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Spring March 1, 2004

The Place of Human Rights Law in World Trade Organization Rules

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Stephen J. Powell¹

I. Introduction

Olívio Dutra, human rights activist and former governor of Brazil's Rio Grande do Sul state, recently charged that the world trading system has worked "a profound dehumanization and systematic banalization of civilization."² In similar if somewhat less hyperbolic fashion, the president of the well-regarded Canadian International Centre for Human Rights and Democratic Development Warren Allmand tellingly contrasts globalization's "presumed contribution to economic growth" with the reality that "hundreds of millions of people [still] are denied the basic human rights provided for by the United Nations."³

World Trade Organization (WTO) rules are routinely linked to the inability of nations to make meaningful progress in sharpening environmental and other human rights protections, for example, the failure of the 2002 Johannesburg World Summit on Sustainable Development to usher in any new treaties despite the bright promise of the Rio Earth Summit successfully concluded a decade earlier. Environmental law professor Alyson Flournoy reflects the view broadly held by human rights advocates with her observation that "[t]he dictates of free trade are increasingly determinative of the limits of domestic environmental law, as illustrated by such World Trade Organization cases as *Dolphin-Tuna* and *Shrimp-Turtle*,"⁴ a position that would find ready assent as applied to a wide range of human rights topics.

Allmand reminds us that both trade law and human rights law, each of which narrows the range of policy options available to states, developed simultaneously but in "splendid isolation."⁵ Over several decades negotiators from the same nations crafted

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² Quoted in Marc Cooper, *From Protest to Politics*, The Nation 1 (March 11, 2002).

³ Warren Allmand, Preface to Robert Howse & Makua Mutua, *Protecting Rights in a Global Economy: Challenges for the World Trade Organization*, International Centre for Human Rights and Democratic Development (2000) at 3, www.ichrdd.ca (visited March 27, 2003).

⁴ Memorandum to University of Florida Levin College of Law Curriculum Committee on Trade and Environment Course Proposal (Feb. 16, 2003).

⁵ Warren Allmand, *supra* note 3 at 3. The modern basis for human rights law, the U.N. Charter, which calls for signatories to promote "universal respect for . . . human rights," Charter of the United Nations, Stat. 1031, T.S. No. 993, art. 55(c),

dozens of treaties in each of these fields of international law applying their respective disciplines to an increasingly overlapping range of topics. Yet until very recently the uninitiated student could be forgiven for wondering whether either group was even aware of the other's activities, for directly conflicting rules often emerged and even delegations from the same country seemed not to speak the same language or spring from the same culture.

Our long-held suspicions that "globalization"—symbolized by the WTO and other institutions of the Bretton Woods System of transnational financial and economic organizations created in the mid-1940's to repair the wartime disintegration of international economic cooperation—had reached crisis mode were confirmed when fifty thousand well-trained protestors disrupted the first meeting in the United States of world trade ministers during the 1999 "Battle in Seattle." In this storied evocation of the maturing backlash against globalization, protestors convincingly demonstrated in those few December days that a remarkably broad range of public interest groups—including those dedicated to health, the environment, labor, development, and other human rights—view the present global economic structure as a serious impediment to nations committed to using the power of trade to advance critical non-economic objectives.⁶

The common brief of these interest groups is that the market principles of supply and demand, comparative advantage, and non-discrimination on which global trade rules are built have encumbered pursuit by nations of fundamental non-economic objectives that must in any reasoned legal hierarchy hold higher societal priority than monetary matters.⁷

This essay argues that the claim is both inaccurate and premature, that in fact the WTO not only is far more than simply neutral as to human rights law, but that the trade body has made respectable progress in fitting the square norms of human rights law into the round holes of utilitarian trade rules, given the limited jurisdiction of trade negotiators, the recency of the WTO's binding dispute settlement system, and the unsettled nature of the human rights law with which trade rules are most likely to intersect.

Oct. 24, 1945, entered into force about two years before the modern basis for international trade law, the General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194 (hereinafter GATT), and both international trade law and international human rights law proceeded to develop substantially more specific disciplines.

⁶ See Steve Charnovitz, *Opening the WTO to Nongovernmental Interests*, in *TRADE LAW AND GLOBAL GOVERNANCE* 495, 512 (Cameron May 2002).

⁷ See Warren Allmand, *Human Rights and Free Trade in the Americas*, International Centre for Human Rights and Democratic Development (2000), www.ichrdd.ca (visited July 23, 2003)(human rights law is not some annex or by-product of trade agreements, but a legal and normative framework for international economic relations and the standard by which their success is evaluated.)

II. Structure of Trade Rules

At the outset we should recall that the logic and coherence of the WTO system—indeed its startling success in increasing world wealth—flow from a single-minded and relentless dedication to encouraging economic growth through the elimination of barriers to trade. Nonetheless, the Preamble to the Marrakesh Agreement Establishing the WTO does not make free trade an end in itself, but a means to fulfill basic human rights such as the improvement of global standards of living, promotion of sustainable development, and preservation of the environment.⁸ And GATT Article XX enumerates a series of public welfare policies that WTO Members may pursue even if the trade restrictions that result would violate basic trade precepts.

Global trade rules are designed to allow nations to make full use of their comparative advantage, that is, their ability to create a particular product or service at lower opportunity cost than other nations.⁹ GATT/WTO rules accomplish this purpose by removing impediments to the free movement of goods, primarily through non-discrimination provisions. The Most Favored Nation Clause requires WTO Members to provide the same treatment to imports from all Members that it gives to its most favored trading partner.¹⁰ The National Treatment Clause requires that foreign goods face equal conditions of competition in the market as like domestic products.¹¹ In addition, Members are bound to limit tariffs charged on imports to the levels negotiated in successive rounds of tariff-reducing negotiations and GATT Article XI forbids quantitative and other restrictions on imports and exports.¹²

Nonetheless, even as these extensive rules work to break down barriers to freer trade, Article XX shelters trade constraints taken to protect public morals, to conserve exhaustible natural resources, to protect human, animal, or plant life or health, and to

⁸ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Preamble (hereinafter WTO Agreement), THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 6 (hereinafter LEGAL TEXTS), 33 I.L.M. 1144 (1994). The WTO is the umbrella system for two dozen individual agreements addressing a wide array of trade and trade-related subjects. The WTO incorporated (as “GATT 1994”) the 1947 GATT that previously had been – and continues as – the principal source of global trading rules. See Annex 1 and the Appendix to the WTO Agreement, LEGAL TEXTS 19 & 485, 33 I.L.M. 1154 (1994).

⁹ Paul R. Krugman & Maurice Obstfeld, INTERNATIONAL ECONOMICS: THEORY AND POLICY 12 (6th Ed. Addison Wesley 2001).

¹⁰ GATT, *supra* note 8 at Article I, LEGAL TEXTS 486.

¹¹ GATT, *supra* note 8 at Article III, LEGAL TEXTS 490.

¹² GATT, *supra* note 8 at Articles II & XI, LEGAL TEXTS 488 & 500.

preserve national treasures.¹³ WTO Agreements on Sanitary and Phytosanitary Measures and on Technical Barriers to Trade explicitly reaffirm that no country should be prevented from taking trade measures needed to protect human life or health or the environment at the level the country itself considers appropriate.¹⁴ The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights authorizes specific remedies to prevent patent rights from adversely affecting the transfer of technology that is vital to medical care and economic development of lesser-developed nations.¹⁵

These provisions clearly sound in human rights law. Yet each of these WTO Agreements has been roundly criticized for impeding the ability of Governments to meet human rights obligations to their citizens.¹⁶ Is there another side to this debate?

III. GATT Article XX's General Exceptions for Public Health and Welfare

Of the ten listed General Exceptions to GATT's fundamental proscription of discriminatory Governmental restrictions on trade, Article XX(a)'s protection of public morals—whose roots reach to the first multilateral trade agreement in 1923¹⁷--in particular provides a fertile source of discretion to apply human rights law.

As the former Director of Yale's Global Environment and Trade Study Steve Charnovitz reminds us, a wide range of trade restrictions over the years has been based on the "immorality" of activities in other countries, from prohibitions of trade with countries practicing slavery to the ban on child pornography.¹⁸

¹³ GATT, *supra* note 8 at Article XX, LEGAL TEXTS 519.

¹⁴ WTO Agreement on Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL TEXTS, *supra* note 8 at 69, 33 I.L.M. 1168 (1994), and WTO Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL TEXTS, *supra* note 8 at 138. This reaffirmation is not without conditions to avoid use of these policies for protectionist purposes or to restrict trade "unnecessarily."

¹⁵ WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, WTO Agreement, Annex 1C, arts. 8 & 31, LEGAL TEXTS, *supra* note 8 at 370 & 371, 33 I.L.M. 1197 (1994) (hereinafter TRIPS Agreement). These provisions act on the Preamble's recognition that least-developed country Members need maximum flexibility in implementation of intellectual property rights "to enable them to create a sound and viable technological base." LEGAL TEXTS, *supra* note 8 at 366.

¹⁶ See, e.g., Howse & Matua, *supra* note 3 at 4.

¹⁷ International Convention Relating to the Simplification of Customs Formalities, Nov. 3, 1923, 30 L.N.T.S. 373. See Steve Charnovitz, *The Moral Exception in Trade Policy*, in Trade Law and Global Governance 325, 339 (Cameron May 2002).

¹⁸ Steve Charnovitz, *The Moral Exception in Trade Policy*, *supra* note 17 at 346.

Article XX(a) likely in addition would support state action on a number of other human rights concerns¹⁹ which might prompt a WTO Member to ban trade to protest immoral acts by a foreign government against its citizens, such as products made by indentured children or from countries which deny freedom of the press, the right to emigrate, or with a consistent pattern of gross violations of human rights. Each of these reasons has been used by the United States to justify trade restrictions.²⁰

IV. Relationship Between the WTO and Other General International Law

In addition to these substantive WTO provisions, the rules that govern dispute settlement procedures confirm that the GATT and other WTO Agreements constitute part of the body of public international law by noting that the Agreements are to be interpreted in accordance with customary rules of interpretation of public international law,²¹ which the “supreme court of world trade,” the WTO’s Appellate Body, has from its inception in such cases as *Gasoline*, *Shrimp-Turtle*, and *Hormones*, interpreted as bringing the Vienna Convention into the room with dispute settlement panels.

“The GATT,” as the Appellate Body confirmed in its first decision, “is not to be read in clinical isolation from public international law.”²² Not only must “customary principles of international law” guide interpretations by WTO dispute panels, but the Marrakesh Agreement Establishing the WTO also requires in Article XVI that “the WTO shall be guided by the customary practices followed by” Members during their half-century of adherence to the original 1947 GATT.²³ This instruction implicates an even broader set

¹⁹ From a human rights perspective, it is noteworthy that dozens of the trade agreements pre-dating the GATT routinely linked “moral” with “humanitarian” goals through an exception for “moral and humanitarian reasons.” The drafting history does not resolve the question whether the reference to “public morals” in Article XX(a) should be viewed as shorthand for the traditional concept or as evidence of intent on the part of GATT’s drafters to exclude whatever humanitarian objectives may not also sound in moral principles. See Steve Charnovitz, *supra* note 17 at 340-42 and 350. The fact that the United States drafted the Moral Exception makes a strong case for treating the two formulations as synonymous, which would strengthen coverage by Article XX(a) of human rights policies.

²⁰ Steve Charnovitz, *The Moral Exception in Trade Policy*, *supra* note 17 at 332-333.

²¹ Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, WTO Agreement, Annex 2, art. 3.2, LEGAL TEXTS *supra* note 8 at 405, 33 I.L.M. 1197 (1994)(hereinafter WTO Dispute Settlement Understanding.) See Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 Am. J. Int’l L. 535, 542 (2001).

²² *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS8/AB/R at 10 (Nov. 1, 1996), 35 I.L.M. 603, 621 (1996).

²³ WTO Agreement, *supra* note 8 at art. XVI:1, LEGAL TEXTS 17.

of customary principles among WTO Members, including practices that may not yet have reached the status of general customary international law.²⁴

²⁴ The Vienna Convention on the Law of Treaties, art. 31, opened for signature May 23, 1969, 1155 U.N.T.S. 331 (hereinafter Vienna Convention), permits resort to other treaties (and their *travaux*) to determine what the treaty provision under review, such as one of GATT's Article XX General Exceptions, means.

The Appellate Body and WTO panels have reasserted that Article 3.2 of the WTO Dispute Settlement Understanding is not intended to limit the sources of law for a WTO panel only to those rules of general international law that relate to interpretation of treaties. As the *Korea—Government Procurement* Panel explained, the “language of 3.2 in this regard applies to a specific problem that had arisen under the GATT” of inappropriate reliance on negotiating history.²⁵ In a dozen other cases, WTO panels and the Appellate Body have used rules of general international law independently of interpreting a particular WTO provision in such areas as deciding a panel’s jurisdiction, drawing adverse inferences, the role of *amicus curiae* briefs, and judicial economy.²⁶

The Appellate Body’s use of non-WTO general international law in permitting St. Lucia to make its dispute panel arguments through private sector attorneys is especially interesting. The WTO Agreement, its Dispute Settlement Understanding, and the Working Procedures for panels are silent on the issue of whether solely employees of their Government must represent WTO Members before panels, as the United States had successfully insisted before the initial panel. The Appellate Body searched not only for what customary international law expressly allowed in this respect, but also for what it did not prohibit, concluding that “we can find nothing in customary international law or the prevailing practice of international tribunals which prevents a WTO Member from determining the composition of the delegation in Appellate Body proceedings.”²⁷ The Appellate Body’s willingness from its very first decision in 1996 to interpret WTO Agreements, including the GATT, in their broader international legal context explains how it has become a factor in the development not solely of trade law, but of general international law.²⁸

With this direction from Members, dispute panels, while respecting the Vienna

²⁵ *Korea - Measures Affecting Government Procurement*, WTO Doc. WT/DS163/R, n. 753 (May 1, 2000)(hereinafter *Korea - Government Procurement*).

²⁶ See *United States - Anti-Dumping Act of 1916*, WT/DS136/AB/R, para. 54, n. 30 (Sept. 26, 2000)(la compétence de la compétence); *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AD/R, para. 202 (Aug. 20, 1999)(adverse inferences); *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 107 (Oct. 12, 1998)(hereinafter *US - Shrimp-Turtle*)(*amicus* briefs); and *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses*, WT/DS33/AB/R, at 19 (May 23, 1997)(judicial economy).

²⁷ *European Communities - Regime for the Importation, Sale, and Distribution of Bananas*, WT/DS27/AB/R, para. 10 (Sept. 9, 1997).

²⁸ See Phillippe Sands, *Treaty, Custom and the Cross-Fertilization of International Law*, 1 Yale H.R. & Dev. L.J. 85, 97 (1998). As the author notes, panel and appellate body decisions have taken the necessary first steps toward applying norms arising outside the GATT/WTO context by recognizing that the GATT/WTO rules themselves form part of general international law. *Id.* at 99.

Convention's preference for examination of the ordinary meaning of the WTO provision, read in context and in light of the object and purpose of the WTO Agreement involved,²⁹ have not hesitated in the face of equivocal or inconclusive treaty language to look to custom to give modern meaning to GATT's General Exceptions.

For example, in deciding in the *US—Shrimp* case whether turtles are “exhaustible natural resources” within the meaning of Article XX(g), the Appellate Body answered in the affirmative by giving a dynamic reading to the 50-year old GATT language through customary law. Noting that the “words of Article XX(g) . . . were actually crafted more than 50 years ago,” the Appellate Body found that this language nonetheless “must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment,” because the “generic term ‘natural resources’ in Article XX(g) is not ‘static’ in its content but is rather ‘by definition, evolutionary’,” citing as support for this general principle of international law a case decided by the International Court of Justice.³⁰

The Appellate Body, noting that the 1994 WTO Agreement makes by its Preamble protection of the environment and promotion of sustainable development important goals of international policy, proceeded to examine environmental treaties such as the Conventions on Biological Diversity, on the Law of the Sea, and on International Trade in Endangered Species to justify its conclusions that “natural resources” included living resources and that living natural resources were indeed “exhaustible.”³¹

Importantly, the Appellate Body also responded in this decision to the decades old proposition that as “exceptions” to the GATT's cornerstone principles, Article XX must be construed narrowly.³² Observing that Article XX makes the General Exceptions available “in recognition of the legitimate nature of the policies and interests there embodied,” the Appellate Body found that “a balance must be struck between the *right* of a Member to invoke an exception and the *duty* of that same Member to respect the

²⁹ Vienna Convention, *supra* note 24 at art. 31.

³⁰ *US - Shrimp-Turtle*, *supra* note 26 at paras. 129-130, citing *Namibia (Legal Consequences) Advisory Opinion*, I.C.J. Rep. 31 (1971).

³¹ *Id.* at paras. 130-32. The Appellate Body was careful in each case to note that Complainants were Parties to these non-WTO conventions, implicit recognition that while non-WTO treaties find proper use as a source of law in interpreting the WTO covered agreements, a WTO Member may not be held to a treaty to which it is not bound. See Vienna Convention, *supra* note 24 at arts. 30 & 41. The non-WTO environmental treaties were relevant to interpretation of GATT Article XX(g) because, in light of the WTO Preamble's recognition of the objectives of sustainable development and environmental protection, they reflected the common intentions of WTO Members. Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, *supra* note 21 at 573.

³² See, e.g., *United States - Restrictions on Imports of Tuna*, GATT Doc. DS21/R (unadopted), para. 5.22 (Sept. 3, 1991)(hereinafter *US - Tuna-Dolphin I*).

treaty rights of the other Members . . . so that neither of the competing rights will cancel each other out.”³³ Elevating the General Exceptions to an equal plane with GATT’s Four Pillars works a sea change in the nature of Article XX analysis by WTO dispute panels.

In the *EC—Beef Hormones* case, panels considered whether the “precautionary principle” was customary international law that could justify the EC’s failure to meet the scientific evidence standards of the WTO’s food safety rules.³⁴ And in certainly the broadest statement by a WTO dispute settlement entity of the role of general international law, including custom, in the interpretation of a WTO covered agreement, the WTO panel in the *Korea—Government Procurement* case found that “customary international law applies generally to the economic relations between the WTO Members” to the extent there is no conflict or inconsistency or other indication that the WTO agreement has “contracted out” of the customary principle.³⁵

The panel proceeded to apply customary international law as found by the International Court of Justice and codified in the Vienna Convention³⁶ to decide whether U.S. consent to a WTO Agreement had been invalidated by error in the treaty negotiations, an affirmative finding of which would have trumped the issue whether Korea’s airport construction was covered by its WTO Government Procurement Agreement Schedule.³⁷

³³ *US - Shrimp-Turtle*, *supra* note 26 at paras. 156 & 159 (emphasis in original).

³⁴ *EC - Measures Concerning Meat and Meat Products*, WT/DS48/R, para. 8.157 (Aug. 18, 1997)(Panel Report), and *EC - Measures Concerning Meat and Meat Products*, WT/DS26 & 48/AB/R, para. 123 (Jan. 16, 1998)(Appellate Body Report)(hereinafter *EC - Hormones*).

³⁵ *Korea - Government Procurement*, *supra* note 25 at para. 7.96.

³⁶ *Id.* at para. 7.123.

³⁷ *Id.* at paras. 7.124 - 7.125. Notably, the panel also decided that even though the subject-matter jurisdiction of the panel was determined, under Article 7.1 of the WTO Dispute Settlement Understanding, solely by the claims made in the U.S. request for establishment of a panel, which was silent on this issue, the panel nonetheless was permitted to examine the issues that had been raised “in the broader context of customary international law.” *Id.* at para. 7.101, n. 755. Duke University law professor and former WTO legal affairs officer Joost Pauwelyn posits that the Panel likely exceeded its jurisdiction by entertaining a claim that does not, as required by the WTO Dispute Settlement Understanding, arise under one of the WTO “covered agreements,” although he believes that the Panel would have been justified in resorting to the customary rule of error in defense of a claim under a covered agreement. Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, *supra* note 21 at 570-71. I would note that the Panel had found common origins for the customary rule of error and the GATT non-violation claim which the United States had in fact raised and the Panel was attempting to squeeze error law into an interpretation of the GATT claim. *Id.* at

From this record we can see that WTO Members have both given themselves wide berth to pursue non-economic policies such as human rights law and also have directed dispute panels interpreting these provisions to be guided by general international law in their interpretations of claims under the WTO covered agreements.

V. Conclusion

Two major problems remain for the legal advocate of human rights concerned with restraints imposed by trade rules, neither of which I submit may fairly be laid at the feet of trade negotiators.

One I mentioned at the start: that much of human rights law is not so widely accepted that WTO panels may reliably be expected to apply its teaching to inform a WTO provision.³⁸ This is especially true for human rights principles most likely to intersect the trade rules, such as the abuse of core labor rights, including a ban on products made by indentured children, or protection of the health and safety of indigenous populations, including trade restrictions aimed at preserving the natural resources on which their future relies.³⁹ Of course we face the issue of which human rights principles have become customary⁴⁰ only because states have been unwilling in

paras. 7.100 - 7.101.

³⁸ David Weissbrodt, Joan Fitzpatrick, & Frank Newman, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 23 (3d Ed. Anderson 2001)(discussing which human rights principles have become customary international law). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

³⁹ An example of the latter would be a prohibition against importation of petroleum products produced in a Central American country for the purpose of protecting indigenous peoples from exploitation through polluting and wasteful drilling for oil by multinational companies with government cooperation. As to the latter, the United States created the conditions for a WTO dispute with Congressional authorization beginning in 1997 to ban import of products made by indentured child labor. *See* Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, § 634, 111 Stat. 1272, 1316 (1997), and Steve Charnovitz, *The Moral Exception in Trade Policy*, *supra* note 17 at 370-371.

⁴⁰ Even if the human rights principle at issue qualifies as customary international law, the issue may still remain whether the customary rule prevails in the event of direct conflict with a WTO Agreement provision. The Vienna Convention does not expressly resolve this quandary, leaving the matter instead to an application of interpretive Articles 30 and 31, especially Article 31(3)(c)'s "principle of integration," *see* Philippe Sands, *supra* note 28 at 95. The Restatement provides that a later treaty provision trumps a prior rule of customary law. If the customary principle is later, it will prevail if the parties to the treaty clearly display an intention for the customary principle to do so, *supra* note 36 at §102(j). Given the continuing revision of WTO Agreements through successive negotiating rounds, usually making the WTO provision the later in time, even the Restatement's

either trade or human rights treaties explicitly to give instruction on which provisions should prevail in the event of conflict.⁴¹

The second problem is that the WTO, even while making way for non-economic objectives, ensures that trade priorities are ranked higher through a “necessity” test. To be considered “necessary,” the measure chosen to implement the human rights objective must be the least trade-restrictive border limitation that will accomplish the human rights objective.⁴²

Human rights advocates of course fault the WTO for not instead asking what trade measure will best accomplish the human rights objective. However, once it is recognized that Governments have refused to provide explicit guidance on how to resolve conflict between the two objectives, it should not be surprising that trade negotiators felt unjustified in redrawing the lines of their own jurisdiction.

Even here, WTO dispute panels have been highly deferential to Members when the human right to health is at stake. In the *Hormones* case, the Appellate Body placed the burden on the complaining Member to demonstrate that a viable measure less restrictive of trade exists.⁴³ The Appellate Body also emphasized in *Asbestos* the

simplistic rule becomes complex, see William A. Kerr, *Who Should Make the Rules of Trade? – The Complex Issue of Multilateral Environmental Agreements*, 3 Estey Centre J. Int’l L. & Trade Pol. (2)162, 165 (2002), at www.esteyjournal.com (visited March 10, 2003).

⁴¹ The one notable exception is the North American Free Trade Agreement (hereinafter NAFTA), which expressly gives priority to several named multilateral environmental agreements if trade restrictions undertaken in pursuit of their terms otherwise would violate the expansive “GATT-Plus” trade disciplines of the NAFTA. North American Free Trade Agreement, Dec. 8, 1992, art. 104, 32 I.L.M. 289 (1993).

⁴² Even so, the Appellate Body has softened the “necessity” test over the years from the requirement that the trade restriction must be “unavoidable,” *US - Tuna-Dolphin I*, *supra* note 32 at para. 5.27, to the present inquiry whether a less GATT-inconsistent measure is “reasonably available,” *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, para. 171 (Mar. 12, 2001)(hereinafter *EC - Asbestos*). Article XX(g), exempting measures “relating to the conservation of exhaustible natural resources,” substitutes a “relationship” test for the “necessity” requirement of other exceptions. The Appellate Body also has reduced the severity of this condition from its early interpretation as mandating that the border restriction have conservation as its “primary aim,” *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, BISD 353S/114, para. 4.6 (adopted Mar. 22, 1988), to the present unremarkable requirement that the border measure be “reasonably related” to conservation, *US - Shrimp-Turtle*, *supra* note 26 at para. 141, thus including measures that have conservation as one of several equally important objectives. The Appellate Body’s assiduous smoothing of these rough edges between trade and non-economic issues has substantially lowered the barriers to meeting Article XX’s conditions.

⁴³ *EC - Hormones*, *supra* note 34 at paras. 126 & 130.

importance of the discretion accorded WTO Members to choose their own level of health protection by insisting that any alternative to the health measure selected must be effective in accomplishing the Member's chosen level of protection, not some level of protection that results from an abstract scientific balancing of costs and benefits.⁴⁴

In fact, Georgetown Law Professor Gregg Bloche argues that in effect the human right to health has become an interpretive principle that informs a wide range of WTO disputes,⁴⁵ even though the WTO Agreements—and likely customary international law—are silent on the existence of such a right.

One final point. I believe we may rightfully ask whether the September 2003 collapse in Cancun of negotiations at the biennial meeting of WTO trade ministers marks the beginning of a paradigm shift in trade negotiations to one that recognizes that the values elevated by the trade economics of Adam Smith and David Ricardo nearly two centuries ago cannot accurately assign priority to the development, labor, environmental, humane treatment, freedom from racial discrimination, and other human rights that most of the world's citizens now demand become a meaningful part of trade policy.⁴⁶ As Brazil's Foreign Minister, Celso Amorim, the man most responsible for the collapse of the talks, has written, "I am convinced that Cancun will be remembered as the conference that signalled the emergence of a less autocratic multilateral trading system, . . . as a turning point. . . . As we resume negotiations in Geneva, . . . may we bear in mind the lessons of Cancun . . . (that) developing countries will not be reduced to the role of supporting actors in discussions that affect their development prospects."⁴⁷ With such a shift in values, the international human rights law essential to development will assume a more prominent role in global trade policy.

In sum, my view is that trade rules have made a start that must be considered reasonable under the circumstances in attempting to set priorities for national pursuit of non-economic objectives such as human rights principles, and that there is even some

⁴⁴ *EC - Asbestos*, *supra* note 42 at paras. 168 & 173-74.

⁴⁵ M. Gregg Bloche, *WTO Deference to National Health Policy: Toward an Interpretive Principle*, 5 J. Int'l Econ. L. 825, 827 (2002).

⁴⁶ Perhaps Adam Smith's classical theory that individual ambition serves the common good could be tempered to positive effect by John Nash's equilibrium concept that the maximum benefit to a group (here, world welfare) can be realized if each individual (here, nation) works for its own benefit and that of the group. See Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 423 (Modern Library ed. Random House 1937) and John Forbes Nash, *Non-Cooperative Games* (Dissertation 1950), as discussed in ISCID Encyclopedia of Science and Philosophy, International Society for Complexity, Information, and Design (2003) http://www.iscid.org/encyclopedia/Nash_Equilibrium

⁴⁷ Celso Amorim, Commentary: *The Real Cancun*, Wall Street Journal Online (Sept. 25, 2003), <http://online.wsj.com/article/0,,SB106444757752551200,00.html>.

reason to hope that the WTO will get it right.