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LINKING TRADE AND SUSTAINABLE DEVELOPMENT: ROUNDTABLE DISCUSSION*

LIST OF PARTICIPANTS

IN ORDER OF APPEARANCE IN TRANSCRIPT

Kevin J. Fandl, Senior Critical Essays Editor, American University International Law Review, Juris Doctor Candidate, Washington College of Law, Class of 2003

Amy Magdanz, Junior Associate, American University International Law Review, Juris Doctor Candidate, Washington College of Law, Class of 2004

Padideh Ala'i (Moderator), Professor of Law, American University Washington College of Law

Robert L. Howse, Professor of Law, University of Michigan Law School

Mark J. Palchick, Adjunct Professor of Law, Pennsylvania State University

David Driesen, Associate Professor of Law, University of Syracuse College of Law

Keith E. Sealing, Visiting Assistant Professor of Law, University of Syracuse College of Law

Chantal Thomas, Associate Professor of Law, Fordham University School of Law

Raj Soopramanien, Senior Counsel, World Bank Legal Department

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Alan Kaiser (Presented question), LL.M. Program Graduate,
American University Washington College of Law,

Monica Sawyer (Presented question), LL.M. Program Candidate,
American University Washington College of Law

Maki Tanaka (Presented question), Senior Articles Editor,
American University International Law Review, Washington College
of Law, Class of 2003

MR. FANDL: We are ready to begin the roundtable. Remember that this is going to be open—this is going to be an open forum, so if you have questions feel free to ask at any time, I mean, after the speakers go.

MS. MAGDANZ: Good afternoon and welcome back.

....

Anyway, without further ado, I would like to talk about Professor [Padideh] Ala'i. She is a professor here at the American University, Washington College of Law, where she was recently tenured. She specializes in international trade law with particular emphasis on [World Trade Organization] ("WTO") and [General Agreement on Tariffs and Trade] ("GATT") law. Before coming to us here at [the Washington College of Law] ("WCL") she worked at Jones Day and Reichler, Milton & Mendel in Washington, D.C., where she worked on cases involving Guyana, Nicaragua, Uganda, China, and the Philippines, probably not all in the same case, but separate cases. And she is also the woman who taught me everything I need to know about *Shochu*.¹ Anyway, without further ado, Professor [Padideh] Ala'i.

PROFESSOR ALA'I: I know that you are all brave to be here after a full [day]. And so I am going to try to be as brief as possible so you can ask your questions. I want to thank the panelists for being kind enough to be here and to have stayed with us until the end to answer your questions.

I also want to thank the International Law Review. I know that we have a reception afterwards, but I feel compelled to say not only thank you, but how proud I am of everything—I mean, as a member of this institution, for what this student body has done, what the Law Review has done. And given the importance of the issues that we have discussed today, this has just been a brain trust of students here. And it is a testimony to the fact that many of these issues are cutting-edge issues and it is your generation and generations to come that will have to deal with it.

1. WTO Appellate Body Report, Japan –Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4 1996), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple (last visited June 25, 2003).

And there is a sense amongst the students—I see it every year—of the importance of not looking at things within the standard barriers that academia has created: trade law, human rights law, environmental law. And, of course, we still have to stick to them because I guess it is difficult to break out of these patterns.

But this is why we have had a very good conference, and we have had people here amongst the panelists who come from very different backgrounds: trade lawyers like myself maybe who are more WTO specialists, like Professor [Robert] Howse; others who have done more intellectual property; environmental backgrounds. So we have had people that have come to realize the importance of what, I think it was Raj [Soopramanien] who said at the beginning, linkages, meaning to trade and phenomena.

Now back in 1997, when I had started teaching, there was a conference that was a small group of us at the American Society of International Law, International Economic Law Group, that did a linkage—there was a linkages conference that I went to.

At that time, it was something novel . . . because trade had already been seen only in our narrow GATT world as sort of having to do with economic laws. And there was a distinction made, as some of you know me well, between economic and non-economic which we had sort of tried to say, well, now with the creation of the WTO things are changing and there is a move towards recognition of linkages.

Now the truth of the matter is, I was just reading a recent article that Professor [Robert] Howse wrote that this is not really true.² Linkages have existed. If you look at the GATT, the GATT itself was created post-World War II with the main thing to make sure never again we would have the protectionist policies that we suspect resulted in the Great Depression and the tragedies or the Great War, the Second World War.³

2. See José E. Alvarez & Robert Howse, *From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94 (2002) (addressing the historical foundation of the multilateral trading system).

3. See Elizabeth E. Kruis, Comment, *The United States Trade Embargo on Mexican Tuna: A Necessary Conservationist Measure or an Unfair Trade Barrier?*, 14 LOY. L.A. INT'L & COMP. L. REV. 903, 910 (1992) (highlighting the purpose behind the creation of the GATT).

So it was a never-again policy that sort of—it brought together—we did not create the international trade organization for various reasons, including the United States Congress not wanting to go ahead with it, but the GATT was created.⁴ But in the GATT itself there was always a recognition, even from the very beginning you have Article 20, that there are other issues, other interests that are as important as market access and nondiscrimination.⁵

In 1994, when the Uruguay round negotiations ended and we had the creation of the World Trade Organization—I do not know how—it was a new world order.⁶ Obviously the preamble to the WTO was amended from the GATT to include, as [many] of you know, the words “sustainable development” in addition and to “protect and preserve” the environment.⁷

So a third goal, if we can say, was added to the World Trade Organization or the multilateral trading system, if I can count it like that, other than market access and nondiscrimination as sort of a

4. See JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT* 293-97 (3d ed. 1995) (noting U.S. congressional committees' intense criticism of early drafts of the GATT).

5. See General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT] (specifying various exceptions such as those related to morality, health, and products of prison labor).

6. See JACKSON ET AL., *supra* note 4, at 301-02 (describing the origins of the World Trade Organization).

7. See Marrakesh Agreement Establishing the World Trade Organization, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 31, 33 I.L.M. 1144 (1994) (establishing the WTO).

Their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

Id.; see also Julie H. Paltrowitz, Note, *A “Greening” of the World Trade Organization? A Case Comment on the Asbestos Report*, 26 *BROOK. J. INT’L L.* 1789, 1798 n.53 (2001) (comparing the WTO preamble and the GATT 1947 Preamble).

recognition of sustainable development. So as you can see, the common thread in this panel was the word "trade."

We started with trade and economic, social, and cultural rights. The reason . . . economic, social, and cultural rights [were] chosen is that initially we had thought about using trade and human rights, I think was the conversation that I had with Kevin [Fandl]. And because of the understanding here, especially in the United States, the separation between civil and political rights and economic, social, and cultural rights, we felt it was better to make it into economic, social, and cultural rights because usually when people look at trade and human rights, they do not think about economic—the second generation rights.

We had a discussion on commodities—coffee—and then indigenous rights of people in Mexico, especially indigenous people and how—a fascinating discussion as to how trade is affecting them and their identity. We had a discussion as to the role of multinational corporations and how they can be protected. Chantal [Thomas] talked about trade prerequisites, that there is no—we are not in a position anymore where we are only talking about trade in a narrow sense. It is very clear that trade in itself is not an engine for poverty reduction, but there is much more to it than that.

With intellectual property we touched immediately on the issue of compulsory licensing. One of the great issues that have come up at the Doha round and which continues to be an important developmental issue as well.⁸

And finally, trade and environment, the one area where I think the linkage has been more firmly established may be because of the inclusion of the world environment for the first time in the provisions, but predating that also with regards to Article 20.⁹ But I

8. See Divya Murthy, Comment, *The Future of Compulsory Licensing: Deciphering the Doha Declaration on the TRIPS Agreement and Public Health*, 17 AM. U. INT'L L. REV. 1299, 1320 (2002) (analyzing the impact of the Doha Rounds on compulsory licensing).

9. See GATT, *supra* note 5, art. XX(g) (stating that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restriction on domestic production or consumption").

also think that the environmental movement has been very successful in utilizing the multilateral trading system, much more successful than the labor movement has been or others.

And so this is just—in order to open, I know I am going to open for discussion, I just wanted to throw out the question to sort of—as a—as somebody who is sort of a fan of the World Trade Organization as an institution, I wanted to ask the panelists if they would, from their perspective and for the benefit of everybody here, tell us what—maybe I will ask a couple of questions, you can choose whichever one you want. From your perspective, what role should the WTO [have], has it played, [and] should it be playing in the linkage with which you have been talking about? Are we asking too much of this one institution?

I mean, the problems of environment have always existed. The problem of poverty has always existed. The problem of abuse of workers and labor rights, also. What is—where do you see the WTO going? What are the challenges? And of course, given the condition of fragmentation that the world is in today. . .how do you see that affecting—by area fragmentation I mean the recent war and the divisions that have existed between us and Europe.

Is there going to be a spill-over into the WTO agenda? And anything that you have been working on, has it been affected by the very, very recent events? I do not know which way. Would you like—Robert [Howse], do you want to start that [discussion]?

PROFESSOR HOWSE: Sure. The—I would make two comments about how recent events have affected some of the issues that I am following with WTO. And this is purely anecdotal, but I think sometimes anecdotes are useful in expressing connections that remain under-theorized and under-thought about.

The first is the sort of hesitation on the part of the U.S. Administration in challenging the European community's regulation of [Genetically Modified Organisms] ("GMOs").¹⁰ And it goes back

10. See generally Ruth MacKenzie & Silvia Francescon, *The Regulation of Genetically Modified Foods in the European Union: An Overview*, 8 N.Y.U. ENVTL. L.J. 530 (2002) (describing the European Union's regulatory approach to genetically modified organisms and the resulting tension with member states of the World Trade Organization due to disparate policy perspectives).

and forth every few days, so I am not sure what the latest rumor is that they are going ahead with the action or not.¹¹

But what was very interesting to me was that a few weeks ago, the drums started beating again, as it were, in [the Office of the United States Trade Representative] ("USTR") that they were going to challenge the Europeans on [Genetically Modified] ("GM") foods and—well, not just GM foods. To be more precise, the whole regulatory regime in the [European Union] ("EU") for genetically modified organisms, which includes not only food, but the importation and dissemination of the organisms themselves.¹² And then there was a Cabinet meeting called to discuss whether to go ahead with the case.

And then the White House apparently cancelled the Cabinet meeting. And the leak to the press was—and this, again, you have got to look back about three or four weeks, this was before France had basically scuttled the Security Council process on Iraq. We are giving the Europeans a hard time on Iraq. We do not want to give them a hard time on GMOs as well. So that is one anecdote.

It raises the issue of whether this was just spin on what happened. It could be that perhaps there were other reasons why the Administration did not want to go ahead on GMOs. For example, the United States Trade Representative [Robert] Zoellick referred to Europeans as Luddites, basically Neanderthals in their attitude toward science because of their queasiness about genetic modification.¹³

11. See Elizabeth Becker, *U.S. Takes Food Dispute to the WTO*, INT'L HERALD TRIB., May 14, 2003 (stating that "[t]he Bush administration filed a suit Tuesday at the World Trade Organization to force Europe to lift its moratorium on genetically modified food, a move that was threatened this year but postponed during the debate over the war in Iraq."), available at <http://www.iht.com/articles/96262.html> (last visited July 12, 2003).

12. See Elizabeth Becker, *U.S. Threatens to Act Against Europe Over Modified Foods*, N.Y. TIMES, Jan. 10, 2003 (noting that the United States Trade Representative considered Europe's treatment of American genetically modified foods as a factor contributing to the famine in Africa), available at 2003 WL 8365164.

13. See Press Release, Soybean Producers of America, U.S. Soybean Farmers Seriously Question Trade Representative's Remarks, May 29, 2003 (discussing Zoellick's statements regarding their European customers), available at

If you turn to the website of the President's Advisory Commission on Bioethics you will see these very Luddite—same Luddite concerns being raised about, you know, certain kinds of biotechnology.¹⁴ So while the USTR may view queasiness about the ability—queasiness about science and technological progress as Ludditeism, that is not the position of the Administration necessarily as a whole.

It also may be the case that another underlying consideration is that it could backfire on the industry, just as hitting hard on pharmaceuticals and [Trade-Related Aspects of Intellectual Property Rights] ("TRIPS")¹⁵ probably backfired in important ways in the pharmaceutical industry.¹⁶ I mean, you will ultimately not shove these products down the throats of Europeans, so trying to resolve the matter in the WTO, you know, is likely only to buy you ill will and bad blood and is not likely to make people eat any more GM modified food than they are eating now.

So what was really behind it? Was it really some hope that this could affect the outcome of the Security Council on Iraq?

Was it fear, you know, that there are some constituencies in the United States that do not think that concern about genetic modification is Ludditeism, but rather that it is part of their morality

<http://www.ofarm.org/news/6-2-03%20%20number%2007.htm> (last visited June 24, 2003).

14. See REGULATING THE NEW BIOTECHNOLOGY: OBSERVATIONS AND PROCEDURAL OPTIONS FOR THE COUNCIL (President's Council on Bioethics, Staff Working Paper, 2002) (noting the need to regulate various new biotechnologies), available at <http://www.bioethics.gov/background/proceduraloptions.html> (last visited July 12, 2003).

15. See Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement], available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf (last visited July 19, 2003).

16. See World Trade Organization, *TRIPS Material on the WTO Website* (describing information on intellectual property in the WTO, news and official records of the activities of the TRIPS Council, and details of the WTO's work with other international organizations in the field), at http://www.wto.org/english/tratop_e/trips_e/trips_e.htm (last visited July 27, 2003).

and even religious beliefs. Or is it fear that the whole thing may backfire on the industry?

We do not really know. But understanding what really goes on in trade policy means trying, to some extent, to puzzle out these complex kinds of interconnections.

The second anecdote actually relates to my paper on why did India bring this case. It seems like a very high-risk strategy for India, as I think Chantal [Thomas] was suggesting. I mean, it is a big gamble because many of the possible outcomes would be adverse to what India wants which is to keep environment and labor out of the WTO context.¹⁷ Well, it turns out the real reason why India is bringing this case is that it is extending the India-Pakistan conflict to the WTO.¹⁸

The Indians did not bring this case before the WTO, even though they had thought about bringing this case for a very long time. Then in the—you know, the European Community ("EC") gave some special concessions/preferences to Pakistan which were probably linked to Pakistani cooperation in connection with the post-September 11th environment.¹⁹ And that was really . . . the straw that broke the camel's back, so to speak, in India and brought them to bring this action.

If you read the Indian press, this action has nothing much to do with labor and environment conditionality. If you actually go online and read the Indian press, most of what is said about the action in India is that it is a reaction to the offense to India from the [European Communities] giving these special preferences to Pakistan that occurred in a geopolitical context that actually is very far removed

17. See Special Correspondent, *India, Switzerland Swap Papers on Investment*, THE HINDU, Feb. 17, 2000 (confirming that India believes that the WTO agenda should not include environmental and labor issues, but rather the International Labour Organization or an international environment forum should discuss such issues), available at LEXIS, News & Business Library, Major Newspapers File.

18. See *EU's Import Policy Displays Pakistan Bias*, FIN. EXPRESS, Aug. 12, 2002 (providing overview of the background behind the conflict between India and the European Union in the WTO), available at LEXIS, News & Business Library, International Trade File.

19. See *id.* (proposing that the concessions to Pakistan were directly related to Pakistan's support of the United States in its war against terrorism).

from the day-to-day political economy of tariffs.²⁰ So my response was really to give these couple of anecdotes and to ask you to try and puzzle out for yourselves, you know, just what these complex interconnections are between the geopolitics of our time and the day-to-day politics of trade policy.

The second challenge very briefly in one minute that you presented to us was, you know, what role for the WTO on labor and environment? Well, I think that in an ideal world perhaps the role would be simply to get out of the way. That is to say the WTO is about ensuring that countries have the confidence that regulations about things like labor and environment are not disguised protectionism.

So that once you determine that the regulations in question are not protectionist and discriminatory, in other words, once you have determined that they are bona fide regulations for other public policy objectives than protecting domestic industries, then the WTO should have no role and let us leave the actual regulatory response at the global level to environmental and labor challenges to other institutions. And I think that had the WTO not become part of the problem by actually going farther than that in some ways in trying to curtail initiatives to protect labor and environment there would not be so much interest in how it could be part of the solution.

So, you know, now, I mean, I think some of those—some of the people in the WTO might wish that we could—that one could go back to the position which I and others have argued was already embedded in the nondiscrimination norm in Article 3 as well as in the exceptions in Article 20, which [in] the GATT/ WTO system is about stopping protectionism.²¹ It is not about imposing a regulatory model that suggests that economic development is achieved by exploiting labor and destroying the environment.

20. See Amit Baruah, *India Raises Dispute over E.U. 'Preferences' to Pakistan*, THE HINDU, May 30, 2003 (noting India's contention that the European Union gave preferences to Pakistan in return for Pakistan's efforts to against narcotics), *available at* <http://www.hinduonnet.com/thehindu/2003/05/30/stories/2003053005001100.htm> (last visited July 12, 2003).

21. See GATT, *supra* note 5, art. III (stating that "contracting parties recognize that international taxes and other internal charges . . . should not be applied to imported or domestic products so as to afford protection to domestic production").

And that is basically the neoliberal economic model that somehow got superimposed on a very different kind of legal bargain, which was about opening borders, not closing off governments' abilities to deal with other issues. So the question is: could we return to some kind of original understanding that as long as it is not protectionism, the WTO keeps out of it?

I am not sure we can just because in a complex regulatory environment, both global and domestic, you know, the borderlines are often not so clear-cut that one can have an unambiguous solution and, therefore, a simply and simplistically legitimate solution by simply having recourse to this traditional consumption of non-protection or nondiscrimination.

So I think that the WTO will have to evolve a role that is both sensitive to the functions and legitimate functions of other institutions, both domestic and global, both state and non-state, and, at the same time, which is positive in a way. I mean if it cannot avoid being part of the problem, in other words, it is going to have to start to be part of the solution.

PROFESSOR ALA'I: Thank you.

PROFESSOR PALCHICK: In the last two years, we have seen a very interesting metamorphosis occur in the area of intellectual property and in the Caribbean, specifically. Two years or more ago, about the only link—I am talking about establishing links—about the only link that you would find between intellectual property and trade was the threat that the USTR had of withdrawing trade benefits for countries that failed to protect U.S. industry, protectionism. That was about the only link that you saw.

What has happened, as a result of looking at how intellectual property issues affect economies is that these effective countries are now starting to figure out that this protectionism that the United States government is providing to the motion picture industry is having an adverse impact on the trade and economies of the countries over and above and totally outside the realm of using that as sanctions.

And there is a growing realization that intellectual property is a trade commodity. And a country that favors its industry in a manner that creates market dysfunctions is operating contrary to the intent of

the WTO. I think we may be two or three years from seeing some actual consequences of that, but I think we are on the road to that.

PROFESSOR ALA'I: Thank you.

PROFESSOR DRIESEN: In terms of where I think the WTO is going, and this may seem fairly obvious, but I think the unilateralism of the U.S., extreme unilateralism we are seeing in steel tariffs in Kyoto and Iraq, is a threat to all international law, including the WTO, and it is a very serious threat because we are a very powerful country. So I am not so optimistic about that.

I guess in terms of where it should go I am largely in agreement with Robert Howse. I would frame it a little differently.

The way I think about this is what sort of concept of free trade can a WTO implement that is legitimate in a world [with] competing objectives. And it seems to me that it can probably implement a concept of non-discrimination if it is defined fairly narrowly.

What it cannot do is make moves that are perceived to be a move towards *laissez-faire*. And I think when it gets into questions like second guessing countries about their scientific judgments about health threats, as we did in beef hormone.²² When we start second guessing countries' views about how best to create the proper incentives for intellectual property, whether that is done by free trade or by government created monopolies, which are what patents are, you know, I think it is getting out of that and it is moving into management of the whole country.

Now, it does have to become part of the solution, and it takes on a manageable set of challenges that would require the transformation of the organization in some way that, you know, what do you mean? International democratic assemblies? I do not know how [to] legitimate that large role.

So I think it has to go now over, but I agree with Robert Howse. Well, I am not saying we are going in that direction, and if it has moved in that direction, I would agree because we have seen, I think,

22. See WTO Appellate Body Report, European Communities – Measure Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (resolving a complaint against the European Communities concerning the use of certain hormones in their meat products).

in the second turtle case,²³ the asbestos case,²⁴ some reaction to these demonstrations in the street. And I think maybe we will see something like that in the intellectual property area in the future.

PROFESSOR ALA'I: Thank you.

PROFESSOR SEALING: What should [the] WTO's role be in these areas of environmental law, labor law, cultural rights and indigenous rights that we have looked at. I think the way you make a subtle change in the way you phrase the question gives us two answers.

Should the WTO stay out of some of these areas? The answer is probably, "yes."

Can the WTO stay out of these, and the answer is, "no," and that ties in with your earlier point of linkages.

Looking at the linkage between trade and the environment, labor, cultural rights, and indigenous rights, just looking at it today, we saw how world trade in coffee is driving some farmers to go back to making—to producing cocaine, for example.²⁵

In the example of corn, we saw how [the North American Free Trade Agreement] ("NAFTA"), how world trade in corn is destroying indigenous cultures that are centuries old.

And, hypothetically, but it really was not terribly hypothetical, artificially induced U.S. consumer demand for [Sport Utility Vehicles] ("SUV's") is contributing to global warming. And it was

23. United States-Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW (Oct. 22, 2001) (upholding the Panel's finding that Article XX of GATT 1994 justified the U.S. measure), available at <http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/58ABRW.doc> (last visited June 25, 2003).

24. European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body, WT/DS135/AB/R (March 12, 2001), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple (last visited July 18, 2003).

25. See Robert Collier, *World's Leadings Java Companies Are Raking in High Profits But Growers Worldwide Face Ruin as Prices Sink to Historic Low*, SAN FRANCISCO CHRON., May 20, 2001 (discussing the effect of the drop of coffee prices on the coffee workers' ability to avoid working in the cocaine plants), available at <http://www.globalexchange.org/campaigns/fair-trade/coffee/sfchron052001.html> (last visited June 28, 2003).

interesting that David [Driesen] put the blame on Germans in his hypothetical, because we now see some of the egregiously polluting SUV's coming out of Germany as a direct result of the U.S. demand which created U.S. SUV's.

The Japanese stepped in and built Japanese SUV's to compete on the higher level, and then the Germans found out that the typical owner of a Porsche also owned an SUV. And so now we have a six liter, V-8 SUV manufactured by Porsche that gets about a third of miles per gallon compared to my Subaru.²⁶

So the short answer is that, right now, the WTO is perhaps the best we have got in that area. And though its original mission is not on point, the linkages are such that we have to work within that framework.

I also share David [Driesen's] earlier comment about thinking about a world democracy and the talk about that in its very early stages. When I first heard that concept, I viewed it as kind of an intermediate step between the [United Nations] ("U.N."), world democracy and then the United Federation of Planets. That was the degree of seriousness with which I took it, but perhaps the idea will eventually be thought to have a little more merit.

PROFESSOR THOMAS: I think those are great thought provoking questions and the question about fragmentation I think returns us maybe to contemplating the original goals of the international trade regime, which were just not economic, but which very much were integrated into a larger vision for world stability so that, you know, the original vision behind the International Trade Organization was not just to secure prosperity, but also to secure peace.

Following World War II, in this time of obviously growing rift between the United States and other regions, it is interesting to note

26. Compare 2003 Porsche Cayenne Turbo: Real Life Keeps Off-Roader's Power on Leash, BOSTON.COM (noting that the SUV got 11 miles per gallon during their road tests), available at http://www.boston.com/cars/reviews/2003/Porsche_cayenne.shtml (last visited June 28, 2003), with California Energy Commission Best Picks (stating that the Subaru Forester SUV gets 24 miles per gallon), available at <http://www.consumerenergycenter.org/vehicles/bestpick/default.php?ID-18> (last visited June 28, 2003).

that the Middle East, for example, happens to be the region with the fewest number of countries who are member states in the World Trade Organization.²⁷

And so I think that it is useful to think about the possibilities that the international trade regime may have to return to part of its original function as an organization that is not only about securing economic relations, but also about securing stability. And I think it is probably appropriate for governments to think about how the WTO can be used as a format for increasing conversations between regions on a number of different levels, and might play a role in trying to address some of the problems that we are seeing on the political front.

That is on the peace side of the equation. On the prosperity side of the equation, in the last half-century, we have expanded our idea of what prosperity means to include this notion of sustainable development.

I guess everybody has been saying this. We all agree in this room. It is not just about growing the [Gross Domestic Product] ("GDP"). It is about a whole other array of economic, social, cultural, environmental objectives, part of what we would now understand to be prosperity, and this is where your linkage question comes in.

As [Robert Howse] was very accurately pointing out, in the WTO's early stages perhaps the interpretations of WTO rules have been overly narrow and have failed to see the importance of integrating trade law into this broader array of notions and concepts around sustainable development, so that the WTO could be seen as having formed part of the problem. And in part, I think that that may be, if not an inevitable result, then at least a predictable result of what we can see as a shift in a style of international governance that really is embodied in the WTO, from what John Jackson might call a more pragmatic mode of relationships between states where the idea of sovereignty and autonomy is much more recognized and much

27. See World Trade Organization, *List of Member States* (providing a comprehensive list of WTO member states), at <http://www.world-tourism.org/members/states/members.html> (last visited July 12, 2003).

more at the forefront in resolving problems to a more rule oriented model.²⁸

And the WTO really represents a very significant shift towards the rule oriented model of solving problems. Now, what does that mean? It means that the international trade regime has become more stable, has become much more like a domestic legal system, but it has also had ripple effects that have destabilized the other aspects of the international order which have not made significant similar or parallel shifts towards rule oriented models of resolving problems and applying rules.

So that is a challenge for those who are concerned with the overall picture or dimensions of the international order. How do we solve that imbalance between the rule oriented model of the WTO and sort of the fact that, I think it was as David [Driesen] was pointing out, many other areas of international law are still very much in the sort of pragmatic or power-oriented model of resolving disputes.

Well, scholars on both the trade side and the environmental side are busy coming up with lots of different proposals. Maybe we need a standalone environmental organization. Maybe we need to negotiate agreements within the WTO. Maybe we just need to change our view of interpretation of existing WTO rules to include all of this other international law.

There are a lot of different proposals that are now on the table, and are these going to push the WTO too far? As [someone] asked, if you asked folks in Geneva right now working in the WTO, they all insist that that is completely—all these proposals are completely ridiculous. There is no way that the WTO could possibly do any of this stuff.

28. See Press Release, Georgetown University Law Center, Georgetown International Law Professor John Jackson Presented with Festschrift at Jan. 11 Ceremony: "Father of the WTO" Honored By 30 Authors on Four Continents (Jan. 17, 2001) (announcing the ceremony and describing Jackson's career contributions to international trade law), at <http://www.law.georgetown.edu/topics/releases/january.17.2001.html> (last visited July 27, 2003). See generally JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT: A LEGAL ANALYSIS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE* (1969) (addressing linkages between trade law, public international law, and other societal concerns from a world trade-related perspective)

It is already totally overextended. It is impossible that they will even come close to resolving what is on the agenda for the Doha negotiations, you know, much less try to solve all these other problems about linkages.

So there is certainly a whole kind of contingent of folks who would say that these are kind of pie in the sky ideas about linking trade and other areas of international law.

But as I think you suggested that a little bit of vision is really important here, and a long-term sort of sense of what the implications are, of failing to think more seriously and more rigorously about crafting real and functional models of linkage.

And so that is, I guess, a bit of what we have been engaged in this room today.

MR. SOOPRAMANIEN: I would like to come to the defense of the WTO to say that I think this is a relatively new institution. While the Secretariat has existed for many years, but as the WTO, it only came into being in 1995, and I think they are still adjusting to the new role.²⁹

It is still a very small Secretariat, consisting of only about 500 people.³⁰ I think the number has not changed a lot in recent years, although the mandate which has been part of them has.

I think that when we think of the WTO, we also have to ask ourselves what [part of the] WTO do we have in mind? Are we talking about the Secretariat? Are we talking about the group of countries that come together to run the business of the business of the WTO?

And I think that, very often, it is very easy to criticize the WTO, not realizing that the problem is really for the countries to agree.

And the other part of the problem is that when countries fail to agree, we expect the WTO to find the solution. I do not think that

29. See World Trade Organization, *The WTO* (explaining the history of the WTO), available at http://www.wto.org/english/thewto_e/thewto_e.htm (last visited July 12, 2003).

30. See World Trade Organization, *Organizational Chart* (providing a chart on the organization of the Secretariat), available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org4_e.htm (last visited July 12, 2003).

even the rule oriented model of the WTO, as we have it today, is equipped to decide—for instance, whether labor conventions should be part of the WTO or not.

I think this is a political decision which the countries are refusing to make because the countries cannot agree amongst themselves. And I think to expect the WTO to come up with the answer to this problem is expecting too much of this organization.

The organization is very limited in terms of resources that the countries have provided to it. And I think that this is one issue that has to be looked at.

In terms of a solution for the future, I think the solution rests probably as much with the countries themselves as with the WTO.

I can think of at least one other international organization, which has come under a lot of criticism recently, and I find that probably it is easier to criticize the international organization than to criticize the countries where the problem really is.

PROFESSOR ALA'I: Thank you very much. Now, I would like to invite questions. I would ask you to come up, and if the microphones work, to introduce yourself and ask your question.

And if you are going to direct it to a specific individual, if you would do so. If not, put it out there, and then I will see whoever would like to answer it. Yes?

MR. KAISER: It seems that you are dwelling upon the effectiveness of the WTO's and organizations, sort of broadly given the trade end issues. But –

PROFESSOR ALA'I: Can you identify yourself? Sorry.

MR. KAISER: Oh, my name is Alan Kaiser. I am an alum[nus] [of] the [Master of Laws] ("LL.M.") Latin [America] Program here.

My question has to do with the potential for the creation of many more nation states within the next 50 to 100 years, and what impact that will promise to have.

No less a figure than Pat Moynihan, just before he left the Senate—I am sorry to say he passed away this week—predicted that there could be as many as 300 to 350 nation states that are part of the United Nations some time 50 years down the road, 100 years down the road It seems to me it connects a little bit with the

comparative advantage issues. There are winners. There are losers—that ten percent figure that Professor [Chantal] Thomas mentioned and so on.

And one issue that has not been addressed is the geographical issue, which is do you have sufficient natural resources? What is going to be happening here on this? Has anybody addressed this? *Foreign Affairs* has [published] articles on things like this too, on the potential for the growth of the nation states and things like that.

PROFESSOR ALA'I: Thank you. Anybody want to address it?

PROFESSOR THOMAS: Actually, it is a very good point when you think about it.

Just on the geographical point, I think one of the challenges that is becoming more apparent is that inequality is a problem, not only between states, but more and more in a globalized economy. . . . Whether you have a plurality of nation states or not, one of the increasing problems is that within countries, globalization tends to create a very large stratification so that you. . . begin to have global cities for folks, whether they are in Shanghai or New York, you know, or Sao Paulo or wherever at the top are living relatively similar lives. And folks that are in more marginalized areas within the states are also experiencing similar deprivations. So that is a problem no matter how many official sovereign members you have in the international community.

PROFESSOR DRIESEN: To me, so much depends on what you mean by “nation states,” but I think that there are a lot of them; obviously problems in coordination agreement are greater. And that is already occurred, because GATT was a small club at first. Now, it is much bigger.

The other thing I think is: sometimes related to that kind of hypothesis is actually disintegration of states, and that comes to a theme I think you mentioned earlier. . . . I mean there is some evidence that having basic infrastructure and governmental structure may be more important than the precise structure of trade for whether a country prospers. And so that could hinder the WTO in achieving its more worthwhile objectives, if that is part of the picture.

And just one [more] very brief point, and that is, in many cases what they referred to as the “disintegration of states” . . . is really . . . a disintegration of artificial states. We are going to see that happening in the aftermath of Iraq where the Kurds to the north decide they want to have Kurdistan again. And, you know, Yugoslavia is the classic example, [and] countries in Africa that were artificially created in the post-colonial world.

So, in some cases, this proliferation of states away from a western colonial imposed model may actually improve things.

PROFESSOR ALA'I: There is an interesting paper that was recently written. If I have your card, I may actually give it to you afterwards, but there is talk [that] nation states may not have much meaning nowadays. I mean there is—you have to look within nation states, as you were saying.

We are having very—like China, a prime example, Shanghai. A very developed, almost industrialized state, city, and then rural China, where you really have the Third World.

So the whole idea of that you actually have a whole monolithic nation state that has—it is becoming more and more [so]—people are thinking about that you should look at nations not as their geographical boundaries, but even within that, how are they functioning.

And that is like a hypothesis for the future that I can see things changing dramatically—both because of the difference in economic scale between cities and rural areas and economic disparities within nations.

Yes, ma'am. Sorry.

MS. SAWYER: My name is Monica Sawyer. I am a current LL.M. student here.

And today, we heard a lot about, you know, anywhere from the movie industry that, you know, it is against trade policies. We heard about the crop producing companies that receive other subsidies from the United States and hinder other companies, and I was wondering if any of you can elaborate on the role that corporations play on international trade. It seems to me that, you know, a lot of that, it is forced by the corporations, that by their lobbying the Congress or whatever, they force nations to act this way or that way.

Thank you very much.

PROFESSOR ALA'I: Would you like [to respond]?

PROFESSOR PALCHICK: I cannot put my finger on the historical reasons why this is true, but it is true, and that is that with respect to copyright intellectual property, that the United States government has really ceded the formation of policy, the advocacy of policy, and the enforcement of policy on intellectual property issues to the industry I think more so than in many other industries.

Perhaps it is because there is [an] intellectual perception that intellectual property is some magic or very difficult to ascertain area of law or thought, and that normal people cannot focus on the best way to go. Perhaps it is because the United States government has always—the United States has always been very proud of the degree to which it has exported intellectual property.

I do not know the reason for it. I think that it is true, though, that the United States government has ceded its intellectual curiosity on this issue to the industry.

PROFESSOR ALA'I: Would you like to [respond]?

PROFESSOR HOWSE: A couple of comments on corporations.

The first is, and I have found myself that corporations are often more prepared to engage in responsive dialogue on, you know, labor issues, environmental issues than, for example, bureaucrats and, you know, international institutions and diplomats. And I think part of the reason is that they are more pragmatic.

They are concerned about making money and making money depends on your reputation, to some extent, in markets where consumers increasingly have preferences that relate to social justice and the environment that they are interested in expressing or prepared to express, in certain cases, in the marketplace.

The second is that the people who work for corporations—and one of my critiques of [a] certain strand of the anti-globalization movement have been their demonization of corporations. I mean the people who work for corporations are not a lot different than many of the activists that march against them. I mean they are educated often in similar universities.

You might be surprised to learn that unlike *laissez-faire* trade economists, they do not have, you know, naive views often about the magic of the marketplace. It is much more academics and bureaucrats who tend to that sort of rigid type view, and so they are more prepared to sit down and talk about the issues. And the official gatekeepers of the WTO be as prepared to engage in responsive dialogue than as are many corporations.

The second, though, perhaps less pro-corporation comment I would make, and sort of an anti-corporation comment is about one trend in international dispute settlement, which has already been mentioned, which is giving corporations the right to sue governments which exists under Chapter 11 of NAFTA.³¹ And I say this as someone who has, you know, occasionally worked with lawyers who act for corporations.

In some of these cases, the corporation has a very good case. There is no labor issue. There is no social justice issue. The corporation has been basically shafted by corrupt government officials, and it is really a good case for international [dispute resolution] while protecting its interests.

In other cases, which I refuse to actually get involved in, I mean corporations are trying to use these legal rules to put pressure on governments to remove or weaken, for example, environmental or health and safety regulations. But what I think one has to understand is that it is a very, very different litigation game when you have the litigation being driven by private industry rather than governments, where you have corporations against governments, and the resources—I mean the corporation will only bring this kind of suit, first of all, if it is willing to burn its bridges with the government it is suing, normally.

Secondly, if there is a lot of money involved, in which case, it will just prep the resources necessary into hiring the lawyers and economists and experts that are required to make the best case. And what has happened I have seen in a number of these cases is that the governments in question do not put the resources into it.

31. *See* North American Free Trade Agreement, Dec. 17, 1992, ch. 11, art. 1116, 107 Stat. 2057, 32 I.L.M. 605 (stating that “[a]n investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation.”).

They spend a lot of time, or their bureaucrats spend a lot of time, complaining about the existence of, for example, NAFTA Chapter 11, which says governments themselves happen to negotiate, and threatening to amend the NAFTA. But they leave the defense of these cases to relatively minimal kinds of legal resources, and that is a very dangerous thing.

I mean it is good for my clients. And it is not necessarily that if those clients have a case that is reasonable and is not threatening to important public values.

But, really, what they are saying is the government has behaved towards us in a non-transparent or a crap way.

I mean that is a legitimate case. I think international laws should protect private actors against certain kinds of abuses by government.

But, on the other hand, if you have this, you know, corporate driven litigation process that is also able to challenge legitimate government processes and governments are too arrogant to put the legal resources necessary into properly defending those cases, which is often that—you know, the way that bureaucrats think in government ministries, then the public interest may well lose out. So one has to seriously think about the desirability of expanding corporate access, or as I proposed, something different, which is to balance it with standing for other kinds of interests in these processes.

The word, “clean hands rule,” which says that a corporation can only sue within NAFTA if it itself has not been engaged in violations of international law—including international human rights law, international labor law, and so on—I think the answer is less now to try and retreat and take away the right to sue from corporations, but to balance it out by giving access to other kinds of non-governmental actors and interests to these sort of processes. And if corporations are going to take the benefit of international law, they should also accept the burden of international law, as it bears on their own corporate practices.

PROFESSOR THOMAS: Padideh [Ala'i], if I can just jump in very quickly, and I know you have been [waiting].

PROFESSOR ALA'I: One more question.

PROFESSOR THOMAS: And I am sure it is going to be a great question.

But just to tie this back to something: I think the point that Raj [Soopramanien] made, which was very good at the end, which was that it would be folly for us to kind of look at the WTO as some monolithic organization and expect it to somehow make changes that are going to benefit the rest of us.

It is an organization that represents a series of dynamics that implicate states and non-state actors, and part of changing the environment within which the WTO operates. And changing the way that the WTO operates is building change from outside as a result of not just a state action, but action amongst non-state organizations and amongst individuals, in other words, international civil society.

Corporations can play an important role there. Other [Non-Governmental Organizations] (“NGO’s”) working with, or putting pressure on, corporations can play an important role. So we will return to this larger idea of building kind of a global demos that [Robert Howse] has written really interesting stuff on, and [David Driesen] was making a couple of comments about it earlier. But I think that that becomes part of the larger—thinking about the role of corporations ties into this larger idea of how do we build a new environment for incorporating all of these concerns.

PROFESSOR ALA’I: Yes, Maki [Tanaka]. One last question.

MS. TANAKA: My name is Maki Tanaka, one of the conference organizers. That is where Congress will articulate the programs, and you know, there [are] kind of several issues. But, somehow, the member has launched Doha.

And [the] Doha declaration is kind of broad, you know, [the] declaration put almost everything together.³² And especially I think now the contentious issue is intellectual property and agricultural subsidies and also the duration between involvement and trade.

32. See World Trade Organization, *The Doha Declaration Explained* (providing a list of issues involved in the Doha Declaration such as intellectual property, transparency in government, technical development, and competition), at http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm (last visited July 12, 2003).

And now, Professor [Chantal] Thomas alluded that there is a kind of overwhelm and if we put these things together, probably they may kind of be overwhelmed. That, on the other hand, the parties have launched this round because they have a kind of fear that they do not want to repeat Seattle. You know, in 1999, the Seattle affair because there was a huge protest between different forces.³³

That is why they kind of bring together, and what I want to ask panelists is from now, if you want to bring success in [the] next step by Mexico, no kind of negotiation is enough. But, basically, it is stopping so there [are] a lot of issues going on.

But now, the negotiation is kind of not moving, because in intellectual property, there is a contentious issue of compulsory licensing and drug.

And, also, in agriculture, the European Union and also developing countries cannot agree, and in the environmental forum, again, this is kind of opposite, you know, force again. The European Union wants to do it, but the developing countries, these are not agreeing.

So I want to ask all the panelists that how can we move from here? How we can—at least members have launched, you know, Doha negotiation, and what should we do to this broad negotiation. And how—what can we expect from this round negotiation?

PROFESSOR ALA'I: I guess what is going to happen in Cancun, okay?

MR. SOOPRAMANIEN: I think this is a very complex question, very difficult question. Let me just offer some thoughts.

First of all, I think that the mandate from Doha is indeed overwhelming, but because the mandate is overwhelming, maybe it also offers the opportunity for agreement for compromises between countries. So there is also the potential for parties to agree to give on certain issues and to accept—you know, to obtain what they want on others. So it offers the possibility for compromise.

33. See Joseph Kahn & David E. Sanger, *Trade Obstacles Unmoved, Seattle Talks End in Failure*, N.Y. TIMES, Dec. 4, 1996, at A6 (noting the collapse of trade talks in Seattle).

The second point I want to make is because the number of countries—well, we were talking a few minutes ago about the increasing number of countries participating.

But there is also the group negotiates now is a lot more unyielding, but it used to be in the bus. This may be one of the problems that was faced in Seattle.

The problem which was faced in Seattle may not have gone away altogether, but Seattle, in a way, was overtaken by events in the sense that Doha was preceded by the events of 9/11, which may have contributed to the package that was agreed in Doha. Of course, the Doha mandate—reaching agreement of the Doha mandate—is the ultimate package, because the mandate was much easier to agree on in the sense that a lot of the issues were worded in very sort of political language where everybody got what they wanted.

But to translate this into a realistic set of agreements may be more challenging, and already people are talking about the possibility of extending the deadline for Doha.

I think, indeed, it is going to be very difficult, and it may—there are two possibilities which people were discussing at the movement. One possibility of reaching agreement on a more limited set of issues.

But the more realistic possibility, I think, is that agreement is not going to be reached in time for the work to be concluded as expected at the beginning of 2005, when people are talking about already about the possibility of an extension. Others will address other aspects of the question that I focus on, institutional capacity, amongst member states.

Your question is interesting. It went from the perspective of the [WTO Chair]. It is like you had the heady, early success of Singapore and then the horrible disasters of Seattle and now it is Doha. There is a feeling that things were kind of hanging in the balance like can we work? Can we pull through all these challenges and actually come up with something that works? And something that I think is a challenge in terms of building, you know, robust sort of democratic institution. And we talk about an overwhelming agenda.

Whether I think we want to or not, want it to be this way or not, all these issues, the wide array of issues from, you know, services to labor and environment are going to be implicated directly or indirectly in negotiations. So it is an incredibly complex sort of issues.

But one thing that is of concern, I think, is very clear disparities in institutional capacity in the negotiations and how that affects the ability of governments to really participate, and also the ability of NGO's to influence what positions their government takes.

So, in this sense, the United States is a disproportionately influential player because it can bring hundreds of lawyers to multi-lateral negotiations, you know, and because it has such a well developed NGO and [societal] set of networks. And it is up against, you know—when you are talking about smaller countries that may not even have a permanent representative in Geneva and may not even have access to the documents in their original language.

You know, those kind of issues really affect the ability of governments to reach, I think, agreements that we would think of as being democratically legitimate, and that is a challenge, I think, going forward for the WTO and the other multi-lateral institutions as well.

PROFESSOR SEALING: Well, I will be brief and I think I will be uncharacteristically optimistic, too, and that is because of something [Padideh Ala'i] said earlier. And that is let us not necessarily look at the immediate past failures, but let us go all the way back to the 1940's, the origins of GATT, or even a few years earlier to Bretton Woods.

And the original GATT threw up its hands and said, "We cannot even bring agriculture or intellectual property into the mix."

So when you look at Seattle and then Doha and Cancun coming up, although I think it is fair to say that there are problems looming, and, again, this new American unilateralism and problems of Iraq may have repercussions, I think we can see continued progress in the form of, admittedly, baby steps, but at least something. And whether it is an extension, I think we will still continue to move forward. I think the direction and the momentum is inevitable.

PROFESSOR ALA'I: Robert [Howse]?

PROFESSOR HOWSE: I would only say this: The sort of energy that resulted in “the success,” of the Uruguay round, I believe was somehow connected to the particular historical moment which, in many ways, was a kind of high-water mark of neoliberalism or neoliberal ideology.

A friend of mine in Germany refers to it as the “Francis Fukuyama round,” because it was influenced by the ethos that somehow the North American model of liberal capitalism represented the end of history, and it was just a matter of, you know, all other countries sooner or later getting in line.

And so with that kind of ethos, you could understand why you would get something like [Sanitary and Phytosanitary Measures] (“SPS”)³⁴ where science is supposed to resolve differences about health, something like, you know, the services agreement or something like the TRIPS agreement. I think where we are today is perhaps well somewhat caustically described by David Kennedy³⁵ as chastened neoliberalism. That is to say that neoliberalism is a decayed ideology.

There are pockets in international bureaucracies where they still really believe in it like a religious faith. But, you know, even major players in industry do not really believe in it that much anymore. On the other hand, there is no alternatives to the model around which one could make a set of new agreements cohere.

So within a period of, I think, of free floating in a certain sense, the existing institutions and the way they operate are partially delegitimized. But because we cannot see alternatives, you know, it would be silly to try and full delegitimize them. And I think in this climate and without decisive political leadership from major powers, it is unlikely that very much will come of the Doha round.

34. See Agreement on the Application of Sanitary and Phytosanitary Measures, April 15, 1994, art. 3.1, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1125 (1994), available at http://www.wto.org/english/docs_e/legal_e/15-sps.pdf (last visited July 27, 2003).

35. See David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, at 572, 608 (“The conditionality/neoliberal tradition often, though not always, proposes a narrower range of plausible national styles than those working in the traditions of development and modernization.”).

The current U.S. administration's unilateralism has been referred to. In fact, to be fair to Bush, he is interested in trade agreements, but much more interested in regional and bilateral approaches.

And again, as long as the WTO remains closed to serious discussions about labor linkages and environmental linkages—well, it is slightly open, but still mostly closed—there will be tremendous incentives to try and deal with those issues on a regional or bilateral basis and a corresponding lack of energy and enthusiasm for putting much into the WTO track of things.

PROFESSOR ALA'I: I want to thank all the panelists and all of you for being with us today. I want to thank again the International Law Review for putting this great conference together Thank you.