental Investigating Group Finds Widespread Trade of CFCs in Europe*, 20 INT'L ENV'T. REP. (BNA) 869 (September 17, 1997).

layer, and created a public health and environmental catastrophe.¹¹⁶

International environmental law has grown in the last few decades.¹¹⁷ It suffers, however, from "treaty proliferation."¹¹⁸ Governments have often agreed to treaties with rather broadly expressed obligations, but often have not taken the actions necessary to meet treaty objectives.¹¹⁹

Governments have often used trade sanctions to encourage compliance with existing treaties. The United States, for example, has used unilateral threats of import restrictions to encourage governments to comply with international fisheries agreements.¹²⁰ Many nations, including several

¹¹⁶ See Barratt-Brown, *supra* note 109, at 534 (discussing need to discourage "the huge potential increase" in developing country production and consumption of ozone depleting chemicals): Jeffrey L. Dunoff, *Reconciling International Trade With Preservation of the Global Commons: Can We Prosper and Protect*, 49 WASH. & LEE L. REV. 1407, 1429 (1992) (a one percent decline in ozone level may cause 200,000 or more skin cancer cases and cause serious damage to peoples' eyes). Although the ozone layer has suffered substantial depletion, it may recover by the middle of the next century. See Montreal Treaty, *supra* note 115.

¹¹⁷ Driesen, *supra* note 111, at 287.

¹¹⁸ See Edith Brown Weiss, *Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths*, 32 U. RICH. L. REV. 1555, 1555 (1999) (more than 1000 international legal instruments have provisions addressing environmental protection).

¹¹⁹ See generally David Wirth, *The International Trade Regime and the Municipal Law of Federal States: How Close a Fit?*, 49 WASH. & LEE. L. REV. 1373, 1391 (1992) (international environmental system invites "holdouts, free riders, laggards, scofflaws, and defectors.")

¹²⁰ See Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 AM. U. J. INT'L L & POL'Y 751 (1994).

underdeveloped countries, responded to the pressure by improving conservation practices.¹²¹ The European Union has also used import bans to meet environmental and public health goals.¹²²

Multilateral agreements sometimes provide for import restrictions as an enforcement strategy.¹²³

The Convention on International Trade in Endangered Species of Flora and Fauna (CITES) generally forbids international trade in listed endangered species and their parts without a permit.¹²⁴ The treaty

Daniel Esty refers to unilateral imposition of sanctions to advance compliance with internationally agreed upon standards as "multilateral unilateralism." See ESTY, *supra* note 1, at 140. He distinguishes this from trade restrictions that countries have agreed to in multilateral treaties, unilaterally imposed trade sanctions to address a transboundary or global harm "without the benefit of any multilateral agreement," and sanctions imposed without multilateral agreement to address harms having no direct impact on the imposing country. *Id.* at 139. My discussion relies implicitly on Professor Esty's very useful framework. See also Steve Charnovitz, *A Taxonomy of Environmental Trade Measures*, 6 GEO. INT'L L. REV. 1 (1993) (presenting a more detailed taxonomy).

¹²¹ Driesen, *supra* note 111, at 305; Charnovitz, *Pelly Amendments*, *supra* note 120.

¹²² See Hudec, *supra* note 14, at 104-105 (describing various European trade restrictions).

¹²³ See e.g. Wold, *supra* note 23, at 880-886 (analyzing GATT legality of the Basel Convention, which limits shipment of hazardous waste).

¹²⁴ Convention on Trade in Endangered Species of Wild Fauna and Flora (CITES), *opened for signature* March 3, 1973, (1976), 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243 art. II, par. 4. See e.g. *Defenders of Wildlife v. Endangered Species Scientific Authority*, 659 F.2d 168 (D.C. Cir. 1981), *cert. denied sub nom.*, *International Assoc. of Fish & Wildlife Agencies v. Defenders of Wildlife*, 454 U.S. 963 (1981) (adjudicating validity of bobcat export decisions under Endangered Species Act provisions).

has enjoyed some success because it aims squarely at limiting trade as a strategy.¹²⁵ Agreements seeking to protect biodiversity that do not rely on trade sanctions have often achieved little.¹²⁶

Prior to the 1990s, GATT seemed to treat international efforts to limit pollution and destruction of natural resources through trade restrictions as GATT compliant. During the development of the Montreal Protocol on Substances that Deplete the Ozone Layer,¹²⁷ a "legal expert from the . . . GATT secretariat stated that GATT did not forbid the use of trade sanctions to encourage non-signatories of these important environmental treaties to comply with the agreements."¹²⁸

Countries have sometimes unilaterally imposed trade restrictions to enforce environmental standards. The United States, for example, successfully used unilateral trade restrictions to encourage a number of nations to abandon tuna fishing techniques that killed dolphins.¹²⁹ In the 1990s, however,

implementing CITES).

¹²⁵ See Wold, *supra* note 23, at 870-74.

¹²⁶ See Chris Wold, *The Futility, Utility, and Future of the Biodiversity Convention*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 1, 1 (1998) (biodiversity convention has accomplished little of substance). Of course, the lack or presence of trade sanctions does not, by itself, explain whether a treaty will be successful. See *id.* at 4-22 (explaining reasons for biodiversity convention's failure). Nevertheless, the conspicuous coincidence of trade sanctions and success should caution one against too quickly concluding that trade sanctions are useless.

¹²⁷ Sept. 16, 1987, art. 4(8), 26 I.L.M. 1541 (1987).

¹²⁸ BENEDICK, *supra* note 109, at 91.

¹²⁹ U.S. Restrictions on Imports of Tuna, September 3, 1991, GATT B.I.S.D. (39th Supp.) at 155 ¶ 2.7 (1993) [hereinafter

first Mexico and then the Netherlands and the European Economic Community mounted challenges to a United States ban on tuna imports caught with purse seine nets in a manner that would kill many dolphins.¹³⁰ GATT panels held the ban contrary to GATT.¹³¹ At the time, GATT required adoption of a panel decision by consensus of member countries in order for the decision to bind member governments, and this never occurred.¹³² Under GATT law, even adopted panel decisions lack formal precedential value.¹³³ In spite of the lack of formal precedential value, these decisions have greatly

Tuna/Dolphin I](Panama and Ecuador prohibited setting purse seine nets on dolphins after U.S. imposition of trade restrictions); Laurel H. Hyde, Comment, *Dolphin Conservation in the Tuna Industry: The United States Role in an International Problem*, 16 San Diego L. Rev. 665, 691-92 (1979)(unilateral measures brought compliance by Senegal, Congo, Spain, and New Zealand with U.S. conservation practices).

¹³⁰ Tuna/Dolphin I, ¶¶ 2.1-2.7; General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839 ¶¶ 2.2, 2.5-2.15 (1994)[hereinafter Tuna/Dolphin II]. For background on the relevant provisions of the Marine Mammal Protection Act see Deidre McGrath, *Writing Different Lyrics to the Same Old Tune: The New (and Improved) 1997 Amendments to the Marine Mammal Protection Act*, 7 MINN. J. GLOBAL TRADE 431, 431-39 (1998); *Earth Island Institute v. Mosbacher*, 746 F. Supp. 964 (N.D. Cal. 1990) (ordering application of import ban to countries fishing with purse seine nets).

¹³¹ Tuna/Dolphin I, ¶ 7.1; Tuna/Dolphin II, ¶¶ 6.1-6.2.

¹³² Charnovitz, *supra* note 101, at 719.

¹³³ See *Canada-Import Restrictions on Ice Cream and Yoghurt*, Dec. 5, 1989, GATT B.I.S.D. (36th Supp.) at 68, 85 (1990) (prior panel reports are relevant but not dispositive); *European Economic Community-Restrictions on Imports of Dessert Apples Complaint by Chile*, June 22, 1989, GATT B.I.S.D. (36th Supp.) at 93, 124 (1990) (panel not bound by prior panel's reasoning); Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT'L

influenced the WTO.¹³⁴

The two Tuna/Dolphin decisions' central rationales have little to do with a concept of free trade as trade free from discrimination against imports. The decisions seem instead to advance a principle limiting international coercion aimed at advancing competing policy goals.¹³⁵ The Tuna/Dolphin decisions both criticize the use of national coercion through trade restrictions to force foreign countries to protect dolphins.¹³⁶ Similarly, the Shrimp/Turtle Appellate decision held that the United States may not seek to force other countries to adopt regulatory regimes identical to those of the United States through trade restrictions.¹³⁷ The Shrimp/Turtle appellate panel considered the "coercive effect" of the

L. 379, 430-33 (1996); Jackson, *Congruence or Conflict?*, *supra* note 52, at 1272-73. *Cf.* Raj Bhala, *The Myth about Stare Decisis and International Trade Law*, 14 AM. U. INT'L L. REV. 845 (1999)(arguing that a "de facto" doctrine of stare Decisis now governs WTO appellate decisions).

¹³⁴ See e.g. WTO Report of the Panel on U.S. Import Prohibition of Certain Shrimp and Shrimp Products, October 12, 1998, 37 I.L.M. 832, ¶¶ 7.11-7.17 (1998)(accepting logic of Tuna/Dolphin case in finding that prohibition on importing shrimp caught in ways endangering sea turtles violates GATT article XI), *affirmed on other grounds*, WTO Report of the Appellate Body on U.S. Import Prohibition of Certain Shrimp and Shrimp Products, October 12, 1998, 38 I.L.M. 832 (1998).

¹³⁵ See Hudec, *supra* note 14, at 118-119 (explaining that the Tuna/Dolphin decisions held U.S. restrictions to be of a "coercive design").

¹³⁶ Tuna/Dolphin II ¶¶ 5.25-5.27, 5.38, 5.39 (characterizing the tuna embargoes as efforts "to force other countries to change their policies with respect to persons and things within their own jurisdiction."); Tuna/Dolphin I ¶ 5.27 (characterizing tuna embargoes as unilaterally determining the policies must follow in order to have rights under GATT).

¹³⁷ Shrimp/Turtle Appellate, at 64-65.

United States' turtle protection program its "most conspicuous flaw."¹³⁸ These decisions implicitly define free trade as including a principle of non-coercion, at least through trade measures.

The theoretical support for a non-coercion principle in international law comes not from economic theory, but from theories of international relations.¹³⁹ Scholars have debated extensively the appropriateness of coercion in various contexts and situations.¹⁴⁰ Widespread agreement exists that nations should not resort to coercion without first attempting to resolve differences through negotiation. However, most scholars recognize that when negotiation cannot resolve important disputes, then some degree of coercion may be appropriate. Scholars disagree, of course, about when to employ coercion

¹³⁸ Id. ¶ 161.

¹³⁹ See *Shrimp/Turtle Appellate* ¶ 164 (declaring use of an economic embargo to force a foreign nation to adopt an American regulatory program unacceptable in "international trade relations."); Richard B. Bilder, *The Role of Unilateral State Action in Preventing International Environmental Injury*, 14 VAND. J. OF TRANSNAT'L L. 51 (1981).

¹⁴⁰ See e.g. Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AJIL 1 (1989) (discussing financial assistance to political campaigns and use of economic leverage); Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113 (1986); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984); M. WALZER, *JUST AND UNJUST WARS* (1977); PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION (M. Shovic ed. 1972); Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AJIL 642 (1984); G. Hufbauer & J Schott, *Economic Sanctions in Support of Foreign Policy Goals* (1983); *Economic Sanctions Reconsidered* (1985); D. Baldwin, *Economic Statecraft* (1985); Bowett, *Economic Coercion and Reprisals by States*, 13 VA. J. INT'L L. 1 (1972); *ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER* (R. Lillich ed. 1976).

and how much coercion is appropriate in various situations. The practice of international relations seems consistent with the theory. Nations typically try to solve disputes through negotiation and resort to coercion only as a last resort. Countries vary in their willingness to employ coercion to resolve different issues when negotiations break down.

Countries can coerce each other without discrimination. For example, a country may demand compliance with an environmental standard as a condition of importation and impose an identical standard on its own domestic producers. Such a standard may coerce, but it does not necessarily discriminate.

Defining free trade as trade free of the effects of international coercion would create a different agenda for expansion of free trade. Expansion of free trade would involve decreasing reliance upon coercive measures to advance policy goals.

E. Trade Restrictions and Barriers

Free traders often state that they do not oppose environmental protection; they only oppose trade barriers and restrictions as the means of protecting the environment.¹⁴¹ This would suggest that

¹⁴¹ See e.g. David Palmetier, *International Trade Law in the Twenty-First Century*, 18 *FORDHAM INT'L L. J.* 1653, 1655 (1995) (governments are free to act with minimal interference: so long as they do not discriminate, so long as they do not erect new trade barriers, governments can do whatever they wish). See also Farber & Hudec, *supra* note 10, at 64 (distinguishing between policing disguised "trade restrictions" and adequate environmental protection); Jagdish Bhagwati, *Introduction in I FAIR TRADE*, *supra* note 3, at 1 (referring to the "simple elimination of trade barriers").

one can protect the environment adequately without trade barriers and restrictions.¹⁴² The three models provide useful analytical tools to help understand why the concepts of trade barriers and trade restrictions do not offer an acceptable substitute for an adequate definition of free trade.

A laissez-faire definition of "free trade" as involving absolute license - trade without any burdens - might well require the elimination of almost all even-handed national regulation and taxation of business, all international coercion, and all regulation and taxation discriminating against foreign commerce. Only regulation that discriminates against domestic production for the domestic market can avoid creation of burdens upon international trade.¹⁴³ Any international coercion, any discrimination against imports, and most even-handed government tax or regulation burdens international trade.

The statement that even-handed taxation and regulation creates burdens for international trade requires some explanation. Even-handed taxation and regulation implies taxes and regulations that apply equally to all relevant businesses, including importers and exporters. Any tax or regulation that applies to all relevant products sold in the taxing or regulating jurisdiction may increase the cost of imports entering the taxing or regulating jurisdiction. Any tax or regulation of production processes that applies to all relevant production within the taxing or regulating jurisdiction may increase the cost of goods that the taxing or regulating jurisdiction exports. For these reasons, even-handed taxation and regulation burdens international trade.

Governments may tax or regulate only domestic producers that produce only for the domestic

¹⁴² See Palmeter, *supra* note 141, at 1655.

¹⁴³ See Anderson, *supra* note 26, at 767-78 (Tuna/Dolphin Panel effectively barred even-handed treatment in favor of discrimination against domestic producers).

market without burdening international trade. But a country that taxes or regulates even-handedly, i.e. that does not systematically discriminate against companies with no involvement with international trade- will often create burdens upon international trade.

This means that as international integration proceeds, even-handed regulation and taxation creates more and more burdens upon international trade.¹⁴⁴ A jurisdiction with no international trade could even-handedly tax and regulate everything sold in the jurisdiction with no impact upon international trade. At the other extreme, if all sectors have some involvement with international trade, then all even-handed commercial regulation and taxation burdens international trade. More integration implies greater burdens upon international trade from routine domestic regulation and taxes.

As global integration proceeds, demands not to use trade restrictions or barriers become indistinguishable from a demand for laissez-faire government. The terms "trade restriction" and "trade barrier" plausibly apply to almost every tax and regulation directly affecting business.

The vague idea that international trade law should eliminate "trade restrictions" or "trade barriers" implies rejection of all taxes and regulation and the acceptance of all three models of what free trade is. It embraces laissez-fair, anti-coercion, and anti-discrimination as free trade goals. Of course, a full embrace of laissez-faire makes other goals unnecessary.

Most regulations that apply equally to imported and domestically produced goods and services include a prohibition on sales and/or shipment made without obeying the regulation. To make this ban on sales of non-compliant goods effective, almost every statute providing for domestic regulation of

¹⁴⁴ See generally, Charnovitz, *supra* note 6, at 478 (as the interdependence of economies increase, more environmental measures come within GATT's purview).

products either explicitly or implicitly forbids importation of goods that do not comply with national laws.¹⁴⁵

An enormously wide range of federal laws rely upon these import restrictions, including criminal, intellectual property, telecommunications, transportation, national security, health and safety, and conservation laws.¹⁴⁶ Since almost all federal regulation rests upon federal constitutional authority to regulate commerce,¹⁴⁷ these prohibitions usually couple a ban on interstate sales or shipment of non-compliant goods with an explicit ban on importation of non-complying goods.¹⁴⁸ Some statutes use less explicit formulations (such as a ban on introduction or delivery for introduction into interstate commerce) that still use import restrictions as part of a ban on sales or shipment of non-complying goods.¹⁴⁹

¹⁴⁵ See Appendix for citations, which are too numerous to cite in a footnote.

¹⁴⁶ See *id.*, *infra*.

¹⁴⁷ See U.S. Const. art. I, sec. 8; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Lobsters from Canada*, 3 Can. Trade & Commodity Tax Cas. (CCH) 8182 ¶ 7.5.1 (1990) (explaining that Magnuson Act prohibits any person from selling lobster in interstate or foreign commerce in order to assert federal commerce clause jurisdiction).

¹⁴⁸ See *e.g.* 16 U.S.C. § 703 (prohibiting sale or importation migratory birds); 16 U.S.C. § 971e (prohibiting the sale or importation of certain fish); 18 U.S.C. §§ 553, 2313 (prohibiting importation or interstate sale of stolen vehicles).

¹⁴⁹ See *e.g.* 21 U.S.C. § 350a(c) (prohibiting introduction or delivery for introduction into interstate commerce of nonregistered new infant formula); 21 U.S.C. § 841(a) (prohibits intentional distribution of illegal drugs).

Almost all regulations applicable to goods rely upon the threat of a sales ban to secure compliance. If this threat is removed, then regulation becomes virtually impossible to enforce. If a person can sell goods without complying with applicable regulations, then she probably will do so. Hence, regulations must forbid the import or export of non-complying goods in order to be effective.

Once one realizes that virtually all "domestic" regulations rely upon coercion the distinction between a laissez-faire model and an anti-coercion model begins to collapse. Any domestic regulation, insofar as it applies to imported goods, aims to coerce a foreign country (or its nationals) to make goods acceptable to the regulating jurisdiction, upon pain of a ban.¹⁵⁰ Regulations that commentators tend to regard as domestic and usually legitimate and those that some regard as extra-territorial and therefore potentially illegitimate under an anti-coercion model function identically from the standpoint of direct burdens upon international trade and both involve coercion.

The WTO may have realized that all regulation involves coercion in the Shrimp/Turtle case. The WTO Appellate Body reversed a Panel ruling broadly prohibiting countries from requiring exporting countries to meet the importing countries' policies in order to obtain market access.¹⁵¹ In doing so, the Appellate Body recognized that "conditioning access to" an importer's "domestic market on" the exporting country's compliance with an importing country's "unilaterally prescribed" policy "may, to some degree, be a common aspect of measures falling within the scope" of the Article XX

¹⁵⁰ See Charnovitz, *supra* note 113, at 10581 ("virtually every product standard has an element of force to it").

¹⁵¹ Report of the Appellate Body of the World Trade Organization on United States-Import Prohibition of Certain Shrimp and Shrimp Products, October 12, 1998, 38 I.L.M. 118, ¶¶ 112, 121 (1999).

exceptions to GATT.¹⁵² The article XX exceptions to GATT cover most subjects of national regulation, so this statement suggests broad recognition that regulation generally involves coercion.

Hence, a free trade principle based on opposition to international coercion and a free trade principle based on allegiance to laissez-faire principles might have very similar results. All regulation and taxation burdens international trade and usually imposes quantitative restrictions on non-compliant shipments.

Non-discriminatory even-handed regulation, however, burdens economic activity in general. It does not increase burdens upon international trade beyond those the regulation imposes upon like domestic economic activity.

Insofar as either national or international regulatory efforts rely upon import restrictions as an enforcement mechanism, the exporting country or company may export anyway. But in order to do that, the exporting company or country must meet the importing country's regulatory standards, hence the burden. Similarly, a domestic firm making a product for the domestic market must comply with the same regulatory standard in order to sell within its own market. Both domestic and foreign firms have the same burden.

Discrimination against imports, however, constitutes a burden on international trade that does not apply to commercial activity in general. The very logic of discrimination disadvantages foreign products.

In sum, almost every tax and regulation of business constitutes a trade barrier or restriction in a global economy. A laissez-faire or anti-coercion definition of free trade might imply elimination of most

¹⁵² Id. ¶ 121.

taxes and regulations applicable to business, since all regulations and taxes coerce and most burden trade economically. Only an anti-discrimination concept functions more narrowly and systematically ferrets out especially problematic treatment of international trade, as opposed to general taxation and regulation of commerce.

II. The Models and WTO Legitimacy

This part will show how these models help illuminate the issue of WTO legitimacy. I assume that a legal institution acting within the scope of its competence commands some degree of respect for controversial decisions, because society accepts its right to make certain decisions.¹⁵³ This implies that a body making decisions that lie beyond its institutional competence will often not command such respect, and will only enjoy the support of those who happen to like its decisions.

This part will discuss the policy issues that arise under each model and ask whether the WTO, an international institution devoted to free trade, provides an appropriate forum for making the policy choices involved in implementing the competing models.¹⁵⁴ This part will then show how the models

¹⁵³ See generally FRANCK, *supra* note 14, at 111-12 (discussing the "compliance pull" of decisions by legitimate institutions).

¹⁵⁴ The legal process school focuses upon the limitations and capabilities of legal institutions. See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1994). Legal scholarship has placed more emphasis on institutional analysis in recent years. See e.g. Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996); Philip M. Nichols, *Forgotten Linkages—Historical Institutionalism and Analysis of the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 461, 461 (1998) (describing institutionalism as "firmly entrenched in legal scholarship" and a "powerful and alluring" theory for

help explain the case law, some of the scholarly commentary, and misunderstandings between free traders and environmentalists. This part concludes that a model based on a non-discrimination principle, rather than either a laissez-faire or non-coercion principle, provides the most legitimacy for the WTO.

A. The WTO: A Specialized International Institution Devoted to Free Trade

In order for WTO decisions to appear legitimate, it must render rulings appropriate to its institutional character. The WTO is a specialized institution devoted to furthering free trade.¹⁵⁵ Its governing bodies, including dispute resolution panels, consist of trade experts, people who have devoted their lives to advancing free trade.¹⁵⁶ Dispute settlement panelists usually lack expertise in

"international law scholarship."); Harold Hongju Koh, *Why do Nations Obey International Law?*, 106 YALE L. J. 2599, 2619 (1997) (describing the relationship between Hart and Sacks work and that of Abram Chayes in international law). Other scholars have used institutional analysis to describe what issues the WTO should address. See e.g. Philip M. Nichols, *Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority*, 28 N.Y.U. J. INT'L L. & POL. 711 (1996).

¹⁵⁵ See Lakshman D. Guruswamy, *Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes*, 7 MINN. J. GLOBAL TRADE 287, 311 (1998) (arguing that GATT excludes consideration of non-GATT law and that environmental protection is not a GATT objective). Professor Andrew Strauss argues that the WTO can change to become less of a trade organization. Strauss, *supra* note 51, at 803-804. My institutional analysis will, however, focus on the WTO as it currently exists.

¹⁵⁶ See Charnovitz, *supra* note 113, at 10582 (GATT panelists are generally trade attorneys, professors, or current government officials with a "GATT-centric" perspective); DSU Understanding, *supra* note 107 art. 8(1). Some of these trade experts are diplomats with little legal

public health and environmental issues.¹⁵⁷ Currently, the trade ministries of national governments generally control the WTO.¹⁵⁸

The WTO does not purport to determine countries' obligations toward each other under international law generally.¹⁵⁹ Rather, it focuses upon the determination of a country's obligation under GATT and related agreements.¹⁶⁰

expertise. See Hudec, *supra* note 17, at 34-35. They often rely upon the WTO Secretariat's legal staff for expertise. *Id.* Environmental groups have also claimed that business groups have representatives on WTO advisory groups that do not include environmentalists. Strauss, *supra* note 51, at 801 n. 86.

¹⁵⁷ See Dunoff, *International Trade*, *supra* note 24, at 352-54 (trade bodies lack the experience or expertise to deal with contentious "linkage" issues); Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043 (1994); Dunoff, *Trading Institutions*, *supra* note 15.

¹⁵⁸ See Hudec, *supra* note 53, at 110-111 (GATT policies tend to reflect the views of government trade ministries).

¹⁵⁹ See Guruswamy, *supra* note 155, at 319-321 (criticizing the WTO's Dispute Settlement Understanding for assuming that trade agreements constitute a sufficient body of law for all disputes).

¹⁶⁰ See DSU Understanding, *supra* note 107 art. 3(2) (charging dispute settlement panels with the task of preserving the rights and obligations of WTO members under free trade agreements). The second Tuna/Dolphin decision illustrates this. In that case, the United States urged the panel to consider various international agreements authorizing trade restriction to protect the environment in judging the legality of its restrictions on tuna. See GATT Dispute Settlement Panel Report on U.S. Import Restrictions on Imports of Tuna, 33 I.L.M. 839 ¶¶ 2.3, 2.4, 3.17; 3.21-23; 3.31 (1994). The panel followed the Vienna Convention's rules on interpreting treaties, with one very noteworthy exception.

The WTO has recently taken some steps designed to enhance the legitimacy of its trade and environment decisions. The WTO's rules now authorize, but do not require, dispute settlement panels to consider amicus briefs from NGOs.¹⁶¹ The amicus procedure, if dispute settlement panels seriously consider amicus briefs, may improve the WTO's legitimacy.

Recently, partly in response to public concerns about the WTO's growing influence on health and the environment, WTO panels have begun consulting scientific experts.¹⁶² This may increase their capacity to understand scientific issues. But the WTO's credibility on health and environmental issues will remain suspect as long as the decision-makers are trade specialists and the organization as a whole, remains, as it is now, a creature of national trade ministries.¹⁶³

Id. ¶¶ 5.18-5.20. It failed to consider whether the combination of international environmental treaty obligations and GATT obligations taken together might lead to a different result, an inquiry that the Vienna Convention's article 31(3)(c) calls for. Compare *id.* § 5.19 (finding environmental treaties irrelevant in interpreting GATT) with Vienna Convention on the Law of Treaties, art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 691 (1969). The GATT panel considered itself competent only to adjudicate GATT obligations in isolation from obligations under other treaties.

¹⁶¹ See Report of the Appellate Body of the World Trade Organization on United States-Import Prohibition of Certain Shrimp and Shrimp Products, October 12, 1998, 38 I.L.M. 118, ¶¶ 98-110 (1999).

¹⁶² See *id.* ¶¶ 9-10; Report of the Panel: EC Measures Concerning Meat And Meat Products (Hormones), 1997 WL 569984, *125-181 (August 18, 1997).

¹⁶³ See Jeffrey L. Dunoff, "*Trade and*", *supra note 15* (GATT/WTO's expansion into new substantive areas raises serious questions about institutional competence and expertise).

The WTO's competence derives from its expertise in international trade. The notion that expert judgment in international trade should merit respect comes from the idea that a coherent economic theory amenable to administration by specialists governs the area. That is why the definition of free trade is so critical.

The WTO is also an international institution. Its legitimacy depends in part upon its performing a function suitable to an international institution.

The WTO lacks democratic legitimacy.¹⁶⁴ Citizens do not elect its officials. And legislative bodies do not select trade panel members or other officials. For this reason, a WTO dispute resolution panel is much less democratic than say, the United States Supreme Court, which itself is generally regarded as an anti-majoritarian institution.¹⁶⁵ After all, an elected official, the President of the United States nominates the Court's justices, and an elected Senate must approve their nomination.¹⁶⁶ No such democratic procedure governs the selection of trade panelists.¹⁶⁷

B. Policy Questions and Legitimacy Under the Three Models

An understanding of the policy questions each model raises will set the stage for understanding how selection of one or another model of free trade might influence WTO legitimacy. This section will

¹⁶⁴ See Esty, *supra* note 30, at 715. See also Wirth, *supra* note 20, at 353-55, 365-372 (discussing barriers to effective public participation in affecting the adoption and interpretation of trade agreements).

¹⁶⁵ See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1986)

¹⁶⁶ See U.S. Const. art. II, sec. 2.

¹⁶⁷ See DSU Understanding, *supra* note 107 art. 8.

have something to say about the desirability of pursuing the policy goals of laissez-faire government, non-discriminatory government, and non-coercive government. But the primary purpose of the policy discussion is to aid understanding of WTO legitimacy under the competing models.

An institution's decisions tend to appear legitimate when they fit the institution's character.

Different models of free trade imply different kinds of policy judgments. Some of these policy judgments seem more fitting for the WTO than others.

1. Laissez-Faire

Those who support free trade at all support it because it may enhance human welfare by increasing prosperity.¹⁶⁸ Free trade's claim to advance welfare comes from economic theory's prediction that free trade will increase the amount of goods and services available and lower prices.¹⁶⁹ But even neoclassical economists do not argue that more goods and services at lower prices alone necessarily improves human welfare.¹⁷⁰

¹⁶⁸ See Hudec, *supra* note 53, at 108 (GATT improves national economies' effectiveness and combats poverty).

¹⁶⁹ See Richard B. Stewart, *International Trade and Environment: Lessons From the Federal Experience*, 49 WASH. & LEE L. REV. 1329, 1330 (1992) (empirical studies show a strong correlation between trade liberalization and economic growth rates). Cf. ENCYCLOPEDIA OF POLITICAL ECONOMY 372 (Phillip Anthony O'Hara ed.) (1999) (most economists would support free trade as "maximizing economic welfare," but the "facts suggest no negative correlation between protection and growth.").

¹⁷⁰ See e.g. Alistair Ulph, *Environmental Policy and International Trade*, in NEW DIRECTIONS IN THE ECONOMIC THEORY OF THE ENVIRONMENT 148-149 (Carlo Carraro & Domenico Siniscalco eds. 1997) (most economists believe that laissez-faire is obviously not desirable when externalities are present); JAGDISH BHAGWATI, PROTECTIONISM 126-27 (1988) (supporting state intervention to

They recognize that activities that seem wealth enhancing may generate “external costs,” costs that the general public experiences but the producer does not pay for.¹⁷¹ Air pollution, for example, generates such external costs by damaging public health and the environment. Since a producer in a completely laissez-faire economy does not pay the cost of reducing pollution, the prices of his products do not reflect these costs. Because of this, even in an otherwise perfect market, the purchase of products made through processes that pollute may reduce society's welfare.¹⁷² The theory of free trade does not endorse the notion that trade without environmental protections will prove optimal.¹⁷³

While economic theory does not support a laissez-faire goal, it may support movement away from "too much" regulation or "too little" regulation.¹⁷⁴ According to neoclassical economics, such policy decisions would involve weighing the benefits of regulations against their costs.¹⁷⁵ In the environmental area, such an exercise might involve complex scientific judgments and comparing

correct for market failure).

¹⁷¹ See e.g. Jackson, *Congruence or Conflict*, *supra* note 52, at 1231.

¹⁷² See Roberts, *supra* note 71, at 378 (sanitary and phytosanitary measures may increase welfare because they correct "market failures"); Frederic L. Kirgis, *Effective Pollution control in Industrialized Countries: International Economic Disincentives, Policy Responses, and the GATT*, 70 MICH. L. REV. 860, 862-63 (1972) (explaining how lack of regulation can produced an "external diseconomy").

¹⁷³ See Jackson, *supra* note 52, at 1231 (describing environmental protection as an "exception" to the "general policy of liberalizing trade.").

¹⁷⁴ See Driesen, *supra* note 47, at 583-585.

¹⁷⁵ See Chang, *supra* note 23, at 2189.

incommensurable impacts.¹⁷⁶

A trade organization seems poorly suited to deciding on the degree of laissez-faire government we should have. Decisions to tax and regulate generally involve pursuit of non-commercial (or less directly commercial) objectives, such as protecting public health, protecting the environment, improving education, or providing social services. The notion that trade experts possess some special expertise in deciding whether a given tax or regulation will advance human welfare seems very problematic.¹⁷⁷

Trade panel decisions that seem to involve judgments about the need for a given or regulation will rarely seem legitimate. Few people will have confidence in trade experts' judgments about the need for regulation, because trade experts have little competence in assessing the validity of the reasons for a regulation.¹⁷⁸ Trade experts are not experts on public health and the environment, and their judgments

¹⁷⁶ See MARK SAGOFF, *THE ECONOMY OF THE EARTH* (1988) (arguing against monetary valuation of environmental harms); CHRISTOPHER STONE, *THE GNAT IS OLDER THAN MAN* (1993); Cass R. Sunstein, *Incommensurability & Valuation in the Law*, 92 MICH. L. REV. 779, 834-40 (1994); McGarity, *supra* note 85 (discussing scientific complexity of regulating carcinogens); Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613 (1995) (arguing that treatment of science as determinative of outcomes amounts to a charade given incomplete nature of available data). See generally Symposium, *Law and Incommensurability*, 146 U. PA. L. REV. 1169 (1998).

¹⁷⁷ See Farber & Hudec, *supra* note 24, at 1432 ("GATT tribunals have few credentials to assess the success or social value of regulatory measures and lack any recognized political mandate to do so."). Cf. Stewart, *supra* note 169, at 1360 (claiming that evaluating the seriousness of a pollution spillover is not beyond the competence of "a specialized tribunal").

¹⁷⁸ This is precisely what the Beef Hormone panel did. See Walker, *supra* note 75, at 319 (describing cases under the

about the scientific justification for health or environmental measures (for example) will tend to command little respect outside of the community of trade experts and economists who share similar assumptions.¹⁷⁹

The WTO's international character also will not enhance the legitimacy of its decisions in this area. Most trade experts recognize the legitimacy of national differences in how highly to value protection of public health and the environment. These differences surely involve different national views about the degree of caution to be exercised in protecting the public from potential public health and environmental threats. International decisions second guessing these national views will seem

SPS agreement as addressing the clash between efficient international trade and the "sovereign duty to protect health").

¹⁷⁹ Professor Hudec, however, argues that no institution can make a completely objective assessment of environmental harms. See Hudec, *supra* note 53, at 113 ("No government or international institution" can "claim complete objectivity" in assessing environmental harm). But many institutions are superior to the WTO in evaluating environmental harms. And a neutral institution, such as the International Court of Justice, might better make judgments requiring a weighing of commercial and non-commercial values. See generally Patti Goldman, *Resolving the Trade and Environment Debate: In Search of a Neutral Forum and Neutral Principles*, 49 WASH. & LEE. L. REV. 1279 (1992); Cf. Richard J. McLaughlin, *UNCLOS and the Demise of the United States' Use of Trade Sanctions to Protect Dolphins, Sea Turtles, Whales, and Other International Marine Living Resources*, 21 ECOLOGY L. Q. 1 (1994) (claiming that the United Nations Convention on the Law of the Sea, if ratified, might limit unilateral measures protecting the marine environment). Moreover, national governments have relatively high democratic legitimacy in weighing competing values. Cf. Hudec, *supra* note 53, at 113 (authority of environmental decisions will depend on the "political legitimacy of the institution making the decision").

inappropriate. If a country values health and environmental protection enough to assume very little health and environmental risk in order to enhance its economic welfare, it is not clear why a trade organization should have authority to override the national decision.

Measures protecting the environment and public health may be unsound. But the connection between generally unsound measures and international trade seems less direct than the connection between anti-foreign discriminatory measures and international trade. To take an extreme case, let's assume that a country panders to ludicrous public fears and passes a measure that restricts or burdens commerce in some fashion, without even arguably advancing public health at all.¹⁸⁰ This stupid measure harms the country's welfare, but it would harm the country's welfare even if the country were an autarky. Absent this measure, its own producers would be free of the burden the measure imposes and consumers could enjoy a better product or lower prices.

In fact, a WTO challenge would only arise when foreign producers experience some of the burden the measure imposes, so such a challenge will have some connection with international trade. But the fundamental grounds for disagreeing with the measure under a principle moving toward *laissez-faire* have little to do with the international character of the measure. Indeed, the measure may be conceived of as purely domestic, since it may operate only in the territory of the stupid country.

This contrasts with the strong connection between an anti-discrimination rationale and the

¹⁸⁰ I am assuming that the measure applies the same requirements to domestic and foreign producers. *Cf.* Sykes, *supra* note 11, at 10-12 (analyzing a stupid and discriminatory requirement that foreign suppliers, but not domestic ones, must hire an "agent to sit on a flagpole. . . and cluck like a chicken").

international character of the commercial interest served by holding illegal a discriminatory measure.

The essence of the problem involves a decision to treat foreign products differently from domestic ones.

2. International Coercion

Free trade might be thought of as a prohibition against using trade restraints as coercive techniques. I have already pointed out that this may amount to the same thing as a laissez-faire principle, since all taxes and regulations coerce. This section will focus on free trade defined somewhat more narrowly as trade free of coercion in international relations between governments. This narrowed definition of coercion excludes governmental coercion of foreign firms.

A policy decision about whether to employ trade restrictions to influence foreign environmental practices involves a judgment about whether the chosen trade restrictions will prove effective.¹⁸¹ It also might involve some judgment about the importance of the trade sanction's environmental aim and the amount and importance of its economic costs.¹⁸² Finally, such a policy decision, ideally, would take into account the wider repercussions of imposing trade sanctions.

Trade specialists must be able to credibly make judgments about all of these factors in order for their decisions about the appropriateness of trade restrictions, as coercion, to appear legitimate. This implies a need to assess the legitimacy of WTO evaluation of effectiveness, utility, and wider repercussions.

a. Effectiveness

¹⁸¹ See Anderson, *supra* note 26, at 777-78.

¹⁸² See Stewart, *supra* note 169, at 1360.

Many trade specialists seem prone to imagine that trade sanctions almost always prove ineffective.¹⁸³ Some use economic theory to make predictions about trade restriction's environmental effectiveness.¹⁸⁴

Some scholars have used economic theory to argue that trade restrictions are efficient in theory.¹⁸⁵ On the whole, economic theory seems an incomplete method for predicting how government officials in foreign countries will react to trade restrictions aimed at promoting environmental goals.¹⁸⁶

Making good judgments about whether trade sanctions induce environmentally favorable

¹⁸³ See LAURA A. STROHM & PETER THOMPSON, *INTERNATIONAL TRADE AND THE ENVIRONMENT: A REVIEW OF THE LITERATURE* 67-72, 90-95 (1996); Jagdish Bhagwati & T.N. Srinivasan, *Trade and Environment: Does Environmental Diversity Detract from the Case for Free Trade*, in 1 *FAIR TRADE*, *supra* note 1, at 196-97; Richard Blackhurst & Arvind Subramanian, *Promoting Multilateral Cooperation on the Environment*, in *THE GREENING OF WORLD TRADE ISSUES* 247-68 (Kym Anderson & Richard Blackhurst eds. 1992).

¹⁸⁴ See e.g. Richard Eglin, *Trade and Environment in THE URUGUAY ROUND AND BEYOND: ESSAYS IN HONOR OF ARTHUR DUNKEL* (Jagdish Bhagwati & Mathias Hirsch eds. 1998).

¹⁸⁵ See e.g. Howard F. Chang, *Carrots, Sticks, and International Externalities*, 17 *INT'L REV. OF L. & Econ.* 309 (1997) (arguing that trade restrictions are efficient, but suggesting some need to limit them).

¹⁸⁶ See generally Harold K. Jacobson and Edith Brown Weiss, *A Framework for Analysis*, in *ENGAGING COUNTRIES*, *supra* note 187, at 2 (explaining that countries sometimes join treaties to join an international bandwagon or because of pressures from other governments or domestic constituencies); David M. Driesen, *Choosing Environmental Instruments in a Transnational Legal Context*, 27 *ECOLOGY L. Q.* 101, ___ (2000) (forthcoming) (arguing that assumption that national responses to environmental problems do not always mirror the self-interested rational choice assumptions that form the foundation of economic theory).

responses requires some expertise in the history of their use in international environmental affairs.

Scholars who have examined the empirical record state that trade sanctions have often proven effective.¹⁸⁷ Furthermore, predicting the effectiveness of any particular application of a sanction involves consideration of a complicated set of factors, including not just economics but also cultural considerations.¹⁸⁸ Trade specialists do not seem especially well situated to evaluate the likely

¹⁸⁷ See e.g. Hudec, *supra* note 53, at 144 ("trade sanctions appear to have succeeded quite often"); Raj Bhala, *Hegelian Reflections on Unilateral Action in the World Trading System*, 15 BERKELEY J. INT'L L. 159, 166-172 (1997) (discussing the factual record especially of trade sanctions under section 301); Charnovitz, *supra* note 89 (discussing history of Pelly Amendment sanctions); Daniel P. Blank, *Target-Based Environmental Trade Measures: A Proposal for the New WTO Committee on Trade and Environment*, 15 STAN. ENV'T L. J. 61, 62-63 (1996) (discussing effective use of sanctions against Taiwan); *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 225 (1985) (each threat of sanctions under Pelly Amendments secured "commitments of future compliance by offending nations"); Alberta M. Sbragia and Philipp M. Hildebrand, *The European Union and Compliance: A Story in the Making*, in ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS (Edith Brown Weiss & Harold K. Jacobson eds.) 238-240 (1998)[hereinafter ENGAGING COUNTRIES](discussing the effectiveness of threatened CITES trade sanctions in improving Italian compliance with CITES); Driesen, *supra* note 111, at 303-305 (discussing how threatened unilateral sanctions helped create international agreement to strengthened standards preventing marine pollution from ships). Cf. Michael J. Glennon, *Has International Law Failed the Elephant*, 84 AM. J. INT'L L. 1, 25-26 (1990)(ban on trade in leopard parts have been far more successful than a ban on trade in rhinoceros horns).

¹⁸⁸ See Glennon, *supra* note 187, at 25-26 (explaining that cultural factors probably explain why bans in trade in some species parts succeed while others fail); Bilder, *supra* note 139, at 79-93; Victor *et al.*, *supra* note 88, at 682-684;

effectiveness of environmental trade measures.

b. Utility

The discussion of the laissez-faire model already explained why the WTO's assessment of the seriousness of various environmental problems will probably lack legitimacy. This defect will infect any judgment about the overall utility of a coercive trade restriction.

At first glance, WTO judgment about the economic cost of a trade restriction, however, seems to lie within the realm of its expertise. These costs will include potential reduction in the amount of restricted goods sold and/or price increases. Yet, WTO decisions generally do not quantify these costs. This raises the question of whether WTO decisions about the specific economic value of a specific trade restrictions would appear legitimate.

Assessing these costs might actually prove quite difficult. Because trade restrictions in the environmental area usually target a handful of products or practices, consideration of a trade restriction's impact should include consideration of the availability of substitutes for targeted products or processes.¹⁸⁹ For example, a prohibition on importation of wood harvested in an unsustainable manner does not restrict imports of either sustainably harvested timber or other building materials.

Targeted trade restrictions may not directly limit the volume of international trade. They may

Anderson, *supra* note 26, at 777-78, 780-81 (discussing factors affecting effectiveness).

¹⁸⁹ *Cf.* Florsheim Shoe Co. v. United States, 880 F. Supp. 848 (Ct. Int'l Trade 1995) (applying Pelly Amendment sanctions to certain fish and wildlife products from Taiwan in order to force Taiwan not to trade engage in trade in rhinoceros and tiger parts and products banned under CITES).

help steer its direction and content instead, toward more ecologically desirable products.¹⁹⁰ This may be a serious problem for firms that lose business, but a benefit to competitors.

These targeted restrictions may tend to raise the prices of goods. But that depends on the price of substitutes. Sometimes, targeted restrictions may lead to lowered prices, by directing innovative energy toward substitutes.¹⁹¹ For example, many companies substituted cheap soap and water for expensive CFCs in response to world-wide efforts to limit CFCs. The restriction stimulated the management work to figure out that these simpler and cheaper substitutes could, if used well, do the job. Hence, labeling a ban of a substance as a trade “restriction” or “barrier” does not tell one whether it will have any negative economic impact upon consumers. And the assessment of the economic impact of targeted restrictions may require knowledge of alternative technologies and techniques that may be difficult for an international trade institution to acquire. It might also require predictions about economic dynamics that any institution would find very difficult.

Even if the WTO could assess the magnitude of the economic impacts of individual measures, any weighing of this against the measure’s environmental value would appear illegitimate.¹⁹² Some traded goods may spur serious environmental destruction while providing only minor benefits to their purchasers’ lives. Too much trade in such goods may be economically destructive. The WTO seems

¹⁹⁰ See generally Driesen, *supra* note 47, at 568-570 (describing substitution’s potential to deliver economic and environmental benefits).

¹⁹¹ See *e.g.* *id.*

¹⁹² See Wirth, *supra* note 76, at 344-45.

like a poor institution to appreciate the problems from insufficiently impeded trade.¹⁹³ Nothing the institution has done suggests any understanding of the role of international trade in helping foster depletion of many of the world's most productive fisheries,¹⁹⁴ the destruction of tropical rainforests,¹⁹⁵

¹⁹³ See Christine Crawford, Note, *Conflicts Between the Convention on International Trade in Endangered Species and the GATT in Light of Actions to Halt the Rhinoceros and Tiger Trade*, 7 GEO. INT'L. L. REV. 555, 556 (1995) (parties enter into environmental agreements impinging upon trade precisely because they want conservation to have priority over free trade).

¹⁹⁴ HILARY F. FRENCH, *COSTLY TRADEOFFS: RECONCILING TRADE AND THE ENVIRONMENT* 16-17 (1993) (38% of annual catch is exported); Nicholas Lenssen, *The Ocean Blues*, WORLD WATCH, July/August 1989, at 26-35 (discussing quadrupling of fish exports and destruction of coral reefs through use of cyanide to collect fish for the aquarium business).

¹⁹⁵ See e.g. Malcom Gillis, *Multinational Enterprises and Environment and Resource Management Issues in the Indonesian Tropical forest Sector*, in MULTINATIONAL CORPORATIONS, ENVIRONMENT AND THE THIRD WORLD 64-71 (Charles S. Pearson, ed. 1987) (explaining, *inter alia*, that foreign trade spurred much of the destruction of Indonesian tropical rainforests); Marianne Schmink and Charles H. Wood, *The "Political Ecology" of Amazonia in LANDS AT RISK IN THE THIRD WORLD: LOCAL LEVEL PERSPECTIVES* 46 (Peter D. Little et al. eds. 1987) (claiming that producers of export crops are responsible for most forest clearing in Amazonia); FRENCH, *supra* note 194, at 10-13 (discussing trade's contribution to deforestation in Asia). Cf. *Trade and Environment in GATT*, 1 INTERNATIONAL TRADE 1990/1991 (1992) (claiming that limiting exports would not greatly decrease deforestation because of large role of domestic consumption of wood). See also Anjali Acharya, *Plundering the Boreal Forests*, WORLD WATCH, May/June 1995, at 21-29 (discussing the role of exports in cutting Boreal forests).

or the decline in biodiversity.¹⁹⁶ Pursuit of the short-term goal of free trade, lower prices and higher production now, may, with respect to some commodities (such as fish), prove economically (not to mention ecologically) disastrous in the long run. One would not expect the WTO to have an unbiased view of whether more robust use of trade restrictions might either directly address some of these problems better or help develop adequate international regimes where they do not currently exist or function poorly.

The most fundamental problem with the WTO's legitimacy in this area stems from the need to evaluate the importance of competing environmental and commercial values in deciding upon the desirability of trade restrictions. It lacks sufficient democratic credentials to make such judgments and its pro-trade bias makes its judgments about this very suspect indeed.¹⁹⁷

On the other hand, Professor Hudec suggests that politicians may systematically undervalue trade restrictions' true costs because of mercantilist misperceptions.¹⁹⁸ While mercantilist conceptions

¹⁹⁶ See FRENCH, *supra* note 194, at 27-28 (discussing the impact of the international trade in wildlife). Of course, habitat destruction, some fueled by domestic, rather than international, economic activity also plays a huge role. See also Alberto Bernabe-Riefkohl, "To Dream the Impossible Dream": *Globalization and Harmonization of Environmental Laws*, 20 N.C.J. INT'L L. & COM. REG. 205, 210 (1995) (referring to deterioration of the ozone layer, global warming, deforestation, water and air pollution, massive oil and chemical spills, acid rain, waste disposal, and nuclear hazards as "consequences of unrestrained free trade.")

¹⁹⁷ *Accord Charnovitz, supra* note 113, at 10585-86 (suggesting that U.S. regulation to protect dolphins may be too stringent, but that GATT panels have no competence to decide this).

¹⁹⁸ *Id.* at 113.

would lead to undervaluing the costs of discriminatory coercion, such perceptions would not lead to undervaluing the cost of non-discriminatory coercion. As long as a coercive trade restriction applies the same regulatory standards to both domestic and foreign producers, politicians have reason to take the economic costs into account. Politicians may be accurately reflecting public preferences if they decide that risking a small increase in prices may be worthwhile to protect against environmental harms that many countries contribute to.

c. Wider Repercussions

A judgment about trade restrictions should involve some consideration of wider repercussions. For example, widespread use of environmental trade measures may create a climate where companies engaged in international commerce routinely consider environmental impacts of all of their decisions and nations feel obliged to carry out their international environmental legal duties. On the other hand, trade restrictions may provoke trade retaliation, thereby expanding their negative economic impact. In the worst case, they may spark trade wars. As an international organization, the WTO no doubt has relevant expertise in international relations. The WTO regularly addresses the challenges of unilateral and multilateral international policy-making.

Trade specialists do have expertise in understanding some of the potential for wider repercussions from trade restrictions. GATT formed part of a response to economically and politically disastrous trade wars and WTO's culture takes the potential for this kind of wider repercussion very seriously.¹⁹⁹

¹⁹⁹ See Dunoff, *Trading Institutions*, *supra* note 15, at 610-12.

This can be a strength. But it may cause a kind of paranoia, a tendency to see every trade restriction as a movement toward repeating GATT's pre-natal disasters.

Trade experts tend to characterize the interest trade sanctions seek to advance in the narrowest possible terms, while treating the interest impeded through trade sanctions in the broadest imaginable terms. Hence, scholars writing about the Tuna/Dolphin decisions have described the interest trade sanctions seek to advance as “dolphin protection”, rather than consistent enforcement of fisheries regimes, or, even more broadly, the development of international standards protecting the environment.²⁰⁰ On the other hand, they identify the interest harmed through the sanctions as international free trade, or even, prosperity, rather than sales of dolphin-unsafe tuna or even sales of fish products.²⁰¹

This bias is completely understandable, since free trade experts may have experience trying to expand trade in a variety of forums and may view the entire issue holistically. But others may appropriately view competing interests holistically as well.

I have argued elsewhere that use of import restrictions to address international environmental problems has greater legitimacy than import restrictions used in other areas, because environmental

²⁰⁰ See Hudec, *supra* note 14, at 151.

²⁰¹ Professor Hudec, for example, articulates GATT's interests in general as involving advancing prosperity and peace. *Id.* at 108-109. He does not discuss the broad aims of environmental law. Instead, he lists several types of specific environmental effects. *Id.* at 112. A parallel list of potential effects of trade measures might include such trivial outcomes as minor rises in prices, substitution of goods, and declines in use of socially useless products, like cigarettes. It would also include more major impacts.

norms frequently address a legitimate world-wide problem.²⁰² By way of contrast, a sanction levied for commercial or military reasons seems more likely to appear focused on securing national advantage and therefore seems less legitimate.²⁰³ I have argued, as have others, that the legitimacy of environmental trade measures may vary with the geographic location of environmental harms and the activities causing the harms.²⁰⁴ But generally, environmental norms enjoy a legitimacy that makes import restrictions less likely to provoke retaliation in the international environmental area than in areas where the principle advanced seems predicated solely on parochial national interests.²⁰⁵ This may explain why trade restrictions to advance environmental goals have not provoked trade wars.²⁰⁶

If this is correct, then WTO efforts to undermine the legitimacy of import restrictions to advance environmental goals may, if partially successful, spark trade wars when they are imposed. The partial legitimacy that trade restrictions for environmental purposes have enjoyed may have encouraged countries to acquiesce in improving the environment or just put up with restrictions rather than retaliate. To the degree that the WTO delegitimizes trade restrictions, it may encourage the object of restrictions

²⁰² David M. Driesen, *The Congressional Role in International Environmental Law and its Implications for Statutory Interpretation*, 19 BOST. COL. ENVT'L AFF. L. REV. 287, 307 (1991).

²⁰³ *Id.*

²⁰⁴ *Id.* See generally Daniel A. Farber, *Stretching the Margins: The Geographic Nexus in Environmental Law*, 48 STAN. L. REV. 1247 (1996).

²⁰⁵ *Id.*

²⁰⁶ See Charnovitz, *supra* note 66, at 39-43 (describing early measures protecting public health and the environment).

to retaliate.²⁰⁷ The WTO could avoid this if it persuades all countries not to use trade restrictions for coercive purposes, but a partial victory, i.e. persuading the object of trade restrictions of their illegitimacy while failing to persuade the imposing countries to cease, could be very dangerous to the WTO's objectives.²⁰⁸

Use of this model to isolate the coercive from the discriminatory in defining free trade reveals a very fundamental problem with WTO legitimacy in this area. The economic rationale for opposing non-discriminatory coercion is very muddled indeed.²⁰⁹ Neoclassical economics, after all, concerns itself with consumer welfare, not with the preoccupations of sovereign states about costs an international accord or a foreign nation imposes upon its producers.²¹⁰ There is no reason to expect the WTO to be superior to a democratic government in deciding what costs its consumers should pay to improve the environment.²¹¹

²⁰⁷ See Charnovitz, *supra* note 113, at 10580 (encouraging countries to resist environmental trade measures will prove counterproductive).

²⁰⁸ See Developing Countries Said to be Increasingly Viewing Environmental Rules as Protectionist, 22 INT'L ENV'T. REP. (BNA) 652 (August 4, 1999); Hudec, *supra* note 53, at 153-154 (discussing the difficulty of persuading the United States to abandon unilateral measures).

²⁰⁹ See generally Chang, *supra* note 23, at 2163 (the risk of "too little pollution hardly seems. . . an important danger").

²¹⁰ Cf. Charnovitz, *supra* note 20, at 10587 (arguing that in theory anti-coercion policy effects who pays for environmental protection rather than the theoretical optimality).

²¹¹ See generally Driesen, *supra* note 47, at 605-613 (explaining that Congressional cost-benefit analysis makes

A trade panel's decisions about international coercion should not enjoy legitimacy. Trade panelists will almost invariably want to oppose coercion, except where it advances the goals of free trade (as in enforcement of WTO decisions), but may feel politically constrained from doing so upon occasion. Hence, their decisions will not appear to reflect a balanced judgment about public welfare.

This does not mean that the arguments trade experts advance have no validity. Some trade sanctions may be unwise. But even if WTO judgments to advance a non-coercion model are substantively right, its judgments will frequently appear to reflect a lack of understanding of the importance of competing objectives and a paranoia about potential threats to unrestrained commerce.

3. Discrimination

The concept of free trade as trade free of discrimination against imports seems very attractive from a policy standpoint. The conventional economic theory of free trade supports a non-discrimination principle.²¹² Indeed, discrimination differentiates protective tariffs from general taxes and import bans from creation of categories of contraband.

Some will oppose even this limited conception of free trade. For example, workers who fear that their companies will fire them in order to compete better globally may favor high tariffs and even import restrictions. But free trade proponents have a response to that. They may claim that most

sense because Congress is more likely to accurately reflect public preferences and values than administrative agencies).

²¹² See Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 234-35. Professor Heinzerling argues, however, that, at least in the presence of a discriminatory measure producing some benefits, such as an environmental regulation, one cannot assume that all discriminatory measures are inefficient. *Id.* at 235-242.

workers will be better off under a non-discriminatory principle in the long run, relying upon the theory of comparative advantage.²¹³ This response may not convince all people at all times, but free traders must convince people of this to secure any type of free trade.²¹⁴ Moreover, this response has proved convincing to a number of national governments, who must consider the interests of both industries that might wish to export and those that fear foreign competition.

Some environmentalists may object to even this fairly narrow principle. After all, anything that lowers the price of goods, increases their quantity, and increases international shipping may harm the environment. But prosperous countries have protected their environments more effectively than less prosperous governments. So some environmentalist can be persuaded that prosperity improves environmental protection, as long as free trade is divorced from a laissez-faire agenda (which would cripple national governmental capacity to protect the environment) or a principle of non-coercion (which would limit effective international responses to serious threats).²¹⁵

²¹³ See e.g. Robert B. Reich, *Trade Accords Spread the Wealth*, N.Y. TIMES A21 col. 2 (September 2, 1997) (accepting free trade, but arguing that multinational operating in less developed countries should establish better wages and working conditions); Sykes, *supra* note 36, at 68-69 (free trade has trivial impact upon jobs on average and increases real income).

²¹⁴ See e.g. Kenneth W. Abbott, *The Trading Nation's Dilemma: The Functions of the Law of International Trade*, 26 HARV. INT'L L. J. 501 (1985) (explaining how international trade law helps officials resist short term pressures in favor of long-term economic gain).

²¹⁵ Cf. Steve Charnovitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 ENV'T'L L. 457, 476-77 (1993)(international trade can help fuel "indiscriminate growth" which harms the environment).

Generally, free traders seem to command fairly high ground when they argue for a non-discrimination principle. The principle boils down to a demand that national governments treat strangers as guests rather than trespassers, at least affording them the treatment afforded members of their own household.

A specialized trade institution seems reasonably well suited to advancing free trade as trade free from express discrimination. Trade experts probably can recognize when a regulation expressly discriminates against foreign producers.

Decisions by a trade body about discrimination generally have some legitimacy. When a trade body states that a regulation discriminates against foreign producers that pronouncement probably strengthens the political case that something unfair is going on which should stop. A good example of this comes from the very first decision under the new WTO. A trade panel held EPA's rule requiring reformulated gasoline in smog prone regions in the United States contrary to GATT.²¹⁶ The regulation expressly discriminated between domestic and foreign refineries. Even though a trade panel held illegal a vital regulation for combating a very serious health problem, the decision did not incite the kind of

²¹⁶ United States-Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body, 35 I.L.M. 603 (1996); 40 C.F.R. §§ 80.40-.130 (1995). See also *George E. Warren Corp. v. EPA*, 159 F. 3d 616 (D.C. Cir. 1998), *amended*, 164 F.3d 676 (D.C. Cir. 1999) (upholding EPA revision of reformulated gasoline rule in response to the WTO decision); Maury D. Shenk, *International Decision: United States Standards for Reformulated and Conventional Gasoline*, 90 AM. J. INT'L L. 669 (1996); Dunoff, *Rethinking*, *supra* note 15, at 368-369 (describing the politics of the dispute).

outcry that the Tuna/Dolphin decisions caused.²¹⁷ The legitimacy of WTO pronouncements that address facially discriminatory regulations may help explain the muted response.

The WTO's international character enhances its qualifications for resolving disputes about alleged discrimination against foreign producers. It stands as a neutral and may claim to be a kind of impartial umpire of discrimination claims. In this context, it may stand for fairness to foreign producers facing discrimination. These producers may not enjoy representation in the national government imposing discriminatory measures.²¹⁸ Hence, the WTO performs a function here that seems to make up for limitations that may impede adequate national decision-making.

Hence, the WTO's legitimacy is at its height when the organization acts pursuant to a non-discrimination model of free trade. The organization has little legitimacy for advancing laissez-faire and non-coercion models.

C. Explaining Judicial and Scholarly Efforts to Justify the WTO

Understanding the core features of these three models helps clarify the trade and environment debate. These models help explain how trade panels seek to legitimate the WTO. Trade panels often try to justify their decisions in terms of non-discrimination, even when other concerns seem to drive the

²¹⁷ Telephone Interview with David Schorr, Attorney, World Wildlife Fund, (August 13, 1999)(NGOs generally found tuna/dolphin cases more troubling than the reformulated gasoline case). A search in the Lexis/Nexis news data base showed more than twice as many articles addressing the tuna/dolphin cases than addressing the reformulated gasoline case. This also indirectly indicates a lesser outcry.

²¹⁸ See generally Heinzerling, *supra* note 212, at 251-52 (explaining this theme in the context of interstate trade).

decisions. The panels also regularly disavow laissez-faire goals. This disjunction between the decisions' dicta and their actual grounds helps explain why so much disagreement exists about whether the WTO poses a serious threat to competing values. The three-part model provides an alternative means of thinking about possible reconciliation between free trade goals and competing non-economic goals.

1. Judicial Disavowal of Laissez-Faire and Embrace of Anti-Discrimination

I have pointed out that concerns about international coercion best explain the Tuna/Dolphin and Shrimp/Turtle decisions. Similarly, a perceived need to have national governments affirmatively justify even non-discriminatory regulation drives the Beef Hormone decision. But these decisions feature explicit, and not always credible, repudiation of laissez-faire goals and use of strained anti-discrimination arguments.

a. Discrimination Talk in Coercion Cases

The first Tuna/Dolphin panel strained to use anti-discrimination rhetoric to defend its holding. The Panel held that the MMPA did not constitute a regulation of a product triggering article III's national treatment obligation.²¹⁹ Since article III did not apply to the case, the Panel did not need to address the question of whether the MMPA discriminated against foreign tuna in violation of article III. Nevertheless, the Panel, in dicta,²²⁰ accused the United States of discriminating against Mexican tuna in

²¹⁹ See U.S. Restrictions on Imports of Tuna, September 3, 1991, GATT B.I.S.D. (39th Supp.) at 155 ¶ 5.14 (1993) [Tuna/Dolphin I].

²²⁰ See *id.* ¶ 5.15 ("even if the . . . MMPA were regarded as regulating the sale of tuna as a product, the United States import prohibition *would not meet* the requirements of Article

violation of article III.²²¹ It stated the MMPA "provided treatment to tuna . . .from Mexico that was less favorable than the treatment accorded to like United States tuna . . ."²²² In light of the fact that the United States imposed requirements on its own fleet similar to those it demanded of foreign countries, this statement seems at least questionable. The Panel justified it by claiming that "Article III:4 . . . obliges the United States to accord treatment to Mexican tuna no less favorable than that accorded to United States tuna, whether or not the incidental taking of tuna by Mexican vessels corresponds to that of United States vessels."²²³ Thus, the panel converted an apparently non-discriminatory regulation into a de-jure discriminatory regulation.

At the end of its opinion, the Tuna/Dolphin I Panel added "concluding remarks" returning to anti-discrimination.²²⁴ The Panel emphasized that "a contracting party is free to tax or regulate imported products and like domestic products as long as its taxes or regulations do not discriminate against imported products. . ."²²⁵ And it admonished the United States stating, "[A] contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own."²²⁶ These statements suggest that the MMPA was GATT illegal

III.") [emphasis added].

²²¹ See id. ¶ 5.16.

²²² Id.

²²³ Id. ¶ 5.15.

²²⁴ Id. ¶ 6.

²²⁵ Id. ¶ 6.2.

²²⁶ Id.

because it discriminated against Mexican tuna, when, in fact, the anti-discriminatory rationale only appears in dicta.

Furthermore, the Panel disclaimed any allegiance to laissez-faire goals. The Panel not only emphasized parties' freedom to tax or regulate absent discrimination against foreign products, it also emphasized parties' "freedom to tax or regulate domestic production for environmental purposes."²²⁷ But the tuna/dolphin principle that only allows a party to tax or regulate domestically prohibits some non-discriminatory regulation and requires that any regulation addressing an international problem effectively discriminate against domestic producers. Extending an even-handed prohibition to both domestic and foreign producers of a product is precisely what the panel prohibited, at least insofar as the regulation addresses processes. Nevertheless, the panel evidently judged it politic to disclaim any allegiance to laissez-faire.

Similarly, the Shrimp/Turtle Appellate Body strained to find discrimination. The panel report that the Appellate Body reviewed followed Tuna/Dolphin and held that the ban on shrimp harvested without turtle excluder devices violated GATT article XI.²²⁸ Since the United States did not appeal this finding, appellate review focused on the issue of whether an article XX exception justified violation of Article XI's prohibition upon quantitative restrictions.²²⁹ The Appellate Body held that this measure

²²⁷ Id.

²²⁸ WTO Report of the Panel on United States-Import Prohibition of Certain Shrimp and Shrimp Products, 37 I.L.M. 832 ¶¶ 11-17(1998) [Shrimp/Turtle Panel].

²²⁹ WTO Report of the Appellate Body on U.S. Restrictions on Imports of Certain Shrimp and Shrimp Products, October 12, 1998, 38 I.L.M. 118 ¶¶ 98, 188 (1999)[Shrimp/Turtle Appellate].

constitutes "unjustifiable discrimination," which disqualifies the measure from enjoying an article XX defense based on the language in that article's chapeau.²³⁰

The Appellate Body used several novel arguments to justify this holding. Because the United States required turtle excluder devices of both its own fleet and foreign fleets as a condition of market access, it appeared to engage in no discrimination at all against foreigners as a class.²³¹ The Appellate Body, however, held that the "cumulative effect" of a number of aspects of the turtle conservation program made this apparently even-handed approach discriminatory.²³²

It implied that a failure to discriminate in favor of foreign exporters constituted discrimination against them. It began by noting that the regime as applied requires exporting countries to adopt "*essentially the same* policies and enforcement actions as the United States."²³³ The Appellate Body recognizes that "the United States also applies a uniform standard throughout its territory."²³⁴ But it found such rigidity unacceptable in foreign relations.²³⁵ The panel suggested that the United States must allow the sale of shrimp from abroad caught without turtle excluder devices, even though the MMPA requires forfeiture of domestic shrimp catches made without the devices.

²³⁰ Id. ¶¶ 176, 184.

²³¹ Id. ¶¶ 143-45 (holding that the U.S. import prohibition was accompanied by restrictions on domestic production).

²³² See id. ¶¶ 176, 186 (indicating that the conclusion is based on the cumulative effects of several arguments).

²³³ Id. ¶ 161 (emphasis in original).

²³⁴ Id. ¶ 163.

²³⁵ Id. ¶ 164.

This kind of argument sounds in anti-coercion. Surely, a call for flexibility suggests an embrace of a model of international relations based on flexible negotiations alone.

But the Shrimp/Turtle Appellate Body converted this anti-coercion argument into an argument that uniform even-handed regulation is generally discriminatory. It found even-handedness inappropriate, because firm even-handed regulation does not involve considering that "different conditions . . . may occur" in the exporting country.²³⁶ It then stated "that discrimination results not only" from differential treatment, but also from measures that do "not allow inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries."²³⁷

Nothing in the decision identifies a single condition in any country that makes a program of installing turtle excluder devices unreasonable outside of the United States.²³⁸ In any case, the Appellate Body converted an argument for flexibility in international relations into a strained argument

²³⁶ Id. ¶ 164.

²³⁷ Id. ¶ 165.

²³⁸ The decision does discuss the financial and administrative costs of implementing a turtle conservation program in the course of an argument against different phase-in periods for different countries. Id. ¶¶ 173-175. But the panel does not argue that the administrative costs and financial costs vary by country or make TED's impracticable. The argument about costs addresses the phase-in periods, rather than the justification for a uniform program. At least one analyst has concluded that no other approach works as effectively as a uniform requirement to use TEDs. See Susan L. Sakmar, *Free Trade and Sea Turtles: The International and Domestic Implications of the Shrimp-Turtles Case*, 10 *COLO. J. INT'L ENVTL. L. & POL'Y* 345, 386 (1999). This would suggest that the requirement is quite reasonable, since sea turtles are endangered.

about discrimination.

The Appellate Body also argued that the United States failure to negotiate treaties to protect the Sea Turtles with some of its trading partners was inappropriate. It found this illegitimate because it meant that the procedures and policies became unilateral, rather than multilateral.²³⁹ This again sounds like a foreign relations argument based on a conception of free trade as trade free of coercion.

The Appellate Body also converted this coercion argument into a discrimination argument. Since the United States negotiated turtle protection with some trading partners, but not the appellees, the Appellate Body stated that the "effect is plainly discriminatory."²⁴⁰ The argument that the United States discriminated by negotiating with some trading partners and not others is quite plausible. The Appellate Body could have simply held that the United States must negotiate with all trading partners or none of them, absent some justification, and focused on discriminatory treatment, rather than discriminatory effect. Its focus on the "effect" of creating "unilateralism," however, allowed it to cloak an argument against unilateralism, a species of coercion, in anti-discrimination garb.²⁴¹

Having created a need for more individualized (and therefore less transparent) bureaucratic

²³⁹ See *Shrimp/Turtle Appellate* ¶ 172.

²⁴⁰ *Id.*

²⁴¹ The Appellate Body also plausibly argued that the differential treatment- negotiating with some countries, but not others- had a differential effect on phase-in periods for the program and technology transfer. *Id.* ¶ 173-76. The Panel could have made this argument without reference to a preference for unilateralism, if discrimination, rather than coercion- was the sole object of its concern. A uniform phase-in period could come about without any negotiation with anybody.

decisions by rejecting uniform standards, the Appellate Body argued for a kind of due process of international relations.²⁴² It criticized the administrative process of certifying turtle conservation programs for the failure to provide a hearing, an opportunity for rebuttal, or a reasoned decision.²⁴³

The Appellate Body converted this argument for due process in international relations into a discrimination argument. It claimed that because of the lack of procedural protections, the United States discriminates against applicants who do not receive certification "vis-a-vis those . . . who are granted certification."²⁴⁴ But the Appellate Body did not claim that the countries who received certificates of compliance with U.S. regulations received the procedural protections denied the unsuccessful applicants. The successful applicants may simply have had a better case on the merits, because they were willing to use turtle excluder devices. Nothing in the Appellate Body's decision directly argues to the contrary. Hence, the discrimination argument appears strained.

The Shrimp/Turtle decision, like the Tuna/Dolphin decision, closes with disavowal of the laissez-faire definition of free trade. The Appellate Body claimed that WTO members may adopt effective measures to protect endangered species.²⁴⁵ But, says the WTO, the United States has applied this ban on shrimp caught without turtle excluder devices in an unjustifiably discriminatory

²⁴² Id. ¶¶ 178-184. The Appellate Body actually characterized this as a matter of due process. Id. ¶ 182 ("rigorous compliance with the fundamental requirements of due process should be required. . .").

²⁴³ Id. ¶ 180.

²⁴⁴ Id. ¶ 181.

²⁴⁵ Id. ¶ 185.

manner.²⁴⁶

As explained previously, the heart of this line of decisions has nothing to do with anti-discrimination. The Tuna/Dolphin Panel concluded that import bans that any country can escape by simply adopting the environmental practices of the importing state constitute prohibited quantitative restrictions, rather than regulations, under GATT. That conclusion rested almost entirely upon an anti-coercion rationale. Notwithstanding the Shrimp/Turtle decision's extended non-discrimination argument, the Appellate Body singled out the coercive nature of the shrimp ban as the turtle protection program's most egregious feature.²⁴⁷

b. Discrimination Talk in Laissez-Faire Cases

The Beef Hormone Panel also characterized a seemingly neutral regulation as discriminatory. The European Union applied its ban on growth hormones to both European and foreign beef producers.²⁴⁸ So, once again, the regulation seems quite neutral.

The Panel held that the measures at issue were invalid because they were not based on a risk assessment, rendering consideration of any discrimination issue unnecessary.²⁴⁹ Yet, the Panel held that the European Community discriminated by banning beef from cattle fed with growth enhancing

²⁴⁶ Id. ¶ 186.

²⁴⁷ Id. ¶ 161. See Sakmar, *supra note 238*, at 385 (characterizing the insistence on multilateral negotiations prior to unilateral measures as the "most important" criterion in the Shrimp/Turtle case).

²⁴⁸ See *id.* ¶¶ 3-5, 244.

²⁴⁹ See Shrimp/Turtle Panel, ¶¶ 8.97-8.165.

hormones, while not regulating naturally occurring hormones.²⁵⁰ It also held that the ban on hormones in beef discriminated, because it did not apply to a different substance used in swine production.²⁵¹

The Appellate Body reversed, finding the failure to regulate natural hormones justified and holding that the discrimination based on differential treatment of substances used in swine production did not constitute a "disguised restriction on international trade."²⁵² While WTO panels frequently shoe-horn their rulings into findings of discrimination, the Appellate Body largely resisted the urge to do so here. The Panel decision, however, conformed to the tendency to seek out anti-discrimination rationales.

The Beef/Hormone Panel decision also illustrates the impulse to disclaim any movement toward laissez-faire free trade. The Panel, after holding illegal a regulation of carcinogenic substances for lack of an adequate scientific basis, tried to claim that it had made no judgment about the necessity of the measure, but couldn't. It stressed that "it was not our task to examine generally the . . . necessity" of the ban on growth hormones in beef.²⁵³ In the same paragraph, however, it acknowledged that it had made a judgment about "the necessity of the import ban. . . for the protection of human life and

²⁵⁰ See *id.* ¶¶ 8.262-8.266.

²⁵¹ *Id.* ¶¶ 8.267-69.

²⁵² Report of the Appellate Body: EC Measures Concerning Meat And Meat Products (Hormones), January 16, 1998, 1998 WL 25520 ¶¶ 219-246(1998)[hereinafter, Beef/Hormone Appellate]. *Cf.* Australia-Measures Affecting Importation of Salmon, 1998 WL 731009, October 20, 1998, ¶¶ 159-178 (holding Australian limitations on salmon imports constitute a disguised trade restriction under the SPS article 5.5).

²⁵³ Beef Hormone Panel ¶ 8.274.

health.²⁵⁴ It then tried to suggest that its ruling somehow left governments free to regulate domestically, as if a regular participant in international markets could generally regulate without affecting international trade. It stated that the ability of countries to regulate without affecting international trade "was not at issue in the present case."²⁵⁵ It then feebly pointed out that it had not addressed non-health related consumer concerns, thereby implying that it had left a field of regulation untouched.²⁵⁶ In this way, the Panel tried to draw attention away from the large swath of health-related regulations that its decision potentially implicated.

The Appellate Body may have recognized the futility of the Panel's efforts to make the implications of its holding appear insubstantial. It narrowed the Panel's legal reasoning, left its ruling in tact, and dispensed with concluding remarks.²⁵⁷

This combination of holdings based on non-coercion and laissez-faire related principles with rhetoric based on discrimination may help explain why observers disagree about whether the WTO poses a significant threat to environmental protection. Environmentalists may look at the logical implications of the principles directly supporting the holdings and see a grave threat. Defenders of free trade may take the limiting dicta in these cases very seriously, partly out of faith in the judgment of trade panelists.²⁵⁸

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *See Beef Hormone Appellate.*

²⁵⁸ *See e.g. Farber & Hudec, supra note 24, at 1440* (international tribunals have reached "defensible results" and

2. Refocusing the Trade and Environment Debate

Scholarly debates about tensions between free trade and competing policies generally treat the concept and scope of free trade as a given.²⁵⁹ The debate then focuses upon what exceptions to free trade GATT should tolerate in order to accommodate the competing policy.²⁶⁰

In the legal academy, much of this debate takes the form of arguments about the appropriate scope and interpretation of article XX exceptions to GATT trade disciplines.²⁶¹ The Tuna/Dolphin case sparked a debate about whether national regulation of the processes of foreign production was appropriate.²⁶² But much of the scholarship views this process/product distinction debate as another

the quality of decision makers is critical).

²⁵⁹ See e.g. Schoenbaum, *supra* note 23, at 271-273 (discussing articles I, III, and XI as background "normative structure").

²⁶⁰ See e.g. 2 FAIR TRADE, *supra* note 3, at 3, 119.

²⁶¹ See e.g. Charnovitz, *supra* note 136; Steve Charnovitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 ENV'T'L L. 475, 493-501 (1993); ESTY, *supra* note 1, at 114-115 (proposing a test to replace article XX); Foster, *supra* note 23, at 437-443 (same); Chang, *supra* note 23, at 2135 (proposing an "alternative interpretation" of article XX); Schoenbaum, *supra* note 23, at 273-280 (same); Padideh Ala'i, *Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization*, 14 AM. U. J. INT'L L. REV. 1129 (1999) (analysis focusing on article XX). Cf. Weiss, *supra* note 23 (arguing for a conception based on sustainable development).

²⁶² See e.g. William J. Snape & Naomi B. Lefkowitz, *Searching for GATT's Environmental Miranda: Are "Process Standards" Getting "Due Process"?*, 27 CORNELL INT'L L. J. 777 (1994).

question about exceptions to free trade.²⁶³

The three part model calls into question conventional structure of the trade and environment debate. From a legal perspective, it is not clear why the debate should be about exceptions to free trade. After all, if the WTO embraces a concept of free trade as trade free from discrimination, as is sometimes claimed, then we need a debate about expansion of the free trade concept beyond those bounds. The debate would be a debate about the browning, not the greening, of the GATT.²⁶⁴ Furthermore, article XX defenses simply do not apply to the most demanding trade disciplines in the regime, those found in the SPS agreement.

Surely the SPS agreement shows that WTO is administering agreements that cumulatively move far beyond the problem of discrimination. The model leads us to ask what concept of free trade the WTO implements.

Asking this question leads to some fresh questioning of the nature of the GATT trade disciplines. One might ask why precisely the MMPA violates GATT disciplines. This question, which

²⁶³ See e.g. Hudec, *supra* note 53, at 119 (assuming that GATT law permits nothing after discussing Tuna/Dolphin); John H. Jackson, *Congruence or Conflict*, *supra* note 52, at 1244 (discussing possibility of "exceptions" to GATT rules to accommodate some process based restrictions); Charnovitz, *supra* note 136, at 53 (focusing on issue of whether Article XX(b) or (g) can sustain a processing standard).

²⁶⁴ Cf. Esty, *supra* note 1 (employing title "Greening the GATT"). Professor Esty uses this title to suggest that GATT should become greener, a point that I do not dispute. I only suggest that the browning of the GATT explains why this greening is needed.

is antecedent to the question of whether a defense applies, turns out to be rather difficult to answer.²⁶⁵

The Tuna/Dolphin panels concluded that the MMPA quantitatively restricts trade.²⁶⁶ GATT article XI generally forbids quantitative restriction of trade.²⁶⁷

Tuna/Dolphin I offers no direct support for the conclusion that the MMPA establishes a quantitative restriction on imports.²⁶⁸ Tuna/Dolphin II states that the "embargoes" constituted "prohibitions or restrictions" of importation under article XI, "since they banned the import of tuna or tuna products from any country *not meeting certain policy conditions*."²⁶⁹ [emphasis added]. Of course, this implies that a country meeting these policy conditions can export freely to the United States. Tuna/Dolphin does not explain why a measure which allows any country to choose to export unlimited

²⁶⁵ See Hudec, *supra* note 62 (trying to identify the textual basis for the product-process distinction found in the tuna/dolphin cases).

²⁶⁶ Tuna/Dolphin I ¶¶ 5.8-5.18; Tuna/Dolphin II ¶¶ 5.6-5.10. See also McGrath, *supra* note 130, at 444-468 (discussing amendments to the MMPA following the GATT panel decision).

²⁶⁷ GATT, *supra* note 8 art. XI.

²⁶⁸ After rejecting the United States' argument that the MMPA provisions at issue created a regulation, the Tuna/Dolphin I panel quoted the language of article XI and then stated:

The Panel therefore found that the direct import prohibition. . . and the provisions of the Marine Mammal Protection Act under which it was imposed were inconsistent with Article XI:1.

Tuna/Dolphin I ¶ 5.18.

²⁶⁹ Tuna/Dolphin II ¶ 5.10.

quantities of tuna (by choosing to comply with conservation standards) should be considered a quantitative restriction on trade.²⁷⁰

The panels held that the MMPA did not involve the kind of regulation GATT “authorizes” in Article III.²⁷¹ It stated that the MMPA did not regulate the characteristics of tuna as a product.²⁷² Since article III only addresses regulation of products, the Panels concluded that the MMPA provisions before them did not constitute a regulation within the meaning of that article. Therefore, the GATT requirement of national regulatory treatment did not apply.

The Tuna/Dolphin decisions suggest that the MMPA regulates the "process" of catching tuna and distinguishes process from product regulations.²⁷³ Scholars debating these decisions have exhaustively discussed both the wisdom and legal soundness of this product/process distinction²⁷⁴ and this article will not revisit that issue. But the argument that this law did not regulate tuna as a product,

²⁷⁰ This assumption that a regulatory measure constitutes a quantitative restriction has earlier roots than Tuna/Dolphin. See Ted L. McDorman, *The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphin, and Turtles*, 24 GEO. WASH. J. INT'L L. & ECON. 477, 513-14 (1991).

²⁷¹ Tuna/Dolphin I ¶ 5.14; Tuna/Dolphin II ¶¶ 5.8-5.9.

²⁷² Id.

²⁷³ See Tuna/Dolphin II ¶ 5.8 (distinguishing between regulation of a product as a product and regulation of "policies or practices").

²⁷⁴ See e.g. William J. Snape III & Naomi B. Lefkowitz, *Searching for GATT's Environmental Miranda: Are "Process Standards Getting "Due Process"?*, 27 CORNELL INT'L L. J. 777, 785 (1994); Anderson, *supra* note 26, at 765-768; Charnovitz, *Pruning, supra* note 23, at 311-323.

even if correct, does not establish that it constitutes a quantitative restriction.

The conclusion that a law allowing imports provided a country meets policy conditions quantitatively restricts trade, while having a certain surface plausibility, does not withstand analysis. Any regulation that applies to imported goods will necessarily prohibit imports in order to enforce the regulation. If the country could export the goods without compliance with the regulation, it would not have to obey the regulation. If the targeted country can comply with a regulation and thereby secure the right to export without any limit to quantity, than clearly a qualitative regulation, not a quantitative restriction, is at issue. Hence, the fact that the MMPA did not inexorably limit the quantity tuna that Mexico could export to the United States seems to establish that it did not impose a quantitative restriction.

GATT scholars, however, consider the holding that these regulations involve a prima facie violation of article XI as so obviously correct as to require no explanation. While article XI on its face might support the notion that it only limits literal import quotas (including zero quotas), GATT panels have traditionally construed article XI much more broadly to invalidate almost any regulation applied at the border that places a burden on imports.²⁷⁵

²⁷⁵ See WTO Dispute Settlement Report on India-Quantitative Restrictions on Imports of Agricultural, Textile & Industrial Products, April 6, 1999, 1999 WTO DS LEXIS 5 (describing article XI as broad and comprehensive); GATT Panel Report on European Community Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables, October 18, 1978, GATT B.I.S.D. (25th Supp.) 68 (January 1979) (invalidating article XI minimum pricing requirements for tomato concentrate enforced through import licenses). Cf. GATT Panel Report on United States-Measures Affecting Alcoholic and Malt Beverages, June 19,

Tuna/Dolphin's narrow construction of the note ad article III made the MMPA illegal only because of broad construction of article XI. This broad construction of article XI goes beyond the anti-mercantilist limit on quotas necessary to sustain the non-discrimination principle and embraces a laissez-faire rule (limited by applicable defenses) . Hence, narrow construction of the ad note implies greater movement toward laissez-faire trade.

An historical view of the three part model suggests a theoretical reason for viewing the trade and environment debate as a discussion of proposals for exceptions to free trade principles. Historically, the theory of free trade has often been viewed as a laissez-faire theory. From the perspective of laissez-faire theory any proposal to allow regulation of the environment looks like a proposal for an exception to free trade principles, because regulations burden international trade. This may help explain why, over time, the WTO and GATT have construed article XI so broadly and defenses so narrowly.

The existence of a background laissez-faire assumption by itself has important implications for understanding "trade and" debates. Since laissez-faire assumptions have very little normative attractiveness, any sense that they inform scholarly or dispute settlement panel opinions will make those opinions less persuasive. This may explain why GATT and WTO panels feel obliged to disclaim pursuit of laissez-faire goals. Absent, however, convincing identification of a more attractive principle, claims that the WTO pursues something more limited than the maximum politically feasible move toward laissez-faire goals will prove unconvincing.

1992, GATT B.I.S.D. (39th Supp.) 206, 292 (December 1993)(article III, rather than article XI applies to "internal measures").

Scholars realize that the non-discrimination principle may prove more attractive than a laissez-faire principal. Professors Farber and Hudec write, "Facial discrimination is the most attractive case for GATT intervention . . ."²⁷⁶ And they understand that thoughtful critics of the GATT regime will be worried about the SPS agreements' restrictions, which I have described as moving toward laissez-faire.

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The three part model facilitates inquiry into which principles actually explain the decisions and why laissez-faire and non-coercion principles appear more troubling than facial anti-discrimination principles. The legitimacy analysis already provided partially explains why laissez-faire and anti-coercion principles appear more troubling than facial non-discrimination principles. WTO decisions relying on non-discrimination appear more legitimate than decisions on other grounds. Non-discrimination seems rooted in fairness concerns and usually involves policy choices that an international trade institution is well placed to make. By contrast, the WTO lacks the democratic credentials and expertise to determine the appropriate degree of laissez-faire government. Similarly, trade experts seem poorly positioned to make decisions about the appropriate use of coercion. While some international control of coercion may be legitimate, trade experts will have a tendency to view fairly trivial coercion as a grave threat, even when it effectively serves ends deemed important by the government of the consumers paying the coercion's direct cost.

While legitimacy matters, functional considerations matter as well. If a WTO panel holds a law illegal under laissez-faire principles, the law might not recover. Of course, the WTO has only moved

²⁷⁶ Farber & Hudec, *supra* note 10, at 69.

²⁷⁷ *Id.* at 62.

toward laissez-faire, not all the way to it. But requiring a nation to invalidate a law because it lacks an adequate scientific justification may have equally fatal consequences. If WTO judgments about the adequacy of a scientific judgment follow national consideration of the most important available evidence, then a compliant government must adopt weaker standards or eschew regulating the matter giving rise to the WTO judgment. Of course, to the extent a WTO ruling under the SPS agreement follows significant oversights in examining available data, then the government may find itself able to regulate after improving the risk assessment. But that may be insufficient if the WTO demands greater certainty than the available data offers on the issue a national government wishes to regulate.

A non-coercion principle would endanger efforts to protect public health and the environment. Indeed, a pure anti-coercion principle, as I have shown, is very similar to a laissez-faire policy, since even-handed regulations and taxes coerce those exporting into the taxing and regulating jurisdiction. A pure non-coercion principle would abolish a great swath of public health regulation.

A less radical principal, embraced by Tuna/Dolphin II, objects to coercion of national governments. Tuna/Dolphin II may implicitly distinguish regulations that coerce national governments from regulations that coerce private companies.²⁷⁸

A rule against coercion of foreign governments would invalidate the use of trade restrictions to force governments to police impacts of their nationals on the high seas or on global environmental problems.²⁷⁹ Since all international environmental law relies upon domestic enforcement, this might

²⁷⁸ See Hudec, *supra* note 14, at 119.

²⁷⁹ Daniel Esty refers to measures trying to "change environmental behavior outside the territory of the party using the trade sanctions" as offensive measures. *Id.*

have serious impacts upon international environmental protection. And international environmental protection is essential to a nation's ability to protect its own people from environmental harms as well as to the protection of other species.

If the WTO extends this non-coercion principle beyond the international environmental context in which it arose, such a principle could eviscerate domestic environmental law. A country, for example, might wish to assure that a product consumed in its jurisdiction does not poison its inhabitants. In order to make a regulation banning this poison's use effective in a globally integrated world, it must apply to imports and domestically produced goods alike. If the importing countries cannot effectively enforce such a regulation through inspections after the product is made, it may have to regulate the foreign manufacturing process.²⁸⁰ A broad non-coercion rule might prevent it from conditioning access to its market upon a country supplying adequate data or enforcing the standards that the national government imposed upon its own manufacturers. Hence, this non-coercion rule would prevent regulators from effectively implementing domestic measures that required some compliance verification abroad.²⁸¹

²⁸⁰ See Charnovitz, *supra* note 113, at 10573 n. 73 (inspectors often examine processing methods because food testing for purity at the border is impractical); Final Rule: Regulation of Fuels and Fuel Additives: Baseline Requirements for Gasoline Produced By Foreign Refiners, 62 Fed. Reg. 45,533, 539-541, 550-559 (codified at 40 C.F.R. pt. 80) (requiring provision of various data and segregation of reformulated gasoline from foreign companies exporting gasoline to the United States) .

²⁸¹ Daniel Esty seems to consider such measures a defensive environmental trade measure. See Daniel C. Esty, *Unpacking the "Trade and Environment" Conflict*, 25 LAW & POL'Y INT'L BUS. 1259, 1263 (1994). He uses pesticide residue

Measures conditioning access to domestic markets upon foreign governmental compliance with national standards have been part of domestic public health laws since the 1920s.²⁸² For example, the U.S. Import Milk Act of 1927 seeks to assure a pure milk supply by requiring a sanitary inspection of the foreign dairy farm as a condition of importation.²⁸³ Similarly, the United States Food, Drug, and Cosmetic, Act of 1938 prohibits commerce in food prepared, packed or held under unsanitary conditions and the U.S. Poultry Products Inspection Act bars importation of poultry unless "subject to the same inspection . . . standards" as apply in the United States.²⁸⁴ Hence, a rule against coercing foreign governments would invalidate a lot of standard domestic regulation.

A pure rule against explicit discrimination, however, would only rarely have terribly significant environmental impacts. The country would usually be able to regulate equally effectively by simply applying the same standard it applied to imports to its own products.

standards and restrictions on beef imports containing growth hormone as examples. *Id.* He states that the purpose of these defensive measures is to "ensure that imported products meet the same environmental standards as domestic producers." *Id.*

His definition of defensive trade measures, however, does not fit his examples or mine. He states that such measures "are employed by one country to change the behavior of another within the territorial confines of the country employing the trade measure. . ." But limitations on pesticide residues and hormone treated beef must change the exporting countries' behavior in its own territory, where it manufactures the product.

²⁸² See *Charnovitz, Taxonomy*, *supra* note 120, at 13-15.

²⁸³ *Id.* at 13.

²⁸⁴ *Id.* at 14-15.

An example of this comes from the Reformulated Gasoline case.²⁸⁵ The United States could regulate as stringently after the WTO ruling against its reformulated gasoline rule by extending to foreign manufacturers the same opportunities for using measurement techniques that domestic manufacturers had. It subsequently modified its rule to do that.²⁸⁶

In short, a facial non-discrimination requirement usually allows the country suffering WTO reversal to continue effectively addressing the public health or environmental problem at issue. Declaring measures illegal on laissez-faire or anti-coercion grounds poses considerably deeper problems for environmental regulation.

A proposal to focus exclusively upon free trade as trade free of discrimination merits consideration. Such a proposal would clearly enhance the WTO's legitimacy. It does, however, entail some reduction in the scope of international trade law.

The models of the definitions of free trade help clarify what is at stake in choosing such a narrowing for the sake of legitimacy. Such a narrowing implies a particular agenda for the WTO. The analysis above suggested that a non-discrimination model would involve focusing WTO's institutional energy upon tariff reduction, elimination of regulations and taxes that expressly discriminate, elimination of quotas, and curbing domestic subsidies. This would leave the WTO with an ambitious agenda. On the other hand, it implies leaving efforts to decrease reliance upon non-discriminatory coercion to

²⁸⁵ See WTO Report of the Appellate Body on United States-Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 603 (1996).

²⁸⁶ See *George E. Warren Corp. v. EPA*, 159 F. 3d 616, 619 (D.C. Cir. 1998), *amended*, 164 F.3d 676 (D.C. Cir. 1999).

achieve international policy goals and to weaken taxes and regulations off of the WTO agenda.

Analysts who wish to consider such a proposal should consider not just the desirability of the various objectives (or variants thereof), but also their suitability for pursuit by the WTO. The possible advantages of a sharper sense of institutional priorities and focus should form part of the analysis.

The focus on the definition of free trade invites critical thinking about GATT and SPS trade disciplines, not just the exceptions to the disciplines.²⁸⁷ In particular, careful analysis of the role of coercion in regulation raises questions about the whether a process standard should constitute a quantitative restriction of trade in violation of article XI. This calls into question the United States' decision not to challenge Tuna/Dolphin I's conclusion that process standards constitute quantitative trade restrictions in Tuna/Dolphin II or in Shrimp/Turtle.²⁸⁸ It also shows the inadequacy of a definition of free trade based as trade free of "trade restrictions" or "trade barriers." Whether or not the reader accepts the concept I offer in the next section, I hope this article serves to make clear the importance of defining free trade as a legal concept.

III. Refining and Evaluating the Non-Discrimination Model

²⁸⁷ The scholarly debate has included some consideration of redefining GATT disciplines. See e.g. Schoenbaum, *supra* note 23, at 288-90 (discussing proposals to change definitions of "like products" under article III). But larger concepts of free trade have played little role in this debate.

²⁸⁸ See Tuna/Dolphin II ¶ 5.7.

The term discrimination does not define itself.²⁸⁹ I have already suggested that WTO decisions frequently employ the term in an elastic fashion, applying anti-discrimination rhetoric to justify decisions really reached on other grounds. This sort of use of the non-discrimination idea may deprive the concept of the legitimacy it might otherwise enjoy. WTO can explicitly adopt a non-discriminatory model and yet lose the legitimacy such a model might otherwise provide, if it applies it wantonly.

Professor Robert Hudec has written that the WTO depends upon "objective legal rulings" tending to "elicit community pressure for compliance."²⁹⁰ Legal rulings that appear ad hoc seem unlikely to be "objective legal rulings" and therefore may attract community pressure for non-compliance. This part seeks to address this problem in the WTO's application of the discrimination concept.

This part will explore the implications of focusing exclusively upon discrimination and develop a more precise definition of discrimination as a means of stimulating further discussion of what free trade should be. First, this part will explain that the WTO has used anti-discrimination rhetoric haphazardly and failed to develop a coherent definition of discrimination, but that it could change its approach without amending GATT. Second, this part will develop a definition of discrimination designed to confine the WTO to institutionally appropriate judgments, called "bright-line" discrimination. Third, it will discuss some of the advantages and disadvantages of narrowing the WTO's function as I have described.

This part has the modest goal of stimulating a dialogue about what exactly free trade should be. The basic models that I have posited so far may help illuminate some fundamental problems with free

²⁸⁹ Ernest J. Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L. J. 219, 224 (1957).

²⁹⁰ Hudec, *supra* note 14, at 114.

trade and its relationship to other areas of law and policy. But some of the legitimacy problems stem from loose use of discrimination talk.²⁹¹ I do not hope to convince the reader that I have the answer to the question what free trade should be. But I do hope this section shows that we need to address this question more explicitly than we have so far.

A. Abandoning the Ad Hoc Approach

Focusing the WTO upon discrimination would not require an amendment of GATT. It would require an abandonment of several questionable interpretations of GATT and a recognition of appropriate limits to the global integration tasks an international organization devoted to free trade can legitimately accomplish. The guiding principles would entail recognizing the WTO should not seek to determine limits upon non-discriminatory national or international regulation. Rather, the WTO should leave these tasks to national governments or other international institutions.

A focus upon discrimination would entail abandonment of WTO oversight of neutral regulations with questionable scientific basis. In particular, the WTO would have to abandon the approach of the SPS agreement, which makes non-discriminatory regulation illegal, if a dispute resolution panel finds nation's scientific justifications for regulation inadequate or concludes that less trade restrictive means could accomplish a nation's regulatory goal.

It would also entail abandonment of the anti-coercion approach followed in the two Tuna/Dolphin cases. General hostility toward coercion would play no part in the evaluation of the

²⁹¹ See Snape & Lefkowitz, *supra* note 262, at 790 (calling Tuna/Dolphin Panel's assertion that restrictions favoring foreign fleets discriminated against Mexico confusing and suggesting a goal of quicky cheap production explains decision).

GATT consistency of a measure. Rather, the inquiry would focus upon whether the questioned law applied the same standards to domestic and foreign producers. If it did, it would be upheld.

The WTO, however, has debased the discrimination concept. In *Reformulated Gasoline*, the WTO held, straightforwardly enough, that application of different standards to foreign refiners constituted discrimination.²⁹² *Shrimp/Turtle*, however, held that application of the same standard to domestic and foreign producers constituted discrimination.²⁹³ Together the rejection of uniform and different standards could imply that practically all law discriminates against foreign commerce. *Shrimp/Turtle* also held that failure to afford certain procedural protections to countries constituted "discrimination."²⁹⁴ In *Beef Hormone*, the WTO Panel treated the failure to regulate of growth hormones in cattle as discriminatory because of underbreadth, specifically, a failure to regulate different substances in swine.²⁹⁵

These decisions articulate no coherent and consistent definition of discrimination. Rather, they

²⁹² The relevant agreements are set out in Annexes to the agreement establishing the World Trade Organization. *Marakesh Agreement Establishing the World Trade Organization*, April 15, 1994, art. II, *reprinted in* URUGUAY RESULTS, *supra* note ?, at 6-7. The annexes themselves appear in this same volume. See *id.* at 19-439.

²⁹³ See Report of the Appellate Body of the World Trade Organization on *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, October 12, 1998, 38 I.L.M. 118 ¶¶ 161-165 (1999).

²⁹⁴ See *id.* ¶¶ 178-84.

²⁹⁵ See Report of the Panel: *EC Measures Concerning Meat And Meat Products (Hormones)*, August 18, 1997, 1997 WL 569984 DS26/R/USA ¶¶ 8.267-69; Charnovitz, *supra* note 75, at 1783.

feature an ad hoc approach.²⁹⁶ The Panels typically identify some feature of the regulation that bothers them, and then try to make it into discrimination. Even assuming that each argument about discrimination is plausible (a difficult assumption to sustain), the jurisprudence as a whole appears arbitrary. Moreover, as I have demonstrated, many of the arguments offered under the anti-discrimination rubric really involve anti-coercion or laissez-faire moves.

Clearly, a definition of free trade based on anti-discrimination will only help legitimize WTO decisions if it has a coherent and fairly consistent meaning. Using the term to cover a multitude of sins will only undermine the legitimacy of the anti-discrimination model.

B. Bright-Line Discrimination

I wish now to highlight a possible approach to discrimination. I do not argue that this approach is the only possible answer to the dilemma of what free trade should be, but wish, instead, to suggest that a fairly coherent principle is possible. Articulating a coherent principle highlights the lack of an acceptable definition of free trade under the existing regime. On the other hand, analyzing the bright-line approach suggests that an important trade-off exists between coherence and breadth.

Explicit discrimination is usually not difficult to discern. It involves, for example, regulations that establish one set of requirements for domestic producers and another for foreign producers. While there are occasions when such regulations may be justified and should be upheld under GATT,²⁹⁷ the WTO enjoys a fair amount of credibility when it focuses on express discrimination.

²⁹⁶ See UNEP Criticism, *supra* note 24 (UNEP claims that uncertainty concerning trade rules has hampered development of multilateral environmental treaties).

²⁹⁷ See Farber & Hudec, *supra* note 24, at 1419-1420.

The WTO generally does not confine itself to explicit discrimination, because of concerns that even-handed standards can create disparate impacts. A legitimacy problem, however, comes from this expansion. In principle, if one expands the concept of discrimination to include regulations that apply the same requirements to foreign and domestic producers, but have a different effect upon foreign producers, one can in theory hold many regulations illegal. This move, unless carefully circumscribed, becomes equivalent to assigning pursuit of laissez-faire government to the WTO.

Differential impacts can occur regularly without any protectionist motive. In order to see why this is so, assume that two countries have different safety standards for a product. One country, which we'll call "Safe", has strict safety standards and the other country, which we'll call "Dangerous," has lax standards. Once these standards exist, producers in "Safe" will produce a safe product and producers in "Dangerous" will produce a dangerous product for their domestic markets. Indeed, even if the land of Dangerous actually contains many producers that meet Safe's standards, substandard producers in Dangerous may exist. The incremental expense that any foreign substandard producer must incur to meet the standard can give rise to a disparate impact claim.

If any substandard Dangerous producers try to export their products to Safe, the regulation at issue will always appear discriminatory in effect. "Safe" must apply its product standards to imports as well as domestically produced goods in order to adequately protect Safe citizens from its dangers.

This routine application of a standard may appear discriminatory to a trade panel for the following reasons. First, given current methods of production, Safe's law will ban the import of some products from dangerous, because sales of Dangerous' product would violate regulatory standards. Otherwise, we would have a standard that discriminated against domestic production (or an unenforced

law). One may also characterize it as a regulation with discriminatory effect, because the regulations keep Dangerous producers out of the “Safe” market.

Viewed from another perspective, however, Safe’s law imposes a non-discriminatory burden. As long as Safe applies the same law to Dangerous as it does to itself, the burden consists of the same burden domestic producers face, the burden of complying with Safe’s standards. Because Safe producers have experience with Safe production this compliance may be easier for them. But this does not amount to discrimination, this is simply the inevitable result of a world of varying health and environmental standards. Normally, Dangerous producers can escape the "trade restraint" by changing production methods.

An approach that treats laws with differential burdens but formally identical standards as discriminatory creates legitimacy problems. Absent success in articulating clear coherent tests, such an approach treats substantially all relatively stringent health and environmental measures as legally suspect trade restrictions.²⁹⁸

One can construct some bright line rules that ferret out a handful of situations where non-facially discriminatory regulations actually prevent (rather than just burden) international trade. The principle rule would state that regulations that make compliance by foreign manufacturers theoretically impossible may constitute discrimination. For example, a regulation that requires that the workers in Safe manufacture a

²⁹⁸ See generally Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an “Aim and Effects” Test*, 32 INT’L LAWYER 619, 639 (1998) (a disproportionate burden on foreign interests may reflect “random distribution of unintended effects” unlikely to normatively justify a WTO invalidation of regulations).

product makes it physically impossible for Dangerous workers to produce products for Safe's market.²⁹⁹ Similarly, a regulation that required that an item be produced outdoors in climactic conditions that do not exist in any country other than Safe effectively prohibits imports from Dangerous. These regulations discriminate, even though they facially apply the same requirements to all producers. I will use the term "bright-line" discrimination to describe that test I suggest, a test that focuses upon express discrimination (different standards for foreign and domestic goods) and those relatively few situations where a regulation imposes a prerequisite upon imports that makes it theoretically impossible for a foreign manufacturer to comply.

One might rationalize the Tuna/Dolphin decisions under such a test, albeit on very different grounds than those the panels emphasized. The Tuna/Dolphin I Panel expressed concern about whether the MMPA required the Mexican fleet to meet "a retroactive and varying ceiling" based upon the U.S. fleet's actual dolphin take.³⁰⁰ This problem raises an issue under the "bright-line" test. If the Mexican government could not tell what numerical limit applied to its fleet's operations in a timely manner, this would raise an issue about whether compliance with the regulatory condition was possible. If compliance was possible for the U.S. fleet, but impossible for the Mexican, this would violate the bright line test, even though the standards applicable to Mexico on their face were less stringent.³⁰¹

²⁹⁹ See e.g. *Indonesia -Certain Measures Affecting the Automobile Industry*, July 2, 1998, 1998 WL 375971 (settling dispute about a tax that varied depending on national origin of autos and auto parts).

³⁰⁰ *Tuna/Dolphin I*, ¶ 5.16.

³⁰¹ Cf. Charnovitz, *supra* note 113, at 10586 (recommending prospective setting of dolphin kill rates for foreign

The bright line approach is consistent with GATT's text. Article III only guarantees foreign products "treatment no less favorable than that accorded to like products of national origin."⁶⁰² This phrase certainly can accommodate an interpretation that only requires facially neutral regulations and regulations that do not make compliance theoretically impossible for foreigners certainly.

GATT panels have traditionally not employed the approach I have suggested under article III.³⁰³ Paragraph 1 of article III supports, but does not require a broader approach. This paragraph states that the "contracting parties recognize that" regulations and taxes "should not be applied . . . so as to afford protection to domestic production."⁶⁰⁴ Certainly, this makes burdens analysis textually plausible.

I simply point out that the approach I suggest here is also textually plausible. Paragraph 1 of article III only speaks of what parties recognize and does not, by its terms, necessarily create a legal rule against "protectionism." Moreover, a bright line anti-discrimination rule would get rid of rules that effectively protected domestic industry anyway, in most cases.

Adoption of the bright-line test would require abandonment of the incorrect claim that process regulations that can be complied with impose quantitative restrictions on trade just because they prohibit the sale of non-complying goods. Prohibitions of the importation of goods produced in violation of a country's standards do not discriminate, provided that a parallel restriction applies to domestic and

vessels).

³⁰² GATT, *supra* note 8 art. III(4).

³⁰³ See Jackson, *supra* note 14, at 1236-1237 (stating that GATT applies to non-facial discrimination).

³⁰⁴ GATT, *supra* note 8 art. III, par. 1.

foreign producers.

Article XI can be read to support this conclusion. Article XI's title refers to "General Elimination of Quantitative Restrictions." This suggests that article XI refers to quantitative restrictions, not qualitative restrictions. Furthermore, article XI uses quotas and import or export licenses as the chief examples of restrictions it prohibits. This again suggests that Article XI does not embrace regulations, but only limits on the quantity of imports or exports. Under this analysis, article XI's prohibition of restriction through "other measures" should take its meaning from the surrounding references to quotas and licenses, prohibiting measures, such as "voluntary" limits on quantities of exports, that directly impose quantitative limits without resort to licences and quotas.

GATT panels have traditionally interpreted article XI much more broadly, reading the reference to "other measures" broadly to include almost any burden on goods.³⁰⁵ This comprehensive interpretation, while textually justifiable, is not the only plausible interpretation.³⁰⁶

The bright-line approach, however, is not a panacea. It entails restricting the scope of "free trade" in order to find a coherent principle and enhanced legitimacy.

³⁰⁵ See Schoenbaum, *supra* note 23, at 273.

³⁰⁶ Article XI's title refers to quantitative restrictions. This supports the quantitative/qualitative distinction I have suggested. GATT, *supra* note 1, art. XI. The text bans "prohibitions or restrictions. . . whether made effective through quotas, import or export licenses or other measures." *Id.* In the context of the title's reference to abolishing quantitative restrictions, this could plausibly refer to complete refusals to allow imports and numerical limitations on the quantity of imports, however enforced at the border, but not to qualitative restrictions that do not inexorably limit the quantity of imports.

Legal precedent and scholarly commentary support the notion of confining the reach of a body's political authority in order to avoid having it make decisions that would tend to sap its legitimacy.³⁰⁷ For example, the United States Supreme Court generally has authority to pass upon the constitutionality of governmental actions. But the Court construes that authority narrowly to avoid resolution of genuine constitutional questions that seem to require a political, rather than a purely legal judgment. Hence, the Supreme Court refuses to decide whether a state's governmental structure conforms with the constitutional requirement for a Republican form of government.³⁰⁸ The Supreme Court also refrains from deciding many crucial questions about the scope of the President's foreign affairs power under the constitution.³⁰⁹ Conceptually, one might think of this as a narrowing of the definition of constitutional law for purposes of judicial review, analogous to a narrowing of the definition of free trade for purposes of

³⁰⁷ See generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

³⁰⁸ See *Luther v. Borden*, 48 U.S. (7 How. 1) (1849).

³⁰⁹ See e.g. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), overruled in part, *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833); *Jones v. United States*, 137 U.S. 202, 212-13 (1890) (annexation of territory held a non-justiciable political question); *Doe v. Braden*, 57 U.S. (16 How. 635, 657-58 (1853) (recognition of new governments and termination of treaties held non-justiciable political questions); *The Three Friends*, 166 U.S. 1, 63-64 (1897) (determination of insurgency held a political question); *The Prize Cases*, 67 U.S. (2 Black) 635, 667, 669-70 (1862) (determination of belligerency held a political question); *The Protector*, 79 U.S. (12 Wall.) 700, 701-02 (1871) (determination of existence of a state of war held a political question). Oliver P. Field, *The Doctrine of Political Questions in the Federal Courts*, 8 Minn. L. Rev. 485, 512 (1924). See also *Mexico v. Hoffman*, 324 U.S. 30 (1945) (holding that State Department, not federal court, decides upon existence of foreign sovereign immunity).

WTO review.

Similarly, Congress sometimes restricts the authority of federal agencies to fully realize legislative goals, in order to avoid federal intrusion upon legitimate state and local decision-making. For example, the Clean Air Act limits EPA's authority to require states to implement certain types of measures aimed at reducing car use, even in the event of state failure to meet its obligation to protect public health.³¹⁰ An analogous principle might prevent the WTO from expanding disciplines protecting free trade in ways that involve inappropriate intrusions on national authority.

This argument does not establish what the bounds of WTO administered free trade should be. But it does support the notion that an objection to a narrowing of grounds based on solely on its failure to correct some objectionable actions does not suffice. Rather, a justification for an expansion of WTO authority must have a theory as to why the WTO, rather than national governments or a more neutral international body, should make the sorts of judgments involved in an expansion of the WTO's authority. Such a justification will be very difficult with respect to the SPS agreement and other moves toward laissez-faire principles.

C. Failure to Root out All Protectionism

I anticipate the following response, to the bright line test: A narrowly circumscribed anti-discrimination principle will fail to root out "protectionist" trade barriers.³¹¹ I show below why this argument proves unsatisfactory. Ultimately, this response simply fails to grapple with the question of

³¹⁰ See 42 U.S.C. § 7410(a)(5), (c)(1)(B).

³¹¹ See generally Chang, *supra* note 23, at 2164-65 (describing protectionist concerns in this context).

what free trade should be in a world that has some objectives, such as protection of public health and the environment, that sometimes require burdens upon commerce. In such a world, anti-protectionism does not offer a satisfactory definition of free trade.

1. Anti-Protectionism: An Unsatisfactory Legal Concept

A suggestion that WTO dispute settlement panels should eliminate protectionism must have a premise that anti-protectionism functions as a satisfactory legal concept to guide WTO decisions. But elimination of "protectionism" cannot serve as an adequate legal principle to govern international trade law, because the concept has no specific agreed meaning.³¹² Melvin Krause has defined the "new protectionism" broadly as referring to all government intervention that affects foreign trade.³¹³ This laissez-faire view would make almost all regulation protectionist. Professor Sykes defines all regulation disadvantaging a foreign party without providing the least trade restrictive means of meeting a regulatory objective as protectionist.³¹⁴ Professor Regan defines as protectionist laws passed with a protectionist motive that are analogous to tariffs, quotas, or embargoes.³¹⁵ Since the term has no many possible meanings, the concept provides no solution to the problem of the ambiguous definition of free trade.

³¹² Accord ROBERT KUTTNER, THE END OF LAISSEZ FAIRE: NATIONAL PURPOSE AND THE GLOBAL ECONOMY AFTER THE COLD WAR 114 (1991) ("free traders have no good working definition of . . . protectionism," except in the extreme case).

³¹³ See MELVYN B. KRAUSE, THE NEW PROTECTIONISM: THE WELFARE STATE AND INTERNATIONAL TRADE 36 (1978).

³¹⁴ Sykes, *supra* note 11, at 3-5 (setting out Professor Sykes' personal definition of protectionism, rather than a generally recognized definition).

³¹⁵ Regan, *supra* note 7, 1094-96.

Nevertheless, elimination of protectionism, whatever it is, seems like a central goal of free trade law. Free-traders may feel that vigorous routing out of this undefined evil constitutes a morally satisfying exercise, because free-traders believe that acceptance of the theory of comparative advantage will advance human welfare (and they may well be right in general). Those who do not believe in this theory, therefore, have committed heresy, and their work should be rooted out.

This does not, however, mean that protectionism functions as an analytically useful concept in adjudicating cases. In order to do that, the terms must have some specific meaning that correlates with sound decision-making and an acceptable definition of free trade.

a. **Discriminatory Motive**

One might define protectionist measures as those enacted with the intent to economically benefit domestic concerns by discouraging foreign competition. This definition would make the legality of a measure hinge on the subjective motivations a trade panel attributes to decision-making bodies, such as national legislatures.

The literature raises a number of fundamental objections to motive review generally. First, ascertaining the motivations of legislatures may prove difficult or impossible.³¹⁶ Second, the inquiry may

³¹⁶ See e.g. *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L. J.* 1205, 1212-14, 1279 (1970) (discovering motivation is very difficult, but at times appropriate and possible in constitutional litigation); Winkfield F. Twyman, *Beyond Purpose: Addressing State Discrimination in Interstate Commerce*, 46 *S.C.L. Rev.* 381, 426-27 (1995) (general rule of not inquiring into legislators' motives keeps the Court out of problematic inquiries).

be unseemly.³¹⁷ Some commentators, however, do not find these objection persuasive.³¹⁸

More fundamentally, the inquiry yields nothing useful in trying to advance public welfare.³¹⁹ A measure that was intended to protect a domestic industry may have a very desirable effect on public welfare and may fail in its objective of protectionism.

This problem becomes especially acute when one consider mixed motives.³²⁰ Suppose that a country has failed to adequately address a serious long-term environmental problem because it fears needed regulation's immediate impact upon its own producers. Suppose that a bill to address this problem passes, because of mixed motives. Producers of a cleaner competing product and environmentalists support the bill. If this bill is even-handed it may burden foreign producers of the

³¹⁷ See e.g. *Uphaus v. Wyman*, 360 U.S. 72, 82 (1959) (Brennan J. dissenting); Kenneth L. Kart, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1164 (1978) (the courts have long regarded inquiries into motive as unseemly); *Twyman*, *supra* note 316, at 426-27 (general rule of not inquiring into legislators' motives keeps the Court out of inquiry into personal motives).

³¹⁸ See e.g. Regan, *supra* note 7, at 1143-1160; Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Motivation*, 1971 SUP. CT. REV. 95, 119-127 (justifying inquiry into motivation in equal protection cases).

³¹⁹ This is a species of a more general argument about motivation, that invalidating an otherwise valid law on the basis of motivation does not enhance utility. See Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 360 (1949)

³²⁰ See generally Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 119-20 (disapproving of searching for predominate motives in mixed motive cases); Ely, *supra* note 316, at 1213-14, 1266-68 (same).

environmentally destructive product as well as domestic producers. A free-trader may well look at this situation and view the legislation as protective of the domestic industry producing the substitute.

Outside of free trade circles this protectionist objection, while plausible, enjoys little legitimacy as a reason to disallow the law. The protection argument amounts to an assertion that environmentalists should never work cooperatively with industry who may benefit financially from environmental protection or that politicians should not consider the commercial upside to environmental regulation.³²¹ But some analysts have posited that increasing economic integration has weakened the state's capacity to further public welfare.³²² If this is true, than environmental protection may need to rely in part upon the political power of industries that might benefit from environmental protection.³²³ As long as the regulation is even-handed and non-discriminatory, a protectionist motive for its passage will not necessarily make the regulation harm public welfare. If this law harms public welfare, this will be because of its content, not its motivation.³²⁴

Approaching mixed motive cases like a blood hound sniffing out improper "protectionist" motives will surely weaken the WTO's legitimacy in the eyes of national governments. The legislators will tend to

³²¹ See generally, Driesen, *supra* note 47, at 568-571 (explaining why environmental regulations may generate commercial benefits).

³²² See Benvenisti, *supra* note 30, at 168, 201.

³²³ See generally Chang, *supra* note 23, at 2205-06 (explaining why protectionist interest group support for trade measures may overcome the problem of too little environmental protection predicted by public choice theory).

³²⁴ See generally *id.* at 2174-75 (proposing that trade restrictions that "in fact offer significant protection" should be GATT-illegal).

view such a case as involving a solid pragmatic approach to a difficult public problem. The WTO will do better, it has some solid problem to point to, like bright-line discrimination.³²⁵

b. Disparate Impact

Rather than define protectionism according to lawmakers' motives, one might identify as protectionist those measures that had disparate impacts i.e. those measures that harmed foreign interests at the expense of domestic interests.³²⁶ Measures creating disparate impacts might fairly be characterized as not just protectionist in motivation, but as actual trade barriers in practice.

I have already identified several of the numerous problems with this approach. In an interdependent world just about any tax or regulation will have a disparate impact.³²⁷ In theory, strict standards will often have a worse impact on foreign producers than on domestic ones, since the domestic producers will usually adapt quickly and fairly completely to strict domestic standards. If a strict standard advances some legitimate public policy goal, then the measure may be welfare enhancing, even if the impact is disparate.

In economic theory the question of whether a regulation is welfare enhancing is based upon a

³²⁵ See generally Chang, *supra* note 23, at 2203 (available evidence suggests little protectionist abuse of environmental trade measures).

³²⁶ See generally, Twyman, *supra* note 105 (recommending such an approach for dormant commerce clause jurisprudence).

³²⁷ See Charnovitz, *supra* note 75, at 1783 (all product standards have differential impacts on exporting countries, since each country has a different structure of production).

cost-benefit analysis.³²⁸ It has nothing to do with its motivation or disparate effects.

Rooting out protectionism seems divorced from neoclassical economic theory and seems to involve a desire to dictate ideological acceptance of the theory of comparative advantage as the most important determinant of public welfare.

Moreover, unless the measure actually applies different standards to foreign competitors, it usually cannot reliably protect the domestic producer anyway.³²⁹ If it applies the same standards to both domestic and foreign producers, then the targeted foreign producer may comply with the standards set up to protect the domestic industry. The protection will then fail. An anti-discrimination standard would seem sufficient to root out the most serious economic problems that protectionism spawns, beyond the continuation of free trade heresy.

This hopefully explains why the standard objection to a facial discriminatory model does not suffice. The standard objection holds that officials can "avoid the force of a literal prohibition with ease."³³⁰ Of course they can. The United States can apply onerous taxes and regulations to high end luxury cars that happen to come predominantly from foreign countries and apply less onerous taxes and

³²⁸ See generally Farber & Hudec, *supra* note 24, at 1417 (stating that the most logical approach would be engage in cost-benefit balancing, but that this approach is politically unacceptable).

³²⁹ See e.g. Roberts, *supra* note 71, at 392 (the European Community imported the same amount of beef before and after adoption of the restriction on hormone fed beef).

³³⁰ See Winkfield F. Twyman, *Losing Face But Gaining Power: State Taxation of Interstate Commerce*, 16 VA. TAX. REV. 347, 361 (1997).

regulations to non-luxury cars that the domestic market produces in great number.³³¹ But this scheme does not protect the domestic market or interfere with free trade in the same manner as a rule that literally applies one set of regulations and taxes to European automobiles and another to American automobiles. First of all, if the Europeans make any non-luxury cars at the time of enactment, they will get the same preferential treatment afforded U.S. manufacturers. Second, even if they do not make non-luxury cars, they can choose to do so and gain the preferential treatment. Third, if the U.S. manufacturers should try and make luxury cars, they will get the same bad treatment that the Europeans received. In short, companies can adapt if the burdens of different impacts are really significant to their trade.³³² This adaptation possibility means that evasion of a ban on bright-line discrimination will not reliably protect domestic industry.

Furthermore, the ability to adapt to differential burdens flowing from neutrally written regulations raises questions about the traditional justification for broad GATT and WTO review of “non-tariff” trade barriers. The general logic supporting this review holds that countries can escape the effect of negotiated tariff reductions by means of non-tariff trade barriers. But tariffs, unlike neutrally framed regulation, expressly discriminate against foreign commerce. Regulations that do not constitute bright-

³³¹ See generally Dispute Settlement Panel Report on United States Taxes on Automobiles, 33 I.L.M. 1397 (1994) (unadopted) (upholding differential taxation under GATT).

³³² See generally Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMM. 395, 413 (1986) (pointing out that the market creates “inexorable” penalties for burdensome regulation that can sometimes get states to change the regulations).

line discrimination do not inexorably create a differential burden, because countries can adapt. It follows that the logic of securing tariff bindings does not fully support differential burdens analysis in the absence of bright-line discrimination.

I do not intend to suggest that the bright-line approach creates no problems. Indeed, some regulations that have no legitimate purpose and harm commerce will survive under this approach, and, in an ideal world they would die. I do wish to suggest that until the WTO can articulate some institutionally legitimate test that relates clearly to a consistent clear concept of free trade, invalidation of neutral regulations with uneven effects poses a legitimacy problem for the WTO.³³³ This argument against protectionism defined as either tainted by improper motives or causing disparate impacts also addresses the various fine-grained definitions of protectionism that legal commentators have proposed from time to time. For example, Professor Donald Regan has proposed a definition of protectionism that requires a protectionist motive and a restriction analogous to tariffs, quotas, or embargoes.³³⁴ This purposeful discrimination test seems more restrictive than the test I have proposed, because a bright line discrimination test would presumptively prohibit discriminatory laws, even without a protectionist motive.³³⁵ To the extent Professor Regan proposes to invalidate legislation based on disparate impacts,

³³³ See Farber & Hudec, *supra* note 24, at 1432 (explaining that GATT suffer problems of legitimacy in making judgments about the effects of regulation); Snape & Lefkovitz, *supra* note 262, at 799-801 (suggesting confusion exists about definition of "free trade" and leaping to the notion that the theory of comparative advantage is outdated).

³³⁴ See Regan, *supra* note 7, at 1094-95.

³³⁵ Regan uses a definition of protectionism that seems to leave out most regulation. He refers to tariffs, embargoes, and quotas, all measures that are discriminatory and fall

my analysis of the problems of a disparate impact test applies.³³⁶

Professor Sykes defines protectionism as “any cost disadvantage imposed on foreign firms by a regulatory policy that discriminates against them or that otherwise disadvantages them in a manner that is unnecessary to the attainment of some genuine, nonprotectionist regulatory objective.”³³⁷ The bright line discrimination test would reach genuine discrimination, but not regulation “otherwise disadvantaging” foreign firms. My critique of the problem of outlawing unequal burdens applies to this otherwise disadvantaging notion. If a law creates a disadvantage without express discrimination, it must be because of unequal burdens.³³⁸

Professor Sykes’ definition, however, only brands as protectionist measures creating unequal

within the ambit of a bright-line discrimination test without any reference to “protectionism.” See *id.* at 1115. He then qualifies his definition by stating that protectionism is inefficient because it diverts business from foreign producers without a “colorable justification” deserving societal approval. *Id.* at 1118. This suggests that expressly discriminatory measures would not qualify as protectionist if the enacting government proffered a colorable justification worthy of societal approval.

³³⁶ Professor Regan’s position on this point is quite subtle. On the one hand, he insists that purpose rather than effect is the touchstone of his concept of protectionism. See *id.* at 1137 (protectionist *purpose* is what we really care about)[emphasis in original]. On the other hand, he treats something he calls protectionist effect, as possible evidence of protectionist purpose. *Id.* at 1136. This might suggest that disparate impacts can trigger invalidation of a measure as protectionist.

³³⁷ Sykes, *supra* note 11, at 3.

³³⁸ See *id.* at 4 (claiming that the European ban on beef raised with hormones creates is protectionist because of a cost disadvantage).

burdens that are “unnecessary to the attainment” of regulatory objectives.³³⁹ His elaboration of his necessity requirement proposes a “least restrictive means” test for economic regulation posing differential burdens for foreign commerce.³⁴⁰ If I am correct that differential burdens will almost always arise under strict, but even-handed, regulation, then Syke’s protectionism definition implies applying a “least restrictive means” test to a lot of economic regulation. Such a test poses a high hurdle, because any good lawyer can imagine a less restrictive means to meet a given end than the one a legislature chooses. Indeed, the Supreme Court uses this test to help implement the constitutional ban on abridgement of free speech,³⁴¹ but considers it too demanding to apply to neutral laws burdening the free exercise of religion and content neutral regulation of speech.³⁴² Applying the least restrictive means test to

³³⁹ *Id.* at 3.

³⁴⁰ *Id.* at 5.

³⁴¹ See e.g. *Denver Area Educational Telecommunications Consortium v. Federal Communications commissions*, 518 U.S. 727, 730, 754-55 (1996) (invalidating regulation of indecent and obscene programming under least restrictive means test);

³⁴² See *City of Boerne v. P.F. Flores*, 521 U.S. 507, 509, 533-534 (1997) (striking down an act protecting freedom of religion through a least restrictive means test); *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (refraining from applying a least restrictive means test to time, place and manner restrictions on speech); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (same). See also *Board of Trustees of the State University of New v. Fox*, 492 U.S. 469, 477-480 (1989) (declining to apply a least restrictive means test to protect commercial speech). *Cf.* *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1593-94 (1995) (justifying invalidation of law prohibiting labeling giving beer’s alcohol content because of the availability of less intrusive alternatives). The Boerne Court invalidated the Religious Freedom Restoration Act of 1993, because it required state laws burdening the free exercise of religion to

commercial regulation, especially outside the context of facially discriminatory measures, may involve a substantial move toward a laissez-faire system.³⁴³

The existence of legal definitions as disparate as those of Professors Sykes and Regan simply highlights the lack of any agreement about what the term protectionism means. Professor Syke's test offers the promise of coherence. But its adoption poses the same threat to WTO legitimacy as other laissez-faire moves. And the WTO in its SPS agreement and the Technical Agreement on Technical Barriers to Trade has adopted a least restrictive means test that requires no showing of unequal burden at all.³⁴⁴ This test requires the WTO to judge whether a regulation is needed, and indeed, creates a strong impetus to conclude that it is not in many cases.

2. Dormant Commerce Clause Jurisprudence as a Model

serve a compelling state interest through the least restrictive means. The Court explained that this test invites "searching scrutiny of state laws" protecting public welfare with the "attendant likelihood of invalidation." *Id.* at 507. The court characterized this test as "the most demanding test known to constitutional law." *Id.* at 534. The court claimed that the "least restrictive means" test was not part of its jurisprudence addressing legislation burdening free exercise of religion. *Id.* at 534. On the other hand, the Court has held that a law aimed squarely at the practices of a single religious sect must be "narrowly tailored to advance" a compelling state interest. See *Smith: Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531-532 (1993).

³⁴³ *Cf.* *Dean Milk Co. v. Wisconsin*, 340 U.S. 349 (1951) (invalidating a facially discriminatory law under the dormant commerce clause because of the existence of reasonable alternatives).

³⁴⁴ SPS Agreement, ¶5.6; Agreement on Technical Barriers to Trade, ¶ 2.2, reprinted in *URUGUAY RESULTS*, *supra* note 13, at 139.

The commerce clause of the United States constitution authorizes Congress to regulate interstate commerce.³⁴⁵ The Supreme Court treats this affirmative grant of power to Congress as authority for judicial constitutional oversight of state regulation and taxation potentially impeding interstate commerce.

The resulting "dormant commerce clause" jurisprudence of the United States Supreme Court also involves the use of an anti-discrimination principle to advance free trade.³⁴⁶ Daniel Esty has suggested that United States Supreme Court jurisprudence under the dormant commerce clause provides an appropriate model for the WTO.³⁴⁷ Professor Esty, however, has not discussed the value,

³⁴⁵ See U.S. Const. Art. I, sec. 8.

³⁴⁶ See e.g. Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 422-467 (1996); Regan, *supra* note 7, at 1093 n.3; *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 402 (1984) ("the very purpose of the Commerce Clause was to create an area of free trade among the several States."); *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2218 n. 21 (1994) (quoting *Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949)); *Associated Indus. of Mo. v. Lohman*, 114 S. Ct. 1815, 1820 (1994); *Goldberg v. Sweet*, 488 U.S. 252, 265-66 (1989). Justice Souter and several scholars have dissented from the view that the commerce clause has promotion of free trade as a central purpose. See Wynkfield F. Twyman Jr., *Losing Face But Gaining Power: State Taxation of Interstate Commerce*, 16 VA. TAX REV. 347, 423-427 (1997) (free trade not a goal of the framers, not part of the early jurisprudence); *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1692-1702 (1994) (Souter J., dissenting); Rachel D. Baker, *C & A Carbone v. Town of Clarkstown: A Wake-up Call for the Dormant Commerce Clause*, 5 DUKE ENV. L. & POL'Y FORUM 67, 84 (1995) (agreeing with Justice Souter's views in *Carbone*); Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941).

³⁴⁷ See ESTY, *supra* note 1, at 113-115.

success, or coherence of the Supreme Court's dormant commerce clause jurisprudence. Justice Scalia, for one, has questioned the court's extension of dormant clause doctrine beyond facially discriminatory regulation in the sharpest terms, characterizing its "practical results" as a "quagmire" and stating that "our applications of the doctrine have, not to put too fine a point on the matter, made no sense."⁶⁴⁸ And Justice Rehnquist has characterized the court's dormant commerce clause jurisprudence as "hopelessly confused."⁶⁴⁹ These comments reflect the views of a number of careful students of this area of the law about the state of the doctrine as applied to non-facial discrimination.³⁵⁰

This article will not canvass and evaluate all of the reasons for this view. Other commentators have addressed this matter at length.³⁵¹

Professors Farber and Hudec, while emphasizing the existence of relatively easy facially discriminatory cases, have suggested a reason for the difficulties the Court faces in resolving cases that

³⁴⁸ Tyler Pipe Indus. v. Washington Dep't of Revenue, 483 U.S. 232, 259-60 (1987) (Scalia, J., concurring in part and dissenting in part).

³⁴⁹ Kassel v. Consolidated Freight Corp., 450 U.S. 662, 701 (Rehnquist J. dissenting).

³⁵⁰ See e.g. Julian Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L. J. 425, 484 (1982); Walter Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 TAX LAW. 37, 44 (1987) (chiding the court for line drawing "discernible, if it all only to itself" in adjudicating the constitutionality of state taxes).

³⁵¹ See e.g. *infra* note 350.

do not involve facial discrimination³⁵² They have stated that the problem of reconciling free trade and local interests is not susceptible to bright line tests.³⁵³

This statement begs the question of what free trade should be conceptually. If free trade consists of a laissez-faire concept and a set of ad hoc judgments about when to abandon laissez-faire, then this statement makes sense. It also makes sense if free trade has no real meaning, but consists of a moral crusade to root out measures with improper motivations or uneven effects. Indeed, Professors Farber and Hudec strongly suggest that no matter what legal tests operate, ultimately these decisions involve a crusade (my term not theirs) against "protectionism."³⁵⁴ But this article questions the idea that WTO administration of a set of ad hoc exceptions to a laissez-faire principle or a crusade against protectionism will enjoy little legitimacy or coherence.

Justice Scalia's comment and my analysis here suggest another possibility. One could simply

³⁵² Professors Farber and Hudec state that the messiness in this area is not the same as chaos. *Id.* at 1438. They emphasize that the dormant commerce clause jurisprudence and GATT deal adequately with "facially discriminatory measures." They acknowledge that both "run into trouble with facially neutral measures," but claim that even here there are a considerable number of easy cases. *Id.* They do not cite any of these easy cases, nor do they suggest that this considerable number predominates. Furthermore, Farber and Hudec analyze regulatory cases, but do not discuss tax cases arising under the dormant commerce clause. While this is understandable, since much of the debate so far has focused on regulations, the tax area may be even more chaotic than the regulatory area. See Hellerstein, *supra* note 350, at 44 (explaining that the degree of incoherence in this area is unusual). Both are relevant to GATT.

³⁵³ See Farber & Hudec, *supra* note 24, at 1438.

³⁵⁴ See *id.* at 1437-38.

define free trade as trade free from bright line discrimination. Then a principle cause for incoherence in WTO adjudication of discrimination claims would vanish.

I do not suggest that this move would solve all problems of coherence. But it would certainly help.

It also would ameliorate the WTO's legitimacy problems. The United States Supreme Court applies balancing tests to regulations that do not facially discriminate.³⁵⁵ As a generalist institution the Court enjoys some legitimacy in balancing competing policy objectives.³⁵⁶ Professors Farber and Hudec have correctly pointed out that such balancing is inevitable in addressing non-facial discrimination claims. But a specialist institution enjoys little legitimacy in performing such balancing.

The search for a definition of free trade suggests that we should not treat the incoherence of trade law as inevitable. Rather, it signals a problem at the core of the enterprise, the lack of an adequate concept of what free trade is. As Julian Eule said in a leading article on the dormant commerce clause,

³⁵⁵ See Earl M. Maltz, *How Much Regulation is Too Much- An Examination of Commerce Clause Jurisprudence*, 46 GEO. WASH. L. REV. 47, 58-64 (1981).

³⁵⁶ See Twyman, *supra* note 330, at 376 (discussing those who basically approve of the court's balancing). Many scholars, however, have criticized the Supreme Court's balancing for a variety of reasons. See *id.* at 377. The problem of having to balance "incommensurable" interests appears even worse when specialists devoted to one of those interests does the balancing, as occurs at the WTO. *Cf. id.* Another problem, the supplanting of political decisions appears even more egregious when the electorate lacks an indirect control over the judges, as in the WTO. See *generally*, Benvenisti, *supra* note 110, at 184-196, 200-201. (discussing the undemocratic nature of international law and institutions).

"A coherent set of guidelines can only flow from an understanding of purpose."³⁵⁷

Hopefully, the identification of the three models of free trade will help spark a dialogue about the problem of defining free trade. The WTO may eventually find that accepting some clear limits to the scope of its enterprise may be a price worth paying to enhance its legitimacy. Whether or not the WTO should adopt the bright line discrimination test posited here or some other approach, its legitimacy will depend on whether it can relate its actions to a coherent concept of free trade that a specialized international institution can credibly administer.

Conclusion

The three part model explains how the departure from a discriminatory model threatens the WTO's legitimacy. The WTO could substantially reduce this threat by focusing on an anti-discrimination model and refining its approach to anti-discrimination.

Focusing inquiry upon the definition of free trade provides another way of thinking about "trade and" issues. It invites more critical thinking about the trade disciplines themselves, rather than just the scope of exceptions. It also shows that misunderstandings between free traders and environmentalists have roots in the conflation of concepts of free trade.

³⁵⁷ Eule, *supra* note 350, at 484.

Appendix

Agriculture

7 U.S.C. §136j (prohibiting sale of pesticides absent compliance with pesticide registration requirements)

7 U.S.C. §136o- (authorizing refusal of admission of pesticides violating pesticide control provision)

7 U.S.C. §150bb(a)- (prohibiting unauthorized movement of plant pests between states and between foreign countries and the U.S.)

7 U.S.C. § 157- (prohibiting importation of stock absent compliance with package-making requirements)

7 U.S.C. § 1611 – (prohibiting sale of non-certified seeds)

7 U.S.C. § 2803- (prohibiting movement of unauthorized noxious weed into or through the U.S.)

Commerce and Trade

15 U.S.C. § 68a (prohibiting introduction of misbranded wool products into commerce)

15 U.S.C. § 68f (prohibiting importation of goods not meeting branding standards and stating that violators may be prohibited from importing any wool products after the violation)

15 U.S.C. § 69a (prohibiting introduction into commerce of misbranded or deceptively advertised or invoiced fur)

15 U.S.C. § 69d (prohibiting anyone failing to comply with the labeling requirements for

imported fur from further importing except upon filing a bond)

15 U.S.C. § 1124 (prohibiting importation of goods bearing marks or names infringing trademarks)

15 U.S.C. § 1125(a), (b) (prohibiting admission of misrepresented goods).

15 U.S.C. § 1192 (prohibiting sale of any material not conforming to flammability standards)

15 U.S.C. § 1198 – (prohibiting introduction into interstate commerce of misbranded or banned hazardous substances)

15 U.S.C. § 1273 (prohibiting admission into U.S. of a hazardous or misbranded substance)

15 U.S.C. § 2066- (prohibiting admission into the United States of products that do not comply with consumer safety standards, are not properly certified, are not properly labeled, are deemed imminently hazardous, or have a product defect that constitutes a substantial hazard)

15 U.S.C. § 2068-(prohibits importing or distributing in commerce anything not meeting specified safety requirements).

Conservation

16 U.S.C. § 703 (prohibiting sale or importation migratory birds).

16 U.S.C. § 705 (prohibiting interstate carrying or importation of migratory birds)

16 U.S.C. § 971e (prohibiting the sale or importation of certain fish)

16 U.S.C. § 1538 (prohibiting the sale in interstate commerce and the importation of endangered species)

16 U.S.C. § 3372 (prohibiting sale and importation of illegally taken fish and wildlife)

16 U.S.C. § 3637-(prohibiting importation or sale of fish taken or retained in violation of provisions relating to North Atlantic salmon fishing)

Copyrights

17 U.S.C. §§ 501, 503, 602 (providing for impoundment of imported goods reflecting copyright infringement)

Crimes and Criminal Procedures

18 U.S.C. § 42 (prohibiting importation and interstate shipment of certain animals)

18 U.S.C. § 553 (prohibiting importation of stolen motor vehicles, mobile equipment, or aircraft)

18 U.S.C. § 2313 (prohibiting interstate sale of stolen vehicles)

18 U.S.C. § 842 (prohibiting importation, transportation, and reception of explosive materials without a license).

18 U.S.C. § 922- (prohibiting importation or sale of firearms without a license)

18 U.S.C. § 1301 (prohibiting interstate selling and the importation of lottery tickets)

18 U.S.C. § 1462 (prohibiting importation and selling in interstate commerce of obscene materials)

18 U.S.C. § 1761 (prohibiting the importation and transportation in interstate commerce of prison-made goods)

Food and Drugs

21 U.S.C. § 331 (prohibiting "the introduction or delivery for introduction into interstate Commerce" any food, drug, device or cosmetic that is adulterated or misbranded)

21 U.S.C. § 350a(c) (prohibiting introduction or delivery for introduction into interstate commerce new unregistered infant formula).

21 U.S.C. § 355-(prohibiting introduction into commerce, or importation of electronic products not complying with applicable standards)

21 U.S.C. § 360oo (same, but referring to different standards).

21 U.S.C. § 458 (prohibiting poultry sales absent compliance with inspection and other food safety requirements).

21 U.S.C. § 460 (generally prohibiting sale or importation of inedible poultry parts absent compliance with requirements to prevent human consumption)

21 U.S.C. § 466 (prohibiting entry of unhealthy poultry absent compliance with domestic standards).

21 U.S.C. § 620-(prohibiting sale or importation of adulterated or misbranded meat products).

21 U.S.C. § 641-(prohibiting sale or importation of inedible meat products absent compliance with requirements designed to prevent human consumption)

21 U.S.C. § 841(a) (prohibiting distribution of controlled substances)

21 U.S.C. § 843(a)(9) (prohibiting importation or distribution of certain listed chemicals without proper registration)

21 U.S.C. § 863 (prohibiting importation or sale of drug paraphernalia)

Public Health and Welfare

42 U.S.C. § 262 (prohibiting introduction into commerce of biological product unless a biological license is in effect and each package has proper markings)

42 U.S.C. § 2077 (prohibiting importation, transfer, or reception of special nuclear material)

42 U.S.C. § 2211 (prohibiting importation, transfer, or reception any atomic weapon)

42 U.S.C. § 5409- (prohibiting sale or importation of mobile homes not complying with construction and safety standards)

42 U.S.C. § 6301 (refusing admission to products not conforming to energy conservation standards).

42 U.S.C. § 7522(a)(1) (prohibiting importation or offering into commerce any new motor vehicle or engine not complying with emission and fuel standards)

42 U.S.C. § 7522(a)(2)(B) (prohibiting sale of devices interfering with pollution control systems).

42 U.S.C. § 7545 (prohibiting sale of unregistered or illegal fuels and fuel additives)

Shipping

46 U.S.C. § 4307 (prohibiting sale or importation of recreational vessels absent conformity with regulatory standards)

Telegraphs, Telephones, and Radio Telegraphs

47 U.S.C. § 302a(b) (prohibiting sale or importation of devices that interfere with radio reception).

47 U.S.C. § 330 (prohibition of importation or shipping in interstate commerce certain types of television receivers)

47 U.S.C. § 605(e)(4) (prohibiting sale or importation of equipment decrypting satellite cable programming)

Transportation

49 U.S.C. § 30112 (prohibiting importation or sale of motor vehicle or equipment that does not comply with safety standards)

49 U.S.C. § 33506(a)(1) (prohibiting importation or introduction interstate commerce of vehicles that do not comply with bumper standards)

49 U.S.C. § 33114(a)(1) (prohibiting importation of introduction into commerce of vehicles violating theft-prevention standards)