

TRADE AND PROGRESS: THE CASE OF CHINA*

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China's accession to the WTO is widely understood as an important step towards greater global market liberalization and integration. However, this step has been also perceived in an ambivalent way. On one hand, the global market liberalization would have never been really completed without participation of such a major player as China. On the other hand, many observers articulated concerns about China's ability to integrate into the WTO system. In order to tackle the issues of concern, attention was paid mainly to technical issues, which were seen as a precondition for China's successful integration into the WTO system. For this reason, topics related with market integration, such as e.g. liberalization requirements, as well as topics related with transparency and legal and administrative policies, necessary for securing of just and equitable resolution of commercial and trade disputes, were initially addressed.

Still, in the light of the changing and evolving geopolitical climate, it has become more evident that Non-Trade Concerns (NTCs) might be another multifaceted topic requiring special attention. EU and US, becoming increasingly aware of the fact that competition of economies with different level of development might result not only in job losses in developed countries due to relocation of production, but also to general deterioration of environmental, social and health standards, have accentuated the importance of a global consensus on NTCs and

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their inclusion into EU and US external policies concerning foreign trade and investment. Civil society from the developed world, in general, is afraid that further liberalization may endanger public policies at different levels: environmental protection and sustainable development, good governance, cultural rights, labor rights, public health, social welfare, national security, food security, access to knowledge, consumer protection, and animal welfare.

On the other hand, coalition consisting of China and other BRICS countries as well as other developing countries gaining more influence in the WTO and other international fora has been able to articulate discontent with measures adopted by developed countries to address NTCs. The clash between interests of developed and developing countries reveals potential unfairness and inconsistencies of the international system, including the international trade system, which needs to undergo a deep reform to integrate the developing countries' needs.

Many of the measures that developed countries introduce to address NTCs were received by developing countries with suspicion, resistance, and even hostility. Developing countries, including China, doubt the authenticity of such considerations and think they might actually hide protectionist purposes. Additionally, developing countries see these measures as an indirect form of western imperialism whereby they will have no choice but to comply with the social, ethical, and cultural values of the developed states. Nonetheless, not only has China undergone serious reforms and adopted new regulations to address the issue of NTCs, but the country has even begun to play an important role in the international negotiations on NTCs—such as those on climate change, energy, culture, and so on.

However, at the same time it provides an opportunity for China and other developing countries to defend their interests in a constructive dialogue with developed countries and restructure the system in order to find a necessary balance between globalization and sustainable development or to shape it according to their interests.

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I. INTRODUCTORY ISSUES: RESORTING TO "NON-TRADE CONCERNS"
TO STEM THE EXCESSES OF GLOBALIZATION

From the WTO protests in Seattle in 1999 to "Occupy Wall Street" in 2011, civil society movements have continued to express their concerns about the negative consequences of globalization for human, social, and environmental rights and justice, as well as their fear and disagreement toward the expansion and supremacy of world trade and of the monetary and commercial commodification of all interpersonal relations and components.

The ongoing economic instability in several countries and regions throughout the world, along with the volatility of markets and job losses, have been leading to an increase in protests that are currently reaching the highest possible levels of conflict against the so-called establishment.

Additionally, the growing political discourse and public opinion regarding the migration crisis and the global fight against terrorism are also providing momentum to some relevant segments of this variegated movement of protests.

Majority votes favoring Brexit and other political turmoil happening around European countries, in the United States, and in different parts of the world are just some of the most critical examples on how the existing systems are failing. Specifically, global governance and law with borderless globalization are to blame for the inability to find appropriate solutions to face the challenges of a constantly changing society. Unfortunately, this inability creates the risk that an increasing part of the population, who are unable to benefit from such globalization, will be left behind

For example, more and more political leaders are trying to use this discontent among the society for obtaining an easy consensus, without truly having a real program to improve the life of the people. More importantly, without endorsing the intrinsic dangers, a strong shift back towards nationalism might come to fruition in the long-term as a result.

The related fears of the people toward the risks of a world without barriers are very real and concrete. Additionally, the proposed solutions to address these problems are certainly influenced by the negative visions on globalization and liberalism, which neglect to take into account the positive effects of the free trade and liberalization of the markets.

From the beginning of the Industrial Revolution to recent times, the success of the capitalist mode of production and its positive impact are visible in its results and achievements in terms of demographic, economic, and technological development. Between 1810 and 2010, the data shows that the total income per capita has multiplied by nine, the world population by six, and the pace of technological innovation and investments grew extensively.

However, while considering the legitimacy and efficacy of the production of goods industrially and the commercial distribution of wealth at the time of global expansion, one needs to bear two important

caveats in mind. The first caveat is that the global development of the industrial mode of production of goods and its related international value chains have caused a perturbation in the balance that regulates the interaction between man, the Earth and the environment: climate change.¹ Increase in global average air temperature, increase in sea levels, widespread melting of snow and ice, increase in the cyclonic activity, increase in precipitation, reduction of oceans' capacity to absorb heat and carbon dioxide, depletion of fisheries, soil erosion, and pollution are some of the flip sides of the global triumph of the Industrial Revolution.

As stated in the report *Limits to Growth*, issued by the Club of Rome in 1972,² and as rephrased more recently in the 2005 *Millennium Ecosystem Assessment*, "[h]uman activity is putting such strain on the natural functions of Earth that the ability of the planet's ecosystems to sustain future generations can no longer be taken for granted."³ Since the current mode of development is considered as not being sustainable, if no changes occur, this mode of development will soon result in its own end. In other words, human expansion and development have exhausted the Earth's production, absorption, and recycling capacity. The second caveat is that the inequalities between the rich and poor countries have increased paradoxically due to global development of the commercial wealth distribution. This process has taken place since 1820 and throughout the 20th century with the exception of the "golden age of capitalism" from 1950-1973 with economies from all over the world who prospered during such period.⁴

Therefore, the idea of limiting the excesses of globalization with an improved and well-balanced system of global governance while monitoring and bettering the international institutions that create them—such as the International Monetary Fund (IMF) or the World Trade Organization (WTO)—may be, to a certain extent, justified and it will be developed further in the rest of this article along with a reasoning on multinational companies and other non-State actors.

As the Former Director-General of the WTO Pascal Lamy once stated:

¹ Gabrielle Marceau & Mireille Cossy, *Institutional Challenges to Enhance Policy Coordination – How WTO Rules Could Be Utilized to Meet Climate Objectives?* 371-94 (Proceedings of the World Trade Forum 2007, International Trade on a Warming Globe: The Role of the WTO in the Climate Change Debate, 2008). See also Paolo D. Farah & Riccardo Tremolada, *Global Governance & Intangible Cultural Heritage in the Information Society: At the Crossroads of IPRs & Innovation*, in THE HANDBOOK OF GLOBAL SCIENCE, TECHNOLOGY, AND INNOVATION (Daniele Archibugi & Andrea Fillipetti eds., 2015).

² DONELLA H. MEADOWS ET AL., LIMITS TO GROWTH: A REPORT FOR THE CLUB OF ROME'S PROJECT ON THE PREDICAMENT OF MANKIND 1-34 (1972).

³ MILLENNIUM ECOSYSTEM ASSESSMENT BOARD STATEMENT, LIVING BEYOND OUR MEANS: NATURAL ASSETS & HUMAN WELL BEING - MILLENNIUM ECOSYSTEM ASSESSMENT 3 (2005).

⁴ Andrés Solimano, *The Evolution of World Income Inequality: Assessing the Impact of Globalization*, ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN (ECLAC), 7-37 (Dec. 2001), <http://www.cepal.org/en/publications/5343-evolution-world-income-inequality-assessing-impact-globalization>.

"For better and for worse, globalization of the issues increases, on a daily basis, the need to organize democratic, global forms of governance that are both legitimate and efficient. In other words: democratic."⁵

In fact, for many years, the General Agreement on Tariffs and Trade (GATT) and the WTO have been highly criticized and portrayed as the least transparent and democratic of all international organizations. Indeed, most of the meetings and debates are held *in camera*, and agreements are reached at the intergovernmental level without any public participation.⁶ The lack of civil society participation in the ongoing negotiation rounds at the WTO affects the rights of all parties to both information and participation, as they were made clear by the 1998 Aarhus Convention (*Access to Justice*),⁷ Article 21 of the Universal Declaration of Human Rights,⁸ as well as Principle 10 of the Rio Declaration on Environment and Development.⁹

Nevertheless, the WTO has gradually begun to open up to civil society, both through the participation of Non-Governmental Organizations (NGOs) in the plenary sessions of the most important ministerial conferences, as during the Singapore Ministerial Conference in 1996, the Geneva Ministerial Conference, and the Bali Ministerial Conference in 2013,¹⁰ and through the establishment of a contact group dedicated to NGOs within the WTO secretariat. Additionally, the WTO website provides access to a wide range of highly detailed information on trade issues and the relevant committees. Moreover, the WTO's Appellate Body (AB) has authorized the submission of *amicus curiae* briefs as well as the opening of public hearings.¹¹ Thus, as trade institutions expand their competence, the role of civil society in the institutions that govern international trade is becoming increasingly substantial.¹² Considering

⁵ PASCAL LAMY, LA DEMOCRATIE-MONDE - POUR UNE AUTRE GOUVERNANCE GLOBALE 20 (2004).

⁶ For a general overview of the WTO rules, see PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 917 (2d ed. 2008); MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY 989 (2003); DAVID LUFF, LE DROIT DE L'ORGANISATION MONDIALE DU COMMERCE. ANALYSE CRITIQUE 771 (Emile Bruylant 2004); PAOLO PICONE & ALDO LIGUSTRO, DIRITTO DELL'ORGANIZZAZIONE MONDIALE DEL COMMERCIO 505 (Diritto Internazionale e Ordine Mondiale 2002).

⁷ United Nations Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447; 38 ILM 517 (1999).

⁸ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

⁹ United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June. 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992).

¹⁰ DIANE A. DESIERTO, PUBLIC POLICY IN INTERNATIONAL ECONOMIC LAW: THE ICESR IN TRADE, FINANCE, AND INVESTMENT 235 (2015).

¹¹ Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998); Gabrielle Marceau & Matthew Stilwell, *Practical Suggestions for the Administration of Amicus Curiae Briefs by WTO Adjudicating Bodies*, 4 J. INT'L ECON. L. 155, 155 (2001).

¹² Heidi K. Ullrich, *Expanding the Trade Debate: The Role of Information in WTO and*

the growing transparency within the WTO, but also the stand-still of most of the multilateral negotiations at the WTO, it has to be noted that recently all this anger, disagreement and protests have been addressed toward the Regional Trade Agreements (RTAs) such as the TTIP and the TPP. The RTAs in general are indeed receiving these similar critics of lack of transparency and of risks of affecting some of the most important NTCs.

Hence, the right approach is not to oppose the global sovereignty of certain international organizations as a whole, but rather to proactively and constructively propose concrete reforms, changes or new arrangements¹³ to provide such institutions with more democratic legitimacy. In addition to the increasing democratic transparency of their decisions, it is mostly the outer frame of analysis which should be amended.¹⁴

Democratic legitimacy and open dialogue, global social justice and sustainable development based on human rights principles and careful consideration to NTCs when negotiations are ongoing and new liberalization policies are proposed, should be used as the regulatory framework to structure global expansion of economic welfare as well as WTO rules.¹⁵ Yet, the difficulty and limit of this approach lies in the fact that it affirms both, that human rights should guide the process of global legal integration and that the WTO should deal with such process of integration of those important societal principles within the trade system.¹⁶ Unfortunately, this is not always possible within international organizations and through binding international agreements which require the necessary consensus of all the countries and the often diverging visions on what are human rights and how their protection should be implemented. Suggesting that WTO law guarantees respect for fundamental human rights implies a refusal to evaluate the practices of

Civil Society Interaction, Information and Communication Technologies and Human Rights Advocacy: the Case of Amnesty International, in CIVIL SOCIETY IN THE INFORMATION AGE 19, 19-36 (Peter Hajnal ed., 2002); Elisabeth Tuerk, *The Role of NGOs on International Governance NGOs and Developing Country WTO Members: Is there Potential for Alliance?*, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS 169, 169-210 (Griller Stefan ed., 2003).

¹³ THOMAS D. ZWEIFEL, INTERNATIONAL ORGANIZATIONS AND DEMOCRACY: ACCOUNTABILITY, POLITICS, AND POWER 14 (2006).

¹⁴ Meinhard Hilf & Goetz J. Goettsche, *The Relation of Economic and Non-Economic Principles in International Law*, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS, *supra* note 12, at 5; ROBERT HOWSE, *How to Begin to Think about the "Democratic Deficit" at the WTO*, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS, *supra* note 12, at 79.

¹⁵ Ernst-Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT'L L. 621, 621-50 (2002). See also Gabrielle Marceau & Aline Doussin, *Le Droit du Commerce Internationale et les Droits Fondamentaux et Considérations Sociales*, 27 L'OBSERVATEUR DES NATIONS UNIES. 241, 241-47 (2010).

¹⁶ Ernst-Ulrich Petersmann, *From "Negative" to "Positive" Integration in the WTO: Time for 'Mainstreaming Human Rights' into WTO Law?*, 37 COMMON MKT. L. REV. 1363, 1363-82 (2000).

organizations such as the WTO itself and the IMF,¹⁷ but also means that within those organizations, Member States would have agreed on a common core of values to be respected.

Indeed, since free-trade and liberalization should be the final outcome and the main guiding principles, WTO rules not only prevent Members from discriminating against other Members in general, but also severely restrain their ability to adopt trade measures against another Member whose practices do not respect human rights. In fact, the ability of the Member States to advance human rights is subject to the condition that it must be done without violating the principles of Most Favored Nation (MFN) and National Treatment (NT). Likewise, accession to the WTO is not subject to any criterion related to respect for human rights, and its rules require that each Member—following accession to the Organization—can enjoy the same commercial benefits as the others, thus preventing Member States from discriminating based on the protection of human rights.¹⁸ Even though the WTO does not have any human rights criteria for membership, between 2003 and 2007, when countries sought to accede to the WTO, the Member countries focused on how the applicant nations protected the rights of citizens as well as non-citizens.¹⁹ Nevertheless, Article XX (f) exception allows Members to adopt measures that restrict trade in goods manufactured by prisoners. Another interesting example is the waiver granted to all countries that are Parties to the *Kimberley Process*,²⁰ which is designed to certify the origin of rough diamonds²¹ from sources that are free of conflict fueled by diamond production (so-called *blood diamonds*).²² Some WTO provisions might be interpreted so as to give Members the opportunity to pursue human rights objectives. The general exceptions set out in GATT Article XX could provide a viable framework for action. Article XX includes

¹⁷ Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815, 815-84 (2002).

¹⁸ There is, of course, a possibility to opt out of commercial relations with a new Member (so-called cause of non-compliance), but it has never been used by any Member.

¹⁹ Susan Ariel Aaronson, *Seeping in Slowly: How Human Rights Concerns are Penetrating the WTO*, 6 WORLD TRADE REV. 1, 12 (2007), https://usitc.gov/research_and_analysis/economics_seminars/2008/Aaronson.pdf.

²⁰ The Parties of the Kimberley Process are listed at the following address: <http://www.kimberleyprocess.com/site/participants.html> (last updated Aug. 21, 2016). They include Angola, Armenia, Australia, Bangladesh, Belarus, Botswana, Brazil, Canada, Central African Rep., China, Côte d'Ivoire, Croatia, Dem. Rep. of Congo, European Community, Ghana, Guinea, Guyana, India, Indonesia, Israel, Japan, Laos, Lebanon, Lesotho, Malaysia, Mauritius, Namibia, Norway, New Zealand, Russia, Separate customs territory of Taiwan, Sierra Leone, Singapore, S. Africa, S. Korea, Sri Lanka, Switzerland, Tanzania, Thailand, Togo, Ukraine, U.S., Venezuela, Vietnam, and Zimbabwe.

²¹ Rough Diamonds are diamonds that are unworked or simply sawn, cleaved, or bruted and fall under the Relevant Harmonized Commodity Description and Coding System 7102.10, 7102.21 and 7102.31. Kimberley Process Certification Scheme § 1 (Aug. 2003). Margo Kaplan, *Note, Carats and Sticks: Pursuing War and Peace through the Diamond Trade*, 35 N.Y.U. J. INT'L L. & POL. 559, 587 (2003).

²² Daniel Feldman, *Conflict Diamonds, International Trade Regulation, and the Nature of Law*, 24 U. PA. J. INT'L ECON. L. 835, 840 (2003).

language allowing nations to restrict trade when necessary to protect life, protect public morals, secure compliance, and conserve natural resources; at the same time also allowing Member States to restrict trade for reasons of national security. This was noted for human rights violations caused by South Africa, and the UN Security Council authorized the trade restrictions.²³

On the other hand, the trend of signing RTAs where States often choose carefully with which other States they wish to engage in such a partnership²⁴ can give more importance to the influence of human rights in trade policy decisions and have consequences in terms of legal empowerment. But as expressed before, RTAs are also facing very strong critics for lacking transparency and potentially affecting NTCs.

This debate also looks at the idea of resituating the notion of Non-Trade Concerns (NTCs). The integration of NTCs within the WTO decision-making process and within the RTAs should include a regulatory reference on how to protect and raise concerns about certain non-economic values and fundamental rights within the economic criteria that have defined globalization so far.²⁵ From this perspective, it is of relevant importance to stress that the current stand-by or the eventual success of the Doha Round depends also on the steps towards how many issues connected to NTCs will be negotiated. The most recent negotiations have experienced the strongest disagreement of the developing countries and least-developing countries, and the ability, real intention, and possibility of bringing all the different countries characterized by diverging needs and level of development, in joint conversations and negotiations on NTCs, relevant conditionality and requirements will decide the outcome of future negotiations.

The right to development and other associated rights, such as the right to food, shelter, water, and so on,²⁶ are all, to some extent, directly affected by international trade. To elucidate, international trade law, both within and outside the WTO, determines how global trade evolves and limits the ways in which trade policy can be used to encourage

²³ Aaronson, *supra* note 19, at 10.

²⁴ This is, of course, subject to negotiation and depends on negotiating power of the different parties involved.

²⁵ James R. Simpson & Thomas J. Schoenbaum, *Non-Trade Concerns in WTO Trade Negotiations: Legal and Legitimate Reasons for Revising the "Box" System?*, 2 INT'L J. AGRIC. RESOURCES, GOVERNANCE & ECOLOGY 399, 399-410 (2003).

²⁶ LUDIVINE TAMIOTTI ET AL., TRADE AND CLIMATE CHANGE. A REPORT BY THE UNITED NATIONS ENVIRONMENT PROGRAMME AND THE WORLD TRADE ORGANIZATION 1-124 (WTO Publications: World Trade Organization 2009); PATRICIA BIRNIE, ALAN BOYLE & CATHERINE REDGWELL, INTERNATIONAL LAW AND THE ENVIRONMENT 43-103 (3d ed. 2009); Christine Breining-Kaufmann, *The Right to Food and Trade in Agriculture*, in HUMAN RIGHTS AND INTERNATIONAL TRADE 341, 381 (Thomas Cottier, Joost Pauwelyn & Elisabeth Bürgi Bonanomi eds. 2005); Rebecca Bates, *The Road to the Well: An Evaluation of the Customary Right to Water*, 19 REV. EUR. CMTY. & INT'L ENVTL. L. 282, 293 (2010); Joanne Scott, *Integrating Environmental Concerns into International Economic Law*, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS, *supra* note 12, at 371; Upendra Baxi, *The Human Right to Water: Policies and Rights*, in WATER AND THE LAWS IN INDIA 149, 166 (Ramaswamy R. Iyer ed., 2009).

domestic policies, which, in developing countries, allow greater legal empowerment. Permitting more substantial participation of developing countries within the WTO and promoting the opening up of trade and custom barriers, such as for agricultural products, might have an extremely important impact on the issues connected to NTCs. While furthering this assertion, rights of disadvantaged farmers in developing countries could be positively, though indirectly, affected. This is precisely why some experts call for the expansion of the concept of NTCs to the dissemination and production of agricultural products, qualifying them as global public goods.²⁷

With regard to NTCs, the main issue is that developing countries do not have the same concerns as developed ones. When a country still faces problems related to basic healthcare and hygiene, fewer resources remain to deal with issues like animal welfare and food safety. Developing countries will try to achieve a high level of protection for NTCs, primarily in those areas where the same level of protection is granted by industrialized countries whose market they want to access. The key challenge is how to satisfy the right of developed nations to grant social values the degree of protection they consider appropriate, while minimizing the negative effects in terms of market distortion for their trading partners. This is exactly where the WTO can prove itself very useful. For example, the regulation of investments and protection of intellectual property rights on product and production processes as well as issues related to patents derived from traditional knowledge or Chinese traditional medicine, fall within both the international legal system (Agreement on Trade Related Aspects of Intellectual Property Rights or TRIPs²⁸ and Patent Cooperation Treaty or PCT)²⁹ and the European one—European Patent Convention.³⁰

The following section examines the particularities of China at a crossroads between the “Right to Development” and “Non-Trade Concerns,” given that China still seeks to grow its economy and expand industry to bring millions of more people out of poverty. Simultaneously, it plays an essential role (together with other BRICS countries) in creating a model to “develop” sustainably, with a view towards tackling climate change, avoiding the increasing environmental risks and damages, and balancing the attractions of foreign investments with labor rights, human rights, and public health.

The subsequent section titled “Non-Trade Concerns Status in the

²⁷ Simpson & Schoenbaum, *supra* note 25, at 399-410.

²⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 ILM 1197 (1994).

²⁹ Patent Cooperation Treaty, June 19, 1970, TIAS 8733, 28 UST 7645; 9 I.L.M. 978 (1970).

³⁰ Convention on the Grant of European Patents (European Patent Convention), Oct. 5, 1973, 1065 U.N.T.S. 199 (as revised by the Act revising Article 63 EPC of Dec. 17, 1991 and the Act revising the EPC of Nov. 29, 2000), <https://www.epo.org/law-practice/legal-texts/html/epc/2013/e/ma1.html>.

WTO Multilateral System," develops a non-exhaustive overview and explores the integration of NTCs in the WTO. In particular, the interplay between environment and trade is examined,³¹ as are the prospects for the new acceding Members (taking China as a case study and its accession to the WTO in 2001). Also examined are the changes in the attitude of the WTO DSB towards ranking public health issues over trade; the relations between food security and international trade regulations; the difficult balance of the right to access essential medicines and the protection of their IPRs; the respect of other human rights in the multilateral trading system; and the relations between cultural products and public morals.

II. CHINA AT A CROSSROADS: FROM "RIGHT TO DEVELOPMENT" TO "NON-TRADE CONCERNS" IN THE GLOBAL CONTEXT

In recent years, the world has been confronted with a critical depletion of natural resources, with increasing risks and disruption to the environment, overpopulation as a major environmental issue, extremely deteriorating public health, economic depression at the global level, a massive increase in commodities pricing (even the most essential ones in view of guaranteeing the right to food), global famine in poor countries as well as the reappearance of hunger in growing areas of the developed world, international tensions, and, the eventual adoption or re-adoption of martial law.

In this evolving and constantly changing context, China successfully developed over the last 30 years without completely overcoming its internal disparities. The tension between the national regime and international influences has never been completely resolved.³² On the one hand, the Chinese Government keeps encouraging vertical integration of the production system within its borders in order to build an independent industrial system. On the other, China has become a global economic player, contributing massively to economic globalization: not only has it received an enormous amount of foreign direct investment, but it also actively engages in global trade and capital exports.

³¹ One of the examples that will be examined in the following analysis is the *US-Shrimp* case. If we can justify restricting importation of shrimp to comply with the societal objective to protect turtles, we certainly can bend economic laws to protect NTCs and related fundamental, social and environmental rights. See GABRIELLE MARCEAU, *Trade and the Environment: The WTO's Efforts to Balance Economic and Sustainable Development*, in *ECONOMIE ENVIRONNEMENT: ETHIQUE, DE LA RESPONSABILITÉ SOCIALE ET SOCIÉTALE* 225, 225-35 (C. Bovet, H. Peter & R. Trindade Trigo eds. 2009). See also Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998); Panel Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/RW (June 15, 2001); Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products Recourse to Article 21.5 of The DSU by Malaysia*, WTO Doc. WT/DS58/AB/RW (Oct. 22, 2001).

³² GIANMARIA AJANI, *Legal Change and Economic Performance: An Assessment*, in *ASIAN CONSTITUTIONALISM IN TRANSITION: A COMPARATIVE PERSPECTIVE* 281, 281-305 (Tania Groppi, Valeria Piergigli & Angelo Rinello eds., 2008).

It is arguable whether China's accession to and integration in the WTO had beneficial consequences for world trade as a whole or has only negatively affected its trading partners while at the same time stressed the limits of the WTO and the trading system in an irreparable way. Probably, neither of these two options is totally correct. China's accession to the WTO has been a milestone³³ for the country itself, for world trade, and for all the other emerging economies and developing countries that have acquired more negotiating power over the years, and has established new geopolitical relations through the BRICS influence in the international trade and non-trade arenas.

China achieved accession to the WTO following a nearly 15-year negotiation process which had many legal, political, and social implications for all parties.³⁴ China's accession surely presented the world trading system with opportunities, but also posed the challenge of integrating an economy with strong structural, behavioral and cultural constraints.³⁵ Many of the effects of this process are now evident throughout the world after nearly fifteen supplementary years, but China's role in world trade has merely added complexity to the preexisting puzzle created by globalization.

At the time of its accession, the other WTO Members endorsed and acknowledged that China's participation was necessary to further expand the global market liberalization and integration, which are the fundamental principles of the WTO. It has been clearly understood that, even though the challenges and implications were many, without China, the WTO would have been only a partial *worldwide* trade organization.³⁶ But, in the years that followed China's accession to the WTO, other factors revealed that the rules set by Western countries to regulate their interests could not be simply applied to non-Western countries without producing friction. Within the WTO system, the best example of these evident disharmonies is the complete standstill of the Doha Round.

The road to the signature of China's Accession Protocol was long,³⁷

³³ Robert Herzstein, *Is China Ready to WTO Rigors?*, WALL ST. J. (Nov. 16, 1999), <http://www.wsj.com/articles/SB942702872275081590>.

³⁴ See generally Karen Halverson, *China's WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT'L & COMP. L. REV. 319, 319-23 (2004); Alan Alexandroff, *Concluding China's Accession to the WTO: The U.S. Congress and Permanent Most Favored Nation Status for China*, 3 UCLA J. INT'L L. & FOREIGN AFF. III 23, 25 (1998-1999).

³⁵ See JOHN H. JACKSON, *The Institutional Ramifications of China's Accession to the WTO, in CHINA IN THE WORLD TRADING SYSTEM: DEFINING THE PRINCIPLES OF ENGAGEMENT* (Frederick M. Abbott ed., 1998).

³⁶ See Press Release, WTO, WTO Ministerial Conference Approves China's Accession (Nov. 10, 2001), http://www.wto.org/english/news_e/pres01_e/pr252_e.htm; James Feinerman, *China's Quest to Enter the GATT/WTO*, 90 AM. SOC'Y INT'L L. PROCEDURE 401, 402 (1996). See also MARIA WEBER, *IL MIRACOLO CINESE: PERCHE BISOGNA PRENDERE LA CINA SUL SERIO* 83-84 (2003); Leila Choukroune, *Chine et OMC: l'Etat de Droit par l'Ouverture au Commerce International?*, 6 REVUE DE DROIT DES AFFAIRES INTERNATIONALES 655, 655 (2002).

³⁷ Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AM. U. INT'L L. REV. 1469, 1471 (1999-2000).

but these difficulties pale in comparison to those that have not yet been tackled in terms of achieving real implementation of its provisions throughout the People's Republic of China (PRC)³⁸ and those still need to be solved at the global level to integrate China and other countries that have acceded to the WTO in the last 10 years. Globalization and expansion of trade have created an interconnected world with the result that some countries have benefited from an increase in their economic development while others have seen a gradual reduction in their growth rates and employability of their citizens. These challenges are even more relevant considering the impact of the economic crisis in 2008. Following the crisis, the system had to integrate the increasing number of petitions from developing countries and emerging economies in many different areas and, on the other side, to account for the requests from civil society in the developed world to protect non-economic values that were under stress due to the increasing growth of many poor and developing countries and the contraction in growth (and its social impact) of the industrialized world. Somehow, globalization is finally bringing more prosperity, wealth, and opportunities to the developing world with the need to duly monitor the actions of multinational companies located and operating in those countries to limit their incredible power and influence. At the same time, the developed world is not growing as before because lower-cost products from developing countries have taken the market share previously belonging to the products from the industrialized countries.

Prior to China's accession to the WTO and the subsequent debates on implementation, a great number of analysts have argued that not only will China's integration be long and difficult,³⁹ but it could also damage the Organization and its Members. In view of overcoming these challenges, some experts decided to focus on the analysis of the market access concessions, tariff reductions, or liberalization requirements for China's integration in the world trading system.⁴⁰ A second group of scholars, researchers, and analysts placed more emphasis on transparency issues, such as legal and administrative policies, that China must establish to ensure equitable and efficient resolution of commercial

³⁸ See Paolo Davide Farah, *Five Years of China's WTO Membership. EU and US Perspectives about China's Compliance with Transparency Commitments and the Transitional Review Mechanism*, 33 LEGAL ISSUES OF ECONOMIC INTEGRATION 263, 263-304 (2006); Donald C. Clarke, *China's Legal System and the WTO: Prospects for Compliance*, 2 WASH. U. GLOBAL STUD. L. REV. 97, 97 (2003).

³⁹ Paolo Davide Farah & Elena Cima, *China's Participation in the World Trade Organization*, in EL COMERCIO CON CHINA. OPORTUNIDADES EMPRESARIALES, INCERTIDUMBRES JURIDICAS 83, 87 (Aurelio López-Tarruella Martínez ed. 2010). See generally *China and the WTO: Compliance and Monitoring: Hearing Before the U.S. - China Economic and Security Review Commission*, 108th Cong. (February 5, 2004).

⁴⁰ Farah, *supra* note 38 at 263-304; U.S. GOV'T ACCOUNTABILITY OFF. (GAO), REPORT TO CONGRESSIONAL COMMITTEES: U.S.-CHINA TRADE, OPPORTUNITIES TO IMPROVE U.S. GOVERNMENT EFFORTS TO ENSURE CHINA'S COMPLIANCE WITH WORLD TRADE ORGANIZATION COMMITMENTS, GAO-05-53, 6 (2004), <http://www.gao.gov/new.items/d0553.pdf>.

and trade disputes.⁴¹ However, the issue of the consequences and influence of China's WTO accession on NTCs has rarely been addressed,⁴² which is now becoming even more evident in the geopolitical context, considering the impact that China along with the other BRICS and developing countries has, not only at the WTO, but also in other international fora.

The intersection of the NTCs and China's participation in the WTO is manifested in the social and environmental consequences of the competition between economies with different levels of development as well as different levels of social protection and implementation of health and environmental standards. Still, the relocation of production seems to have been the only answer to the increasing economic pressure exercised on European and American companies by "low-cost" producers. Unfortunately, such relocation has resulted in job losses for European and American citizens and could have a corrosive influence on fundamental social values in Europe and the United States as well as in the host countries. Both public opinion and political leaders, as well as policy makers, fear that international trade—and, in particular, its further liberalization—may endanger public policies at different levels: environmental protection and sustainable development, good governance, cultural rights, labor rights, public health, social welfare, national security, food security, access to knowledge, interests of consumers, and animal welfare.⁴³ A consensus has emerged on the necessity to integrate NTCs—which reflect different social aspirations and fears—into the external policy of the European Union and the United States to adopt measures related to international trade and foreign investment. Moreover, the European Union and the United States strongly demand the possibility to act in all international areas to defend and preserve these values by giving them a high degree of protection.

Nevertheless, many of the measures that developed countries

⁴¹ *Id.* at 6; Halverson, *supra* note 34, at 346; Jiangyu Wang, *The Rule of Law in China: A Realistic View of the Jurisprudence, the Impact of the WTO, and the Prospects for Future Development*, SINGAPORE J. LEGAL STUD. 374, 374-89 (2004); Alan Alexandroff, *The WTO's China Problem*, 21 POLICY OPTIONS. 64, 64 (2000).

⁴² Paolo Davide Farah, *Le Rôle de la Chine et de l'OMC dans le Développement des «Considérations Autres que Commerciales» pour Réguler le Commerce Mondial de Façon Plus Juste et Durable (The Role of China and of the WTO for the Development of the Non-Trade Concerns to Regulate the World Trade in a More Just and Durable Way)*, in *ECONOMIE DE MARCHÉ, DROITS ET LIBERTES ET VALEURS COMMUNES EN EUROPE ET EN ASIE (Market Economy, Rights and Freedoms, and Common Values in Europe and Asia)* 67, 67-80 (Laurence Potvin-Solis & Hiromi Ueda eds., Publication of the Jean Monnet Chair of the University of Lorraine Metz, France, 2012); Basu K. Parikshit & Bandara M. W. Y., *Introduction: Socio-Economic Development in China – WTO Accession and Related Issues*, in *WTO ACCESSION AND SOCIO-ECONOMIC DEVELOPMENT IN CHINA* 1, 1-18 (Basu K. Parikshit & Bandara M. W. Y. eds. 2009); Basu K. Parikshit, Hicks John & Sappey Richard, *Socio-Cultural Challenges to Economic Growth in China-Looking Ahead*, in *WTO ACCESSION AND SOCIO-ECONOMIC DEVELOPMENT IN CHINA*, at 165-84.

⁴³ See generally Robert Howse & Joanna Langille, *Permitting Pluralism: The Seal Products Dispute and Why Should Permit Trade Restrictions Justified by Non-Instrumental Moral Values*, 37 YALE J. INT'L L. 367, 367-426 (2012).

introduced to address NTCs were received by developing countries with suspicion, resistance, and even hostility.⁴⁴ Developing countries, including China, doubt the authenticity of such considerations and think they might actually hide protectionist purposes. Moreover, developing countries see these measures as a means the industrialized world uses to impose its own social, ethical, and cultural values on developing country exporters. Nonetheless, not only has China undergone serious reforms and adopted new regulations to address the issue of NTCs, but the country has even begun to play an important role in the international negotiations on NTCs—such as those on climate change, energy, culture, and so on.

In fact, China could play a leading role in this field for both cultural and geostrategic reasons. China is trying more and more to develop its soft power and to harmonize its commercial power with its strong cultural beliefs. From this perspective, the discourse on “Asian values” launched by the conservative government of Singapore—and which was then silenced by the Asian crisis during the 1990s—can be rearticulated in terms of international law.

The “Asian values” can be explained as the one which emphasizes social stability, privileging community and duties over the rights of the individual, as compared to the “western” approach, which is accused of advocating an individualistic approach to rights that prioritizes the individual’s rights against society.⁴⁵

The goal is to both minimize the value of the critics towards human rights by qualifying them as Western, and promote fundamental rights as closer to the “Asian” thought:⁴⁶ “First of all, in many countries in Asia and south East Asia, the sense of ‘human rights’ is very weak and foreign, and they have no theoretical background for the concept of human rights. Rather they are concerned with overcoming starvation and poverty not by means of promoting human rights but by increasing national wealth and mutual aid.”⁴⁷

⁴⁴ Han Sung-Joo, *Forward & Asian Values: An Asset or a Liability*, in CHANGING VALUES IN ASIA: THEIR IMPACT ON GOVERNANCE AND DEVELOPMENT 3, 9 (Han Sung-Joo ed., Japan Center for International Exchange 2003) (“To many Asian leaders, Western concern for areas such as human rights and the environment is often seen as unwarranted interference at best and as revealing ulterior motives at worst.”). See also PETER VAN DEN BOSSCHE, NICO SCHRIJVER & GERRIT FABER, UNILATERAL MEASURES ADDRESSING NON TRADE CONCERNS. A STUDY ON WTO CONSISTENCY, RELEVANCE OF OTHER INTERNATIONAL AGREEMENTS, ECONOMIC EFFECTIVENESS AND IMPACT ON DEVELOPING COUNTRIES OF MEASURES CONCERNING NON-PRODUCT-RELATED PROCESSES AND PRODUCTION METHODS xxix (The Ministry of Foreign Affairs of the Netherlands 2007).

⁴⁵ Yvonne Tew, *Beyond “Asian Values”: Rethinking Rights* 3 (CGHR Working Paper 5, Cambridge: University of Cambridge Centre of Governance & Human Rights, Nov. 2012), www.repository.cam.ac.uk/bitstream/handle/1810/245115/CGHR_WP_5_2012_Tew.pdf?sequence=8. See also Paolo Davide Farah, *L’Influenza della Concezione Confuciana sulla Costruzione del Sistema Giuridico e Politico Cinese*, in IDENTITÀ EUROPEA E POLITICHE MIGRATORIE 193, 193-226 (Giovanni Bombelli & Bruno Montanari eds., 2008).

⁴⁶ Tew, *supra* note 45, at 5.

⁴⁷ Hyakudai Sakamoto, *Foundations of East Asian Bioethics*, 6 EUBIOS J. ASIAN & INT’L BIOETHICS. 31, 31-32 (1996).

Today, China's dependence on energy has become the main obstacle to the development of its power.⁴⁸ To tackle this issue, China has entered into a global redefinition of power strategy, which has two main features: the regionalization of power as a means and energy security as an end.⁴⁹

To promote energy security, China will make full use of its domestic resources, diversify energy supplies, and further invest in exploration and energy infrastructure. According to China's Eleventh Five-Year Plan (2006-2010), China will try to meet its energy demand mainly with domestic supplies, as mentioned, utilizing coal as the main source of energy.⁵⁰

While discussing a country's policies with regard to its non-trade concerns, including the question of energy security, it becomes pertinent to have regard for emerging aspects of sovereignty.

On the one hand, the creation of international organizations like the United Nations (UN), WTO, and IMF seems to mark the end of nation states or at least partially question their sovereignty. On the other, the formation of regional powers—Brazil in South America, the France-Germany axis in Europe, Russia in Eastern Europe, South Africa in Southern Africa, India in Southeast Asia, China in East Asia, and so on—has introduced new actors, thus questioning the *status* of the ultimate decision maker and of international bodies themselves, while facilitating negotiations within smaller groups of actors sharing a similar history and culture, which could help take over the impasse faced by both trade (GATT/WTO) and environmental (Kyoto Protocol)⁵¹ multilateral consultations. Because of the shortcomings of multilateral agreements, RTAs have become defining features of the globalization process over the last few years. The need for further trade and economic development between states is evident in the developing country regions, in particular, but it is arguable whether the RTAs will risk jeopardizing the multilateral trading system leaving the bittersweet residue of success of such regional negotiations, including further protection of NTCs, without having reached an effective and real worldwide minimum consensus on such important matters that globalization affects so dramatically. In short, the perspective on the integration of world regions through regional trade agreements is Janus-faced. Particularly when negotiations between countries with disproportionate levels of economic power take place, trade agreements can have a powerful effect on political stability and increase the risk of inter-state conflict as well as intra-state conflict

⁴⁸ Gabrielle Marceau, *The WTO in the Emerging Energy Governance Debate*, 5 GLOBAL TRADE & CUSTOMS J. 83, 83 (2010).

⁴⁹ See generally PAOLO FARAH & PIERCARLO ROSSI, *CONNECTING ENERGY, SECURITY AND SUSTAINABILITY BETWEEN EUROPE AND ASIA: POLICY, LEGAL AND SOCIAL-ECONOMIC DIMENSION* (Eurasia-Pacific Rim Book Series, Imperial College University Press/World Scientific 2015).

⁵⁰ XUECHENG LIU, *CHINA'S ENERGY SECURITY AND ITS GRAND STRATEGY* (2006), <http://www.stanleyfoundation.org/publications/pab/pab06chinasenergy.pdf>.

⁵¹ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, UN Doc. FCCC/CP/1997/7/Add.1; 37 ILM 22 (1998).

because of the economic adjustments involved in pursuing regional trade integration. Conversely, regional blocks with like-minded countries that have similar economies or socio-cultural similarities serve as powerful tools to negotiate based on common interests both within and outside the WTO.⁵²

The paradox of China's potential to be a new global regional player promoting the recognition and protection of NTCs—for example through the recognition of the right to water—⁵³ is based on certain conditions that conflict with the very reasons that motivate its implementation.

At the cultural level, the quest for Chinese soft power is motivated by the will to retrieve its qualification of "Asian culture," which China should represent on the front line. China promotes an antagonistic vision, based on the defense of the East Asian culture threatened by the West, which, in the short term, can prove unifying at the national and regional levels, but is extremely risky in the long term: "[former] President Hu Jintao has said China must strengthen its cultural production to defend against the West's assault on the country's culture and ideology, according to an essay in a Communist Party policy magazine [...]: 'We must clearly see that international hostile forces are intensifying the strategic plot of Westernizing and dividing China, and ideological and cultural fields are the focal areas of their long-term infiltration,' Mr. Hu said, according to a translation by The Associated Press."⁵⁴ The risk is that of approaching any conflict in cultural terms, so as to make it impossible to find a consensus between different civilization perspectives.

On the other hand, in terms of international law, the integration of NTCs in the text of WTO agreements requires the creation of a global constitutionalization of the law,⁵⁵ which would allow a limitation of the WTO's power even within its scope of action—in the same way in which the constitution restrains the authority of the laws.⁵⁶ This limitation reflects a set of principles that are not just economic. Certainly, this

⁵² Paolo Farah & Piercarlo Rossi, *National Energy Policies and Energy Security in the Context of Climate Change and Global Environmental Risks: A Theoretical Framework for Reconciling Domestic and International Law Through a Multiscalar and Multilevel Approach*, 20 EUR. ENERGY & ENVTL. L. REV. 232, 232-44 (2011).

⁵³ China voted in favor of the right to water in the sixty-fourth plenary session of the General Assembly, 108th meeting (AM). The resolution recognizes access to clean water, sanitation as a human right, accepted with 122 votes in favor, none against, and 41 abstentions. See Press Release, General Assembly, United Nations, General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, by Recorded Vote of 122 in Favour, None against, 41 Abstentions, U.N. Press Release GA/10967 (July 28, 2010), <http://www.un.org/press/en/2010/ga10967.doc.htm>; See also G.A. Res. 64/292, The Human Right to Water and Sanitation (Aug. 3, 2010).

⁵⁴ Edward Wong, *China's President Lashes Out at Western Culture*, N.Y. TIMES (Jan. 4, 2012), <http://www.nytimes.com/2012/01/04/world/asia/chinas-president-pushes-back-against-western-culture.html>

⁵⁵ KAARLO TUORY, *Fundamental Rights Principles: Disciplining the Instrumentalism of Policies*, in ARGUING FUNDAMENTAL RIGHTS 33, 33-52 (A. J. Menéndez & E. O. Eriksen eds. 2006).

⁵⁶ *Id.* at 33-52: "Constitutions contain provisions on institutional practices which have been expressly specialized in the task of the law's self limitation."

raises two problems from China's perspective: on the one hand, China has the tendency to invoke a "right to development," which should prevail over any form of international legal regulation—human rights, environmental rights, right to water, right to food, and so on—whenever its commercial freedom is threatened, risking to reproduce the West's unsustainable mode of economic development. On the other, China cannot be yet qualified as a constitutional law regime, not only because some of the provisions of the Constitution of the People's Republic of China are subject to flexible implementation—a suitable example is the third line of paragraph 33 (The State respects and preserves human rights), which was added in 2004—but even more because China's notion of the *rule of law* dodges the fundamental principle of accountability⁵⁷ in order to highlight the concept of sovereignty.⁵⁸ However, the principle of a global constitutionalization of the right to food, water, education, health, and so on, requires the local regime of national sovereignty to submit to an evaluation which is both external and reciprocal⁵⁹.

In conclusion, it can be discussed whether it is up to the European Union and the other social actors to foster the integration of NTCs in the WTO, so as to ensure democratic and egalitarian participation of all parties to sustainable and global trade. The "Stiglitz proposals" have tried to advance solutions towards a fairer world trade and investment system with international monetary and financial reform (through the establishment of the "Stiglitz Commission") and also with the recommendation to extend the anti-dumping legislation to domestic firms as well (§80 of the report).⁶⁰

For reaching the relevant objectives of sustainable development, this proposal should be broadened and it should extend the anti-dumping legislation even further in order to adopt legal measures that set trade to social and environmental standards whose overall non-compliance amounts to a disguised subsidy. In this sense, it could be a solution to "constitutionalize" NTCs within the WTO.⁶¹

⁵⁷ U.N. Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶6, U.N. Doc. S/2004/616 (Aug. 23, 2004); ¶6: "[The rule of law] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards."

⁵⁸ Bing Bing Jia, *A Synthesis of the Notion of Sovereignty and the Ideal of the Rule of Law: Reflections on the Contemporary Chinese Approach to International Law*, 53 GERMAN Y.B. INT'L L. 11, 11-64 (2010).

⁵⁹ On this point, see Björn Ahl, *Exploring Ways of Implementing International Human Rights Treaties in China*, 20 NETH. Q. HUM. RTS. 361, 361 (2010). See also Björn Ahl, *Statements of the Chinese Government before Human Rights Treaty Bodies: Doctrine and Practice of Treaty Implementation*, 12 AUSTL. J. ASIAN L. 82, 82 (2010).

⁶⁰ Joseph E. Stiglitz, *A New Agenda for Global Warming*, in THE ECONOMISTS' VOICE: TOP ECONOMISTS TAKE ON TODAY'S PROBLEMS 22, 22-27 (Joseph E. Stiglitz, Aaron S. Edlin & J. Bradford Delong eds., 2008); see also PAOLO FARAH & ROBERTO SOPRANO, DUMPING E ANTIDUMPING 3-7 (2009).

⁶¹ Commission of Experts of the President of the United Nation General Assembly, Report on Reforms of the International Monetary and Financial System 47-108 (Sept. 21,

III. NON-TRADE CONCERNS STATUS IN THE WTO MULTILATERAL SYSTEM

1. Integrating NTCs in the WTO

At the outset it should be noted that NTCs have no clear definition. Even the WTO Doha Ministerial Declaration did not provide an official definition of NTCs. The conference only stated that⁶² "[they] take note of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirm that non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture."⁶³ In theory, "defining NTCs and adopting clear criteria would be the best way even for the most ardent free trader or export minded country"⁶⁴ since the latter country will know the rule of the game and the balance that must be made between trade issues and NTCs. As a matter of fact, NTCs are difficult to specify and, considering the extremely different domestic conditions and large number of WTO Member States, they cannot readily be shaped with models aimed at assessing the economic effects of alternative scenarios.⁶⁵ Moreover, several countries have an interest in maintaining this undefined context and refuse any attempt to regulate the many different aspects of NTCs to avoid the potentially high costs for their economies of a binding set of rules adopted at the WTO. Yet, "a balance must be established in the WTO between trade liberalization and NTCs where the economic dimension of trade will be balanced with non-economic values."⁶⁶

The Agreement on Agriculture⁶⁷ allows governments to pursue NTCs such as food security, poverty alleviation, environmental protection and rural development through the use of domestic support measures.⁶⁸ Some countries have questioned the way that other States may pursue objectives related to NTCs if their doing so will cause trade distortion. The agreement allows all WTO Members to maintain some support measures to achieve the above mentioned objectives.⁶⁹ Developing

2009), http://www.un.org/ga/econcrisissummit/docs/FinalReport_CoE.pdf.

⁶² Simpson & Schoenbaum, *supra* note 25, at 401.

⁶³ World Trade Organization, Committee on Agriculture, Special Session, *Agriculture: Negotiations on Agriculture*, WTO Doc., *Modalities Phase: Chairperson's Overview Paper*, TN/AG/6 (Dec. 18, 2002).

⁶⁴ Simpson & Schoenbaum, *supra* note 25, at 403.

⁶⁵ RALF PETERS & DAVID VANZETTI, *SHIFTING SANDS, SEARCHING FOR A COMPROMISE IN THE WTO NEGOTIATIONS ON AGRICULTURE*, at 10, U.N. Doc. UNCTAD/ITCD/TAB/ (Policy Issues in International Trade and Commodities Study Series. 23, U.N. Sales No. E.04.II.D.4 (United Nations 2004).

⁶⁶ Simpson & Schoenbaum, *supra* note 25, at 400.

⁶⁷ Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.

⁶⁸ Josef Schmidhuber et al., *Agricultural Trade, Trade Policies and the Global Food System*, in *WORLD AGRICULTURE: TOWARDS 2015/2030: AN FAO PERSPECTIVE* 232, 245 (Jelle Bruinsma ed. 2003).

⁶⁹ SUSAN ARIEL AARONSON & JAMIE M. ZIMMERMAN, *TRADE IMBALANCE: THE STRUGGLE TO WEIGH HUMAN RIGHTS CONCERNS IN TRADE* 56 (2007).

countries asked for a degree of flexibility in the area of domestic support in order to address their NTCs issues.⁷⁰ That is why, for instance, they demanded stronger provisions on NTCs as well as special and differential treatment.⁷¹ NTCs' matters seem to be accepted to a large degree; nevertheless, a problem occurs when discussing the extent of their application and the instruments necessary to support these NTCs in both developed and developing countries.⁷²

Members have filed disputes before the WTO regarding matters related to the interplay between trade and NTCs, especially following the accession of new Members to the WTO multilateral system. Generally speaking, the Appellate Body is qualified to interpret the rights of Members as set out in the WTO covered agreements. The Appellate Body in *China – Raw Materials*,⁷³ in response to Chinese claims that a State has the right to regulate trade, stated the following: "... we understand the WTO Agreement, as a whole, to reflect the balance struck by WTO Members between trade and non-trade-related concerns."⁷⁴ The Appellate Body considered that a Member joining the WTO has abandoned all rights to regulate NTCs in exercising its sovereignty and the right to regulate trade. Yet, certain questions remain unanswered such as, "[is the Appellate Body] qualified to determine and to interpret the rights of Members to regulate non-trade-related concerns that are not set out in the WTO Agreement?"⁷⁵

The following sections analyze the mechanism by which NTCs matters were integrated in the WTO multilateral system while focusing on the existing legal provisions related to every NTC as well as the case law before the Dispute Settlement Body that played an essential role in opening the door for integration of these concepts with a balance of free trade.

⁷⁰ JOSEPH A. MCMAHON, THE NEGOTIATIONS FOR A NEW AGREEMENT ON AGRICULTURE 45 (2011).

⁷¹ Miho Shirotori (United Nations Conference on Trade and Development), *Notes on the Implementation of the Agreement on Agriculture, in A POSITIVE AGENDA FOR DEVELOPING COUNTRIES: ISSUES FOR FUTURE TRADE NEGOTIATIONS* 125, 156, U.N. Doc. UNCTAD/ITCD/TSB/10 (UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT ed., 2000).

⁷² Susette Biber-Klemm & Michael Burkard, *The Impact of Agriculture Subsidies, in RIGHTS TO PLANT GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE: BASIC ISSUES AND PERSPECTIVES* 324, 354 (Susette Biber-Klemm & Thomas Cottier eds., 2006).

⁷³ Panel Report, *China – Measures Related to the Exportation of Various Raw Materials*, WTO Doc. WT/DS394/R, WT/DS395/R, WT/DS398/R (Jul. 5, 2011); Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (Jan. 30, 2012). See also Asif H. Qureshi, *Distinguished Essay: Reflections on the Global Trading Order Twenty Years After Marrakesh: A Development Perspective*, in EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 93, 93-100 (C. Hermann, M. Krajewski & J.P. Terhechete eds., 2014).

⁷⁴ Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, ¶ 306 WTO Doc. WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (adopted Jan. 30, 2012).

⁷⁵ Qureshi, *supra* note 73, at 104.

2. *The Interplay among Environment, Health, and Trade, and the Prospects for the New Acceding Members: China as a Case Study*

China, like other Member States, has joined the WTO on the basis of Accession Protocols and has benefited from the dispute settlement understanding which became applicable to disputes.⁷⁶ The Accession Protocol is considered an "integral part of the WTO Agreement."⁷⁷ However, a country aiming to participate in an established international organization will have more obligations and criteria to fulfill and integrate in its own internal legal system compared to the founders of such organization, which actively created and decided how to shape and develop the rules of the system.⁷⁸ Moreover, the alteration of the obligations of an existing Member State in case of an accession of a new Member is not consistent with the WTO rules.⁷⁹ Additionally, existing WTO Members have a willingness to use their bargaining power to obtain further commitments and economic policy changes from States seeking to join the WTO.⁸⁰ As a consequence, there is the impression that recently acceded Members became second-class citizenry without having the capacity to fully exploit the rights under WTO law, while being burdened by additional negotiated obligations.⁸¹

In the case of the Protocol of Accession of China, such obligations "exceed[ed] the existing requirements of the WTO agreements,"⁸² and China's obligations are not only unique but more stringent than those of the current Member States.⁸³ However, since China's accession in 2001, other new Member States, such as Vietnam, were obliged to accept even more *WTO plus* commitments than China.

China's commitments cover "areas ranging from the administration of China's trade regime (transparency, judicial review, [...]), to the Chinese economic system (market economy commitments), to new WTO disciplines on investment (such as investment measure [...])."⁸⁴ Simultaneously, China has obtained significant concessions, in particular extensions that allow China to postpone the termination of some of its

⁷⁶ Matthew Kennedy, *The Integration of Accession Protocols into the WTO Agreement*, 47 J. WORLD TRADE 45, 48 (2013).

⁷⁷ Panel Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WTO No. WT/DS431/R, WT/DS432/R, WT/DS433/R, at ¶7.79 (Mar. 26, 2014).

⁷⁸ Antonio Parenti, *Accession to the World Trade Organisation: A Legal Analysis*, 27 LEGAL ISSUES OF ECONOMIC INTEGRATION 141, 155 (2000).

⁷⁹ *Id.* at 156.

⁸⁰ Mitali Tyagi, *Flesh on a Legal Fiction: Early Practice in the WTO on Accession Protocols*, 15 J. INT'L ECON. L. 391, 395 (2012).

⁸¹ *Id.* at 397.

⁸² Julia Ya Qin, "WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System - An Appraisal of the China Accession Protocol, 37 J. WORLD TRADE 483, 483 (2003).

⁸³ WORLD TRADE ORGANIZATION, HANDBOOK ON ACCESSION TO THE WTO: CHAPTER 5, SUBSTANCE OF ACCESSION NEGOTIATIONS (2008), https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c5s1p1_e.htm.

⁸⁴ Qin, *supra* note 82 at 483.

WTO inconsistent measures which might be offset by some of the incumbent Members' more stringent obligations.⁸⁵

China recently made use of the notion of NTCs in its disputes to justify mainly measures to protect the environment.⁸⁶ Its attempts to define the role of international trade in determining environmental outcomes and the effects of trade on the environment have generated some controversy.⁸⁷

From the beginning, the WTO has almost exclusively prioritized free trade over environmental protection when it comes to the trade-environment conflict.⁸⁸ That is why the WTO was called "GATT-zilla", which describes a trade monster that was intent on eating its way through the global ecosystem.⁸⁹ In fact, coherence among WTO rules and existing multilateral treaties regarding the environment has often been lacking.⁹⁰ Moreover, the WTO initially gave little attention to climate change.⁹¹ Principles such as the Polluter-Pays⁹² leave it to the parties to determine the means by which to implement their obligations.⁹³ Additionally, because of climate change, some Members have begun to debate the transfer of low carbon technologies to States in need.⁹⁴ Broadly speaking, energy issues did not get much prominence at the WTO, yet the

⁸⁵ Tokio Yamaoka, *Analysis of China's Accession Commitments in the WTO: New Taxonomy of More and Less Stringent Commitments, and the Struggle for Mitigation by China*, 47 J. WORLD TRADE. 105, 155 (2013).

⁸⁶ Bill Butcher, *WTO Open Trade Rules and Domestic Environmental Protection Policies: A Balancing Approach*, in ENVIRONMENTAL TAXATION AND GREEN FISCAL REFORM: THEORY AND IMPACT 69, 71-77 (Larry Kreiser et al. eds., 2014).

⁸⁷ Werner Antweiler, Brian R. Copeland & M. Scott Taylor, *Is Free Trade Good for the Environment?*, 91 AM. ECON. REV. 877, 877 (2001).

⁸⁸ DAVID COATES, KATHY SMITH & WILL (C. WILLIAM) WALLDORF, THE OXFORD COMPANION TO AMERICAN POLITICS 440 (David Coates ed. 2012). On the fragmentation of international law, the lack of coherence and the need of a multiscalar and multilevel approach to face the challenges of climate change, see FARAH & ROSSI, *supra* note 52.

⁸⁹ J. Samuel Barkin, *The Environment, Trade and International Organizations*, in HANDBOOK OF GLOBAL ENVIRONMENTAL POLITICS 334, 335 (Peter Dauvergne ed. 2005). See also Andrew L. Strauss, *From GATTzilla to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 769, 769 (1998).

⁹⁰ Johanne Muller, *Strengthening Development Politics and Global Partnership*, in CLIMATE CHANGE, JUSTICE AND SUSTAINABILITY: LINKING CLIMATE AND DEVELOPMENT POLICY 331, 333 (Ottmar Edenhofer et al. eds., 2012).

⁹¹ David Satterthwaite et al., *Adapting to Climate Change in Urban Areas, The Possibilities and Constraints in Low- and Middle-Income Nations*, INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT, HUMAN SETTLEMENTS, 91 (2007), <http://pubs.iied.org/10549IIED.html>.

⁹² According to the principle, "the polluter should bear the expenses of carrying out the pollution prevention and control measures decided by public authorities to ensure that the environment is in an acceptable state." See Jean-Philippe Barde, *Economic Instruments in Environmental Policy: Lessons From the OECD Experience and Their Relevance to Developing Economies*, OECD, 5-6 (1994), <http://www.oecd.org/dev/1919252.pdf>.

⁹³ BRADLY J. CONDON & TAPEN SINHA, THE ROLE OF CLIMATE CHANGE IN GLOBAL ECONOMIC GOVERNANCE 38 (Oxford University Press 2013).

⁹⁴ Ramgopal Agarwala, *Towards a Global Compact for Managing Climate Change*, in POST-KYOTO INTERNATIONAL CLIMATE POLICY: IMPLEMENTING ARCHITECTURES FOR AGREEMENT 179, 195 (Joseph E. Aldy & Robert N. Stavins eds., 2010).

landscape started to change as many oil producing countries have joined the Organization.⁹⁵ Energy trade is one of the most significant trade sectors and constitutes the largest primary commodity of global trade in terms of volume and value.⁹⁶ It is worth mentioning that WTO rules are relevant to the energy sector, while energy security and climate mitigation constitute priorities on the global agenda.⁹⁷

The first generation of GATT/WTO, pre-1994 cases, from 1982 to 1994, invoking environmental concerns through GATT Article XX highlighted a negative approach from the adjudicatory bodies for considering environmental matters under Article XX of the GATT.⁹⁸ In the *United States - Tuna and Tuna Products from Canada* case,⁹⁹ an import prohibition on tuna and tuna products imposed by the United States against Canada was found discriminatory by the Panel and could not be justified under Article XX (g) of the GATT since no equivalent restrictions on domestic production and consumption of tuna were imposed.¹⁰⁰ According to the United States, it has to be also highlighted that the measure had been put in place as a retaliatory measure to the Canadian arrest of the U.S. vessels fishing tuna.¹⁰¹ In the *Tuna/Dolphin I* case,¹⁰² the United States imposed a ban on the import of Tuna from countries whose "incidental kill ration" of dolphins was greater than its own on the basis of Article XX (b) or (g) of the GATT.¹⁰³ Mexico challenged the US measure claiming that the latter violated article XI of the GATT. Yet, the Panel decided that the restrictive measure could not be justified under Article XX (b) or (g) of the GATT.¹⁰⁴ The main criticism in both

⁹⁵ Paolo Davide Farah & Elena Cima, *Energy Trade and the WTO: Implications for Renewable Energy and the OPEC Cartel*, 16 J. INT'L ECON. L. 707, 707-40 (2013); Paolo Davide Farah & Elena Cima, *L'Energia nel Contesto Degli Accordi dell'OMC: Sovvenzioni per le Energie Rinnovabili e Pratiche OPEC di Controllo dei Prezzi*, 2 DIRITTO DEL COMMERCIO INTERNAZIONALE 343, 343-81 (2013); Sajal Mathur & Preeti Mann, *GATT/WTO Accessions and Energy Security*, in TRADE, THE WTO AND ENERGY SECURITY: MAPPING THE LINKAGES FOR INDIA 73, 74 (Sajal Mathur ed., 2014).

⁹⁶ RAFAEL LEAL-ARCAS, ANDREW FILIS, & EHAB S. ABU GOS, INTERNATIONAL ENERGY GOVERNANCE: SELECTED LEGAL ISSUES 138 (2015).

⁹⁷ Alan Yanovich, *WTO Rules and the Energy Sector*, in REGULATION OF ENERGY IN INTERNATIONAL TRADE LAW: WTO, NAFTA AND ENERGY CHARTER 1, 42 (Yulia Selivanova ed. 2011).

⁹⁸ See General Agreement on Tariffs and Trade, Art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm [hereinafter GATT].

⁹⁹ Report of the Panel, *United States - Prohibition of Imports of Tuna and Tuna Products from Canada*, L/5198 - 29S/91, ¶¶4.10 - 4.12 (Feb. 27, 1982).

¹⁰⁰ NATHALIE BERNASCONI-OSTERWALDER, ENVIRONMENT AND TRADE: A GUIDE TO WTO JURISPRUDENCE 87 (2005).

¹⁰¹ Report of the Panel, *United States - Prohibition of Imports of Tuna and Tuna Products from Canada*, L/5198 - 29S/91, ¶¶4.13 (Feb. 27, 1982).

¹⁰² Report of the Panel, *United States - Restrictions on Imports of Tuna*, DS21/R (Sep. 3, 1991).

¹⁰³ Paul Ekins & Robin Vanner, *Reducing the Impacts of the Production and Trade of Commodities*, in TRADE, GLOBALIZATION AND SUSTAINABILITY IMPACT ASSESSMENT: A CRITICAL LOOK AT METHODS AND OUTCOMES 277, 281 (Paul Ekins & Tancrede Voituriez eds. 2009).

¹⁰⁴ ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 389-91 (2d ed., 2008).

Tuna/Dolphin cases was that national coercion was used through trade restrictions to force foreign countries to protect dolphins. These critics were pointing out that US national measures were illicit because they had an extraterritorial effect with the objective to influence environmental policies of other States. In this situation, the United States employed unilateral trade restrictions to encourage a number of nations to abandon tuna fishing techniques that killed dolphins.¹⁰⁵ Before adopting these trade distorting measures, however, the United States should have tried to make use of other means to obtain similar results in favor of the values they aimed to protect (the environment) with less trade restrictive effects.¹⁰⁶ The ruling in the 1994 *Tuna/Dolphin* case,¹⁰⁷ brought by the Netherlands and the European Community, which was affected as secondary exporters of tuna imported from primary producing countries, confirmed that Article XX cannot be interpreted in such a way to permit the application of trade measures with extraterritorial effects within the jurisdiction of other Member States with the objective of forcing those countries to change their policies.¹⁰⁸ Thus, also in this case, the measure could not be justified under Article XX of the GATT signaling that the WTO is giving primacy to trade over the environment.¹⁰⁹ It is worth highlighting that the present case shows a difference in the approach of the adjudicatory body. The Panel noted in ¶5.16, ¶5.17 and ¶5.31 that the General Agreement did not in an absolute manner prohibit measures related to resources outside the territorial jurisdiction of the party taking the measure.¹¹⁰

In the *United States – Superfund* case,¹¹¹ the environmental aspects of toxic waste formed the background of the dispute rather than having a direct influence on the result.¹¹² In this case, the European Community, Canada, and Mexico claimed that a US excise tax, a corporate income tax and appropriations on petroleum, and a tax on certain imported substances produced or manufactured from taxable feedstock chemicals may have breached Article III.2 of the GATT.¹¹³ The Panel established

¹⁰⁵ David M. Driesen, *What is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate*, 41 VA. J. INT'L L. 279, 279-368 (2001).

¹⁰⁶ Panel Report, *United States - Restrictions on Imports of Tuna*, DS29/R, ¶5.28 (June 16, 1994). Here the Panel pointed out that the U.S. by not using other means to achieve similar results had failed to fulfill the necessity requirement for invoking the Article XX (b) exception.

¹⁰⁷ *Id.*

¹⁰⁸ PETER R. GARDINER & K. KUPERAN VISWANATHAN, *ECOLABELLING AND FISHERIES MANAGEMENT* 20-21 (2004).

¹⁰⁹ KATI KULOVESI, *THE WTO DISPUTE SETTLEMENT SYSTEM: CHALLENGES OF THE ENVIRONMENT, LEGITIMACY AND FRAGMENTATION* 85 (2001).

¹¹⁰ Vanda Jakir, *The New WTO Tuna Dolphin Decision: Reconciling Trade and Environment?*, 9 CROATIAN Y.B. EUR. L. POL'Y. 143, 149 (2013), <http://www.cyelp.com/index.php/cyelp/article/view/155/115>.

¹¹¹ Panel Report, *United States - Taxes on Petroleum and Certain Imported Substances*, L/6175 - 34S/136 (June 17, 1987).

¹¹² KRISTA NADAKAVUKAREN SCHEFER, *SOCIAL REGULATION IN THE WTO: TRADE POLICY AND INTERNATIONAL LEGAL DEVELOPMENT* 159 (2010).

¹¹³ FEDERICO ORTINO, *BASIC LEGAL INSTRUMENTS FOR THE LIBERALISATION OF TRADE:*

that the first set of measures on petroleum constituted a violation of Article III.2 of the GATT because there was a tax differential applied to imported products compared to domestic ones.¹¹⁴ The United States Government did not argue about the existence of this differential, but stated that the measure's trade effects were irrelevant and, for this reason, no violation of the GATT/WTO agreements should be found. However, the Panel rejected this argument because the sole violation of the provision's letter is sufficient. Regarding the second measure on certain imported substances produced or manufactured from taxable feedstock chemicals, the Panel recognized that the tax applied was perfectly aligned with the WTO rules since it was a licit border tax adjustment.¹¹⁵ According to the United States, the revenue of this tax was used to sponsor environmental programs in favor of the domestic U.S. producers.

Nevertheless, the Panel's interpretation adopted in this case, unfortunately, does not seem to be supported by more recent case law. In fact, it took time for the dispute settlement body to recover from the past, the positive provisions and thoughts included in the opinions of the adjudicatory bodies of this case and develop, in more recent cases, environmentally friendly interpretations of the WTO agreements. Far from being perfect, those interpretations in favor of the environment in the *United States - Superfund* case are even more relevant if we remember that this case was ruled in 1987.

In the *Thailand - Cigarettes* case,¹¹⁶ Thailand decided to permit the importation and exportation of tobacco seeds, tobacco plants, tobacco leaves, plug tobacco, shredded tobacco, and tobacco only by license on the basis of public health concerns.¹¹⁷ The US challenged Thailand's decision under Article XI of the GATT to apply quantitative restrictions on the importation of cigarettes, claiming that the Thai government permitted the sale of domestic cigarettes. Moreover, in the event the cigarette imports were permitted, Thailand applied higher internal excise taxes on the imported cigarettes compared to the taxes applied to domestic like products. Thailand argued that these restrictions were justified by the exception contained in Article XI:2(c), because cigarettes should be classified as agricultural or fisheries products within the meaning of Article XI. Furthermore, the Thai Government did not have to apply these measures to the domestic production as well because, as observed by the Panel, the US cigarettes were not considered like products since

A COMPARATIVE ANALYSIS OF EC AND WTO LAW 128 (2004).

¹¹⁴ GARY CLYDE HUFBAUER, STEVE CHARNOVITZ & JISUN KIM, *GLOBAL WARMING AND THE WORLD TRADING SYSTEM* 41 (2009).

¹¹⁵ YULIA SELIVANOVA, *Managing the Patchwork of Agreements in Trade and Investment*, in *GLOBAL ENERGY GOVERNANCE: THE NEW RULES OF THE GAME* 49, 59 (Andreas Goldthau & Jan Martin Witte eds., 2009).

¹¹⁶ Report of the Panel, *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R - 37S/200 (Nov. 7, 1990).

¹¹⁷ OBIJOFOR AGINAM, *GLOBAL HEALTH GOVERNANCE: INTERNATIONAL LAW AND PUBLIC HEALTH IN A DIVIDED WORLD* 84 (2005).

they contained additives and flavorings that make them easier to smoke than their Thai counterparts. Hence, public health concerns affirmed by the World Health Organization (WHO) seem to arise from the ease of access factor attached to western cigarettes and the consequent increase in smoking. Further, the WHO submitted expressly that there was a lack of scientific evidence to prove as to which cigarette was more harmful than the other.¹¹⁸ Then, the Panel considered such measures to control or reduce the consumption of cigarettes to fall within the scope of Article XX (b) but nevertheless found Thailand's measure on license and quantitative restrictions unnecessary since less trade-restrictive alternatives existed, such as warning labels or ingredients lists,¹¹⁹ despite the fact that in the 1990s the World Health Organization heavily criticized the US Government and cigarette companies while aiming to reduce tobacco-related mortality.¹²⁰ To the contrary, the Panel did not consider the higher internal excise taxes for imported cigarettes in violation of Article III of the GATT because the legislation did not mandate the State authorities to apply these higher taxes to the imported products, but rather left it as an option.¹²¹

In the *Canada-Herring Salmon* case,¹²² a Canadian national measure made it compulsory for herring and salmon caught in Canadian waters to be processed in Canada before being exported. Canada attempted to justify the measure on the basis of Article XX(g) for the conservation of natural resources.¹²³ When it came to the interpretation and application of Article XX(g), the Panel limited itself to a restrictive interpretation of the text of Article XX(g), reducing the possible scope of application of the exception.¹²⁴

The outcome of the disputes demonstrates that all the environmental questions pivoted, to a large extent, on GATT Article XX. With the intention of saving the trading system the adjudicatory bodies have sometimes used unreasonable legal justifications and other times very restrictive interpretations and reasoning as to why Article XX could not be used. However, these claims threatened the trading system by causing

¹¹⁸ Report of the Panel, *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶¶52-53, DS10/R - 37S/200 (Nov. 7, 1990).

¹¹⁹ LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 264 (2d ed. 2008).

¹²⁰ Report of the Panel, *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶¶50-57, DS10/R - 37S/200 (Nov. 7, 1990). See also David P. Fidler & Martin S. Certon, *International Considerations*, in *LAW IN PUBLIC HEALTH PRACTICE* 93, 116 (Richard A. Goodman et al. eds., 2d ed. 2007).

¹²¹ FABIO COSTA MOROSINI, *THE MERCOSUR AND WTO RETREADED TIRES DISPUTE: REHABILITATING REGULATORY COMPETITION IN INTERNATIONAL TRADE AND ENVIRONMENTAL REGULATION* 17 (2007).

¹²² Panel Report, *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, L/6268 - 35S/98 (Mar. 22, 1988).

¹²³ MASSIMILIANO MONTINI, *The Necessity Principle as an Instrument to Balance Trade and the Protection of the Environment*, in *ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE* 135, 148 (Francesco Francioni ed., 2001).

¹²⁴ *Id.* at 148-49.

concerns about its hostile attitude toward the environment.¹²⁵ The Appellate Body corrected the Panels' errant holdings made in the *US - Gasoline*, *US - Shrimp*, and *EC - Asbestos* cases signaling to the public that the era of runaway Panels on environmental matters had ended.¹²⁶ It is worth mentioning that the *C.A.F.E.* case was the first to open the new era for balancing trade and environment before the above mentioned cases created a shift in the dispute settlement rulings.¹²⁷ In this case, the EU challenged the US corporate average fuel economy standard, the "gas guzzler" tax, and the luxury tax on cars over \$30,000. The Panel decided that these measures were discriminatory. At the same time, it did not confirm the restrictive interpretation of the "necessity" test by the EU in its statement and found, according to the US argument, that the measure to be justified under Article XX needed to be "primarily aimed at" the conservation of exhaustible natural resources and at rendering effective restrictions imposed on domestic production and consumption. Therefore, the United States was not obliged to take the least restrictive measures to serve environmental goals¹²⁸ because, as determined by the Panel, if no requirement was placed on imported cars, the *C.A.F.E.* program's objectives would be prejudiced since large imported cars would not be subject to any restriction on fuel consumption. Thus, the application of fleet averaging to imported cars in a similar manner as its application to domestic cars clearly served the purpose of fuel conservation, and served to render effective the conservation measure. In these respects, fleet averaging met two of the key requirements of Article XX(g).

Paragraph 5.66 of this dispute states:

This analysis suggested to the Panel that in the absence of separate foreign fleet accounting it would be possible to include in a revised CAFE regulation an averaging method that would render the CAFE regulation consistent with the General Agreement. As such a revised method was only hypothetical at this time (since fleet averaging did not exist independently of separate foreign fleet accounting), and since the CAFE regulation would in the view of the Panel require substantial change if separate foreign fleet accounting were removed, the Panel did not consider that it could or should make a finding on the consistency of a revised regulation. This could only be determined on the basis of the actual elements of a revised CAFE scheme.

For that reason, the decision confirmed the inconsistency of the US

¹²⁵ Steve Charnovitz, *Trade and the Environment in the WTO*, 10 J. INT'L ECON. L. 1, 1-27 (2007).

¹²⁶ *Id.* at 14-15.

¹²⁷ Report of the Panel, *United States - Taxes on Automobiles*, DS31/R (Oct. 11, 1994).

¹²⁸ LINDA A. MALONE, INTERNATIONAL LAW 205 (Emanuel Law Outlines 1995). See also Report of the Panel, *United States - Taxes on Automobiles*, ¶5.59, ¶¶5.63-5.66, DS31/R (Oct. 11, 1994).

measures with the WTO agreements.¹²⁹

In spite of some court decisions that were not aligned with the protection of health, the environment and the principles of sustainable development, the relevant case law together with the work of other international organizations and negotiations beyond the WTO, strongly influenced the passage from the GATT to the WTO in 1995 to embrace a new trade dimension that takes NTCs into due consideration. Indeed, the WTO's Preamble recognizes among the listed objectives: "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 development."¹³⁰ In fact, the protection of NTCs in the following case law has grown increasingly robust since January 1, 1995, when the WTO officially commenced.

When it comes to the cases that highlight the shift in the dispute settlement reasoning, the Panel in *US - Gasoline*¹³¹ weighed a US measure on air quality establishing one scheme to regulate the content of imported gasoline and another to regulate the content of US gasoline. The Appellate Body under the newly created WTO modified the Panel reasoning by stating that the interpretation of GATT Article XX requires a two-step analysis, verifying first whether the measure at stake falls under one of the provision's subparagraphs and, second, whether it complies with the *chapeau*.¹³² Here, the Appellate Body found that the US measure was indeed covered by paragraph (g) of Article XX,¹³³ but it

¹²⁹ Report of the Panel, *United States - Taxes on Automobiles*, ¶5.66, DS31/R (Oct. 11, 1994).

¹³⁰ *WTO Analytical Index: Marrakesh Agreement, Preamble to the Marrakesh Agreement Establishing the World Trade Organization*, WORLD TRADE ORGANIZATION, https://www.wto.org/ENGLISH/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm (last visited June 2, 2017).

¹³¹ Panel Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996); Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/9 (May 20, 1996).

¹³² Hans J. Crosby, *The World Trade Organisation Appellate Body - United States v. Venezuela: Interpreting the Preamble of Article XX - Are Possibilities for Environmental Protection under Article XX (g) of GATT Disappearing*, 9 VILL. ENVTL. L. J. 283, 283 (1998), <http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1189&context=elj>.

¹³³ W. J. DAVEY, *WTO Dispute Settlement Practice Relating to GATT 1994*, in THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003 (STUDIES IN TRANSNATIONAL ECONOMIC LAW SET) 191, 204 (Federico Ortino & Ernst-Ulrich Petersmann eds., 2004); Sophie Nappert & Federico Ortino, *International Resolution of Energy Trade and Investment Disputes*, in REGULATION OF ENERGY IN INTERNATIONAL TRADE LAW: WTO, NAFTA AND ENERGY CHARTER 303, 313 (Julia Selivanova ed., 2011); BEN SAUL, DAVID KINLEY & JAQUELINE MOWBRAY, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 1081 (2014); ROBERT READ, *Process and Production Methods and the Regulation of International Trade*, in THE WTO AND THE REGULATION OF INTERNATIONAL TRADE: RECENT TRADE DISPUTES BETWEEN THE EUROPEAN UNION AND THE UNITED STATES 239, 259 (Nicholas Perdiki & Robert Read eds., 2005); M. Kent Ranson et al., *The Public Health Implications of Multilateral Trade Agreements*, in HEALTH POLICY IN A GLOBALISING WORLD 18, 21 (Kelley Lee, Kent Buse & Suzanne Fustukian eds., 2002).

could not be justified under the *chapeau* because of the discriminatory element of the measure. More precisely, the Appellate Body considered the manner of application of the measure, "disguised restriction on international trade" and "arbitrary or unjustifiable discrimination", and not the specific contents of the measure as such, should not constitute abuse of the exception.¹³⁴

Similarly, in the *US - Shrimp* dispute,¹³⁵ although the Appellate Body declared that the US import ban applied to shrimp for protecting endangered turtles on the high seas and in foreign jurisdictions was related to the conservation of exhaustible natural resources and thus covered by Article XX(g), the exception was not applicable because the measure was not justifiable under the *chapeau* of Article XX.¹³⁶ In paragraph 185 of its report the Appellate Body stated:

In reaching these conclusions, we wish to underscore *what we have not decided in this appeal*. We have not decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have not decided that sovereign States should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.¹³⁷

This is an important statement to support the protection of the environment and advice to the WTO Member States to find proactively and jointly a balance and an agreement between trade and environment in the WTO and in other international contexts.

In the *Asbestos* case,¹³⁸ banning Asbestos on the basis of protecting

¹³⁴ Chang-Fa Lo, *The Proper Interpretation of 'Disguised Restriction on International Trade' under the WTO: The Need to Look at the Protective Effect*, 4 J. Int. Disp. Settlement. 111, 111-37 (2013). See also Padideh Ala'i, *Free trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization*, 14 AM. U. INT'L L. REV. 1129, 1159 (1999).

¹³⁵ Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998); Panel Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/RW (June 15, 2001); Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products Recourse to Article 21.5 of The DSU by Malaysia*, WTO Doc. WT/DS58/AB/RW (Oct. 22, 2001).

¹³⁶ Ernst-Ulrich Petersmann, *From "Member-Driven Governance" to Constitutionally Limited "Multilevel-Trade Governance" in the WTO*, in *THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM* 86, 101 (Giorgio Sacerdoti et al. eds., 2006).

¹³⁷ Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, ¶185, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998) (emphasis added).

¹³⁸ Panel Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R (Sep. 18, 2000) and Appellate Body Report, *European*

public health¹³⁹ was ultimately found to be justified under article XX(b) and the *chapeau* of Article XX¹⁴⁰ because no discrimination was found between the domestic and imported products. As such, the WTO Agreements support the Members' ability to protect human health and safety at the level of protection they deem appropriate. The same argument was applied a few years later, in the *Brazil – Retreaded Tyres* dispute,¹⁴¹ where the Panel and the Appellate Body held that the ban of European tires was necessary to protect health and the environment, but it was applied inconsistently with the WTO requirement because the restrictive measures did not include all exporting countries.¹⁴² In fact, Brazil imposed restrictions on EU retreaded tires justifying the measure under Article XX as necessary for the protection of human health since the accumulation of waste tires constitutes a breeding ground for mosquitoes which spread malaria and dengue fever while causing long-term toxic leaching. The Panel accepted Brazil's claims.¹⁴³ However, Brazil excluded MERCOSUR from these restrictive measures,¹⁴⁴ so the Appellate Body reversed the Panel's ruling with respect to the analysis under the *chapeau* of Article XX due to the violation of the non-discrimination principles within the meaning of the *chapeau* of the Article XX and requested that Brazil apply and extend these provisions to all countries.¹⁴⁵ Despite the importance of the WTO Panels and Appellate Body's rulings for the protection of public health and the environment, some critics alleged that the settlement created a narrow construction of the public health exception to GATT.¹⁴⁶ Scholars lamented the loss of national control over health risks due to these decisions while indicating that the WTO favors the markets over other values.¹⁴⁷ However, despite the criticism, it is clear from these cases that the WTO dispute settlement

Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (Mar. 12, 2001).

¹³⁹ Helen Walls et al., *Trade and Global Health*, in *GLOBALIZATION AND HEALTH* 100, 107 (2d ed. Johanna Hanefeld ed., Open University Press 2014); GEOFFREY COCKERHAM & WILLIAM COCKERHAM, *HEALTH AND GLOBALIZATION* 119, 134 (2010).

¹⁴⁰ KULOVESI, *supra* note 109, at 102.

¹⁴¹ Panel Report, *Brazil, Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/R (June 12, 2007); Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R (Dec. 3, 2007).

¹⁴² Julia Ya Qin, *Managing Conflicts Between Rulings of the World Trade Organization and Regional Trade Tribunals: Reflections on the Brazil-Tyres Case*, in *MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS* 601, 607 (Peiter H.F. Bekker, Rudolf Dolzer & Dr. Michael Waibel eds. 2010); MOHAMMAD F. A. NSOUR, *RETHINKING THE WORLD TRADE ORDER: TOWARDS A BETTER LEGAL UNDERSTANDING OF THE ROLE OF REGIONALISM IN THE MULTILATERAL TRADE REGIME* 79 (2009).

¹⁴³ TRACEY EPPS, *INTERNATIONAL TRADE AND HEALTH PROTECTION: A CRITICAL ASSESSMENT OF THE WTO* 230 (2008).

¹⁴⁴ NSOUR, *supra* note 142, at 79.

¹⁴⁵ Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶¶ 233, 259, WTO Doc. WT/DS332/AB/R (Dec. 3, 2007). See also Qin, *supra* note 142, at 607.

¹⁴⁶ Nikolaos Lavranos, *The Brazilian Tyres Case: Trade Supersedes Health*, 1 *TRADE L. & DEV.* 230, 231-59 (2009).

¹⁴⁷ COCKERHAM & COCKERHAM, *supra* note 139, at 134.

body has struck a balance between the protection of public health and trade, while prioritizing the former in case of a serious public health matter.

As a matter of fact, a relevant shift in the dispute settlement ruling can be seen in the *Tuna/Dolphin Case II* of 2011.¹⁴⁸ In this case, Mexico claimed that the US measures establishing the conditions for the use of a “Dolphin-Safe” label on tuna products, which may vary depending on the geographical area and location where the tuna is caught and the type of vessel and fishing method by which it is harvested, breached Articles I:1 and III:4 of the GATT, as well as other articles related to the TBT Agreement.¹⁴⁹

As stated in the Appellate Body Report at Paragraph 172, tuna caught by “setting on” dolphins is currently not eligible for a “dolphin-safe” label in the United States, regardless of whether this fishing method is used inside or outside the Eastern Tropical Pacific Ocean (ETP).¹⁵⁰ As described in footnote 355 of the Appellate Body Report, “the fishing technique of ‘setting on’ dolphins takes advantage of the fact that tuna tend to swim beneath schools of dolphins in the ETP. The fishing method involves chasing and encircling the dolphins with a purse seine net in order to catch the tuna swimming beneath the dolphins.”¹⁵¹

Even according to the recent compliance Panel Report requested under Article 21.5 of the DSU, following the Panel and Appellate Body Reports, tuna caught in the Eastern Tropical Pacific large purse seine fishery, where most of Mexico’s fleet fishes are, could be labeled as “dolphin safe” only if both the captain and an independent observer certified that the tuna was caught without harming dolphins. Tuna caught in all other fisheries would require only a captain certification with a lower level of costs for the final product. These relevant differences amounted to *de facto* discrimination against Mexican tuna and tuna products because such tuna were subjected to additional burdens and costs not faced by tuna caught by other WTO Members.

The WTO Panel started addressing the question of whether a voluntary labeling requirement can be conceived of as a technical regulation that must comply with the TBT Agreement where a legal test will then be conducted to check if the measures are applied in a discriminatory manner and, if so, whether they are more trade restrictive

¹⁴⁸ Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/R (Sept. 11, 2011); Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/AB/R (May 16, 2012); Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 of the DSU by Mexico*, WTO Doc. WT/DS381/RW (Apr. 14, 2015).

¹⁴⁹ Vicki Waye, *International Trade Law, Climate Change and Carbon Footprinting*, in *SUSTAINABLE BUSINESS: THEORY AND PRACTICE OF BUSINESS UNDER SUSTAINABILITY PRINCIPLES* 251, 255-56 (Geoffrey Wells ed. 2013).

¹⁵⁰ Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶172, WTO Doc. WT/DS381/AB/R (May 16, 2012).

¹⁵¹ *Id.* ¶69.

than necessary to fulfill a legitimate objective.¹⁵² In this situation the Panel did not find the US measures discriminatory since they applied to capture method rather than the national origin of the products. However, the Appellate Body reversed the Panel's finding and judged these measures as discriminatory, considering that the US measures *de facto* granted most US products and like products from other WTO Members better conditions and corresponding, relevant competitive advantages to access the US market that did not apply to Mexican tuna products.¹⁵³ The Appellate Body further developed this reasoning and noted that, "the US measure does not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP, and that tuna caught in this area would be eligible for the US official label."¹⁵⁴

Moreover, the Appellate Body reversed the Panel's findings that Mexico had demonstrated that the US "Dolphin-Safe" labeling provisions are more trade-restrictive than necessary to fulfill the United States' legitimate objectives.¹⁵⁵ The Appellate Body considered that the Panel's analysis and its comparison between the challenged measure and Mexico's proposed alternative measure was imprecise and inconsistent and that "the Panel erred in concluding, in paragraphs 7.620 and 8.1(b) of the Panel Report, that it has been demonstrated that the measure at issue is more trade restrictive than necessary to fulfil the United States' legitimate objectives, taking account of the risks non-fulfilment would create."¹⁵⁶ For this reason, the Appellate Body reversed the Panel's findings that the measure at issue is inconsistent with Article 2.2 of the *TBT Agreement*.¹⁵⁷

This case shows the WTO's clear shift from favoring trade openness over environmental concerns. Compared with the decision in the previous Tuna GATT/WTO cases, the decision in the *Tuna/Dolphin Case II* of 2011, recognizing the protection of the environment and sustainable development in the TBT Agreement as a means of derogation from the provisions (when applied in a non-discriminatory way) and against the principle of territoriality (that was strictly applied in *Tuna-Dolphin Case I*),¹⁵⁸ clearly demonstrates an attempt to reconcile trade rules with NTCs.¹⁵⁹

The *EU Seals* case, in which the "public morals" exception contained

¹⁵² Sofya Matteotti & Olga Nartova, *Implementation and Monitoring of Process and Production Methods*, in *TRADE AGREEMENTS AT THE CROSSROADS* 167, 171-72 (Susy Frankel & Meredith Lewis eds., 2013).

¹⁵³ Waye, *supra* note 149, at 256.

¹⁵⁴ Appellate Body Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶251, WTO Doc. WT/DS381/AB/R (May 16, 2012) (citations omitted).

¹⁵⁵ *Id.* ¶333.

¹⁵⁶ *Id.* ¶331.

¹⁵⁷ RAFAEL LEAL-ARCAS, *CLIMATE CHANGE AND INTERNATIONAL TRADE* 131 (2013).

¹⁵⁸ Report of the Panel, *United States - Restrictions on Imports of Tuna*, DS21/R (Sep. 3, 1991).

¹⁵⁹ JAMES K. R. WATSON, *THE WTO AND THE ENVIRONMENT: DEVELOPMENT OF COMPETENCE BEYOND TRADE* 190 (2012).

in Article XX(a) of the GATT was raised related to an "environmental issue" like the inhuman method of hunting seals, also demonstrates the emergence of environmental concerns in WTO case law.¹⁶⁰ However, in *EU Seals*, the result was different because the respondent could not successfully verify the *chapeau* of Article XX. Still, the Appellate Body upheld the Panel's finding that the EU Seal Regime is "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994. Nevertheless, it is Article XX of the GATT that represents a deliberate determination to grant WTO Member States the decision on the scope of a domestic measure regarding NTCs.¹⁶¹ One might say that Article XX of the GATT provides the last bit of sovereignty left to the Member States in the WTO system. It allows a country to impose trade restrictions when requirements under Article XX are met. Likewise, quantitative restrictions on trade and discriminatory regulation of foreign commerce under some circumstances which also include environmental laws could be applied.¹⁶² Yet, some States employ trade-restrictive measures to protect domestic industry. Furthermore, some countries tried to benefit from the exceptions mentioned in Article XX to alter other states' trade policies within their own jurisdiction.

Most scholars agreed that it was impossible for China to maintain a perfect implementation record following its accession to the WTO (as has happened to all WTO Member States), and disputes over the correct implementation of China's WTO obligations were certain to arise.¹⁶³ The high risk of China's non-compliance with WTO rules meant that China had to accept the instruments, procedures, and multilateral (as opposed to bilateral) framework of the WTO dispute settlement system despite China's legal culture and past resistant attitude towards international adjudication.¹⁶⁴

Among the WTO's many challenges, environmental protection is one of the most debated NTCs within the organization. Certainly, Multilateral Environmental Agreements (MEAs), the ongoing international negotiations on climate change, and the increasing number of countries with sophisticated environmental laws and regulations have pushed the WTO to gradually open its door to environmental concerns. However, considering the high diversity of interests and needs of the Member States, when States attempt to justify trade barriers or different

¹⁶⁰ Panel Report, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/R, WT/DS401/R (Nov. 25, 2013); Appellate Body Report, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014).

¹⁶¹ Driesen, *supra* note 105, at 279-300.

¹⁶² *Id.*

¹⁶³ Craig Pouncey et al., *China as a WTO Member: Systemic Issues*, in *DOING BUSINESS WITH CHINA 1*, 19-20 (Jonathan Reuvid & Li Yong eds. 2008).

¹⁶⁴ Marcia Don Harpaz, *Sense and Sensibilities of China and WTO Settlement*, in *CHINA AND GLOBAL TRADE GOVERNANCE: CHINA'S FIRST DECADE IN THE WORLD TRADE ORGANIZATION 233*, 240 (Ka Zeng & Wei Liang eds., 2013). See also Farah, *supra* note 45, at 193-226.

treatment based on environmental issues, the majority of developing countries interpret these NTCs as a form of green protectionism.¹⁶⁵ China, like many other developing countries, has prioritized economic growth over environmental concerns, which has caused an incredibly high level of air and water pollution and produced many other environmental and health impacts on the population.¹⁶⁶ On the other hand, it has to be recognized that China's accession to the WTO (and its participation in other international organizations and fora, such as the climate change negotiations) has positively influenced the country's internal environmental regulations, which it has strengthened to comply with international standards.¹⁶⁷ While it is disputable that China fully complies with the positive environmental laws and regulations that it has adopted throughout its entire territory, it has also adopted discriminatory laws and regulations in other fields by disguising their justifications based on environmental concerns and sustainable development to secure governmental control and adopt discriminatory trade measures in order to boost its internal market and favor its domestic industry.

The mining sector offers an excellent example of the extent to which such governmental control can push itself. State ownership over mineral resources is exercised by the State Council and is not affected by the alteration of ownership of the land where the resources are found. According to the *Mineral Resource Law of the People's Republic of China*,¹⁶⁸ "[m]ineral resources belong to the State"¹⁶⁹ and there is actually a straightforward reason to which the Chinese Government might root its claims. Such reason is to be found in public international law, where ownership of natural resources—and hence all kinds of raw materials—rests upon the legal concept of sovereignty.¹⁷⁰ The latter

¹⁶⁵ Urs P. Thomas, *Trade and the Environment: Stuck in a Political Impasse at the WTO after the Doha and Cancun Ministerial Conferences*, 4 GLOBAL ENVTL. POL. 9, 18 (2004).

¹⁶⁶ Regarding the water management in China and how the EU Water Framework Directive might be an excellent model for China, see Deng Yixiang et al., *China's Water Environmental Management Towards Institutional Integration. A Review of Current Progress and Constraints vis-a-vis the European Experience*, 113 J. CLEANER PRODUCTION 285, 285-98 (2015).

¹⁶⁷ Xingle Long et al., *Are Stronger Environmental Regulations Effective in Practice? The Case of China's Accession to the WTO*, 39 J. CLEANER PRODUCTION. 161, 161-62 (2013). See also Malin Song et al., *Statistical Analysis and Combination Forecasting of Environmental Efficiency and its Influential Factors since China Entered the WTO: 2002-2010-2012*, 42 J. CLEANER PRODUCTION. 42, 42-51 (2013).

¹⁶⁸ Kuangchan Ziyuan Fa (矿产资源法) [Mineral Resource Law] (promulgated by the Standing Comm. Nat'l People Cong. Aug. 29, 1996, effective Jan 1. 1997), <http://www.china.org.cn/english/environment/34342.htm>.

¹⁶⁹ *Id.* art. 3.

¹⁷⁰ See Jorge E Viñuales, *The 'Resource Curse' - A Legal Perspective*, 17(2) GLOBAL GOVERNANCE 197, 197-212 (2011). See also James N. Hyde, *Permanent Sovereignty over Natural Health and Resources*, 50 AM. J. INT'L L. 854, 854 (1956); NICO SCHRIJVER, *SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES* (1997); Thomas Dietz, Elinor Ostrom, & Paul C. Stern, *The Struggle to Govern the Commons*, 302 SCIENCE 1907, 1907 (2003); Lynton K. Caldwell, *Concepts in Development of International Environmental Policies*, 13 NATURAL RESOURCES J. 190, 190 (1973); Julia Ya Qin,

evolved through a series of Resolutions adopted by the United Nations General Assembly starting in 1952, establishing the "rights of peoples and Nations to permanent sovereignty over their natural wealth and resources."¹⁷¹ Sovereignty over natural resources derives from sovereignty over a State's territory, which implies control of such resources as well as sovereignty over all the activities that take place within that territory. However, such doctrine might seem unfair if we consider the so-called resource curse: since natural resources are unevenly distributed throughout the world, it would not be entirely fair to grant States such exclusive rights. This concern led to the emergence of the doctrine of the environment as common concern of mankind.¹⁷² According to this principle, the domestic use and exploitation of natural resources are elevated beyond exclusive national jurisdiction to a point of international concern and therefore subjected to international regulation.¹⁷³

Given its rich broad variety of raw materials, China chose to stick to the first principle and exercised strict control over its resources. This principle perfectly suited China's development agenda and, through its power over natural resources, the country managed to lift hundreds of millions of people out of poverty, sustaining an average Gross Domestic Product (GDP) annual growth rate of 9.3% during the past 20 years.¹⁷⁴ Such principle is even enshrined in the Constitution;¹⁷⁵ wherein Article 6 states that, "The basis of the socialist economic system of the People's Republic of China is socialist public ownership of [the means of production]," where "means of production" certainly includes raw materials and natural resources.¹⁷⁶

The State control over the country's resources takes different forms

Reforming WTO Discipline on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection, 46 J. WORLD TRADE. 1147, 1163-65 (2012).

¹⁷¹ G.A. Res. 626 (VII), U.N. Doc. A/RES/626(VII) (Dec. 21, 1952). The UN General Assembly based this important document on two previous resolutions: resolutions 523 (VI) of January 12, 1952 and 626 (VII) of December 21, 1952. The idea expressed here was then confirmed and further explored by the two 1966 International Human Rights Covenants as well as two resolutions—resolution 3201 (S.VI) of May 1, 1974, and resolution 3281 (XXIX) of December 12, 1974.

¹⁷² The "common concern of mankind" principle substituted the earlier "common heritage of mankind" concept, first introduced by Arvid Pardo in 1968 but adopted by the international community only two decades later. See PATRICIA BIRNIE & ALAN BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 97-99 (2d ed., 2002); EDITH BROWN WEISS, *ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS* (1992); PHILIPPE SANDS, *GREENING INTERNATIONAL LAW* (1993); PHILIPPE SANDS, RICHARD TARASOFSKY & MARY WEISS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* (1994); LAURENCE BOISSON DE CHAZOURNES, *ETHIQUE ENVIRONNEMENTALE ET DROIT INTERNATIONAL* (2003); KEMAN BASLAR, *THE CONCEPT OF THE COMMON HERITAGE OF MANKIND IN INTERNATIONAL LAW* 306 (1998).

¹⁷³ Ben Saul, *China, Resources, and International Law* 9 (Sydney Law School, Legal Studies Research Paper No. 11/82, Nov. 2011).

¹⁷⁴ *Id.*

¹⁷⁵ XIANFA art. 6 (1982) (China).

¹⁷⁶ Xu Xuelei & Xu Xin, *Information Disclosure of State-Owned Enterprises in China*, 4 TSINGHUA CHINA L. REV. 1, 14 (2012).

and can be seen as the root cause of the two main strategies adopted by China to support, boost, and foster its domestic industry: on the one hand, the limitation of the quantity of raw materials that can be exported (export restraints) and, on the other, of the possibility for foreign firms to access the Chinese market. Under both strategies, the government plays a crucial role.

In fact, when it comes to NTCs, the main WTO disputes involving China and concerning NTCs related to environmental matters specifically are *China - Raw Materials*¹⁷⁷ and *China - Rare Earths*.¹⁷⁸

In the first dispute, Beijing imposed restrictive measures on the export of nine types of raw materials, in particular various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc. The US, the EU, and Mexico challenged these measures claiming that they breached China's commitments under China's Accession Protocol Part I,¹⁷⁹ para. 1.2, Part I, para. 5.1, Part I, para. 5.2, Part I, para. 8.2, Part I, para. 11.3 and GATT Articles VIII, VIII:1, VIII:4 X:1, X:3 (a), XI:1¹⁸⁰ since the new regulations constituted export duties, export quotas, export licensing, and minimum export price requirements.¹⁸¹

These exports restraints increased the prices of raw materials at the global markets and, as a consequence, the Chinese domestic industries gained advantage through sufficient supply and lower prices. The Chinese Government claimed that these measures were justified under Article XX of the GATT.

In fact, China had stated among its arguments that some of its export duties and quotas were justified because they were measures "relating to the conservation of exhaustible natural resources" for some of the raw materials. However, China was unable to provide evidence that it adopted these restrictions in conjunction with measures applicable to domestic production or consumption of the raw materials so as to conserve the raw materials. It is important to highlight here that even though the decision did not favor China, the Panel acknowledged that China appeared to be on the path to adopting a legal framework to justify its quotas under WTO rules, but that the framework was not yet WTO-consistent because it still needed to be put into effect for domestic producers to avoid any accusation of violating the WTO non-discrimination principles.

¹⁷⁷ Panel Report, *China - Measures Related to the Exportation of Various Raw Materials*, WTO Doc. WT/DS394/R, WT/DS395/R, WT/DS398/R (Jul. 5, 2011); Appellate Body Report, *China - Measures Related to the Exportation of Various Raw Materials*, WTO Doc. WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (Jan. 30, 2012).

¹⁷⁸ Panel Report, *China - Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, *supra* note 77; Appellate Body Report, *China - Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WTO Doc. WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (Aug. 7, 2014).

¹⁷⁹ Accession of the People's Republic of China, WTO Doc. WT/L/432 (Nov. 23, 2001).

¹⁸⁰ GATT, *supra* note 98, at arts. VIII:1(a), X:1, X:3(a) & VI:1.

¹⁸¹ Butcher, *supra* note 86, at 72-73.

As to the other raw materials, China claimed that its export quotas and duties were fundamental and necessary in view of protecting the public health and its people. Unfortunately, China could not produce evidence that the adopted measures, such as export duties and quotas, would reduce pollution, in the short or long-term, and therefore improve the health of its citizens.

The Panel and Appellate Body had to examine whether China could use Article XX to justify its failure to comply with its commitments under Paragraph 11.3 of China's Accession Protocol. In *China - Publications and Audiovisual Products*, China's defense based on Article XX was allowed as the language of paragraph 5.1 of China's Accession Protocol granted China the right to regulate trade.¹⁸² Taking note of the same, the Appellate Body in *China - Publications and Audiovisual Products* stated that the language of Paragraph 11.3 being in contrast to paragraph 5.1, does not suggest that China may have recourse to Article XX to justify a violation of its obligation to eliminate export duties.¹⁸³

Thus, the debate over the place of the Accession Protocols in the WTO multilateral system continues since the basis on which WTO Accession Protocols take legal effect has not been raised in the DSB.¹⁸⁴ That is why, for instance, the Appellate Body had the opportunity to take a different reasoning concerning the application of Article XX to the Accession Protocols. Moreover, the Appellate Body confirmed the Panel's position that even if Article XX was applicable in this case, China has failed to provide a link between the measures taken and the objective of protecting the environment and public health.¹⁸⁵ Thus, the NTCs argument was rejected.

The second dispute, *China - Rare Earths*, concerned export restriction measures that Beijing adopted on Rare Earths, Tungsten, and Molybdenum (which are raw materials used in the production of various kinds of electronic goods),¹⁸⁶ with the justification of protecting the environment, preserving resources, reducing pollution caused by mining, and promoting sustainable development.¹⁸⁷ According to China's Accession Protocol, China must eliminate all export duties except for

¹⁸² Panel Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/R (Aug. 12, 2009); Appellate Body Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/AB/R (Dec. 21, 2009).

¹⁸³ Appellate Body Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 291, WTO Doc. WT/DS363/AB/R (Dec. 21, 2009); Butcher, *supra* note 86, at 72-73.

¹⁸⁴ Kennedy, *supra* note 76, at 46-47.

¹⁸⁵ Butcher, *supra* note 86, at 73.

¹⁸⁶ Panel Report, *China - Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WTO Doc. WT/DS431/R, WT/DS432/R, WT/DS433/R. (Mar. 26, 2014); Appellate Body Report, *China - Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WTO Doc. WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (Aug. 7, 2014). See also Butcher, *supra* note 86, at 74.

¹⁸⁷ See Butcher, *supra* note 86, at 76.

those included in Annex 6. With the exception of tungsten ores and concentrates, which are not included in the claim's terms of reference, none of the other products at issue are included in Annex 6. Therefore, China is not entitled to adopt any export duties on them.

Once more, China tried to invoke Article XX of the GATT to justify its measures which were "necessary to protect human, animal and plant life and health" from the pollution caused by mining the products at issue. Yet again, both the Panel¹⁸⁸ and the Appellate Body found that Article XX did not justify the breach of Paragraph 11.3 of China's Accession Protocol. It is relevant to note that, although China was not successful in its claim, the Panel agreed with China that the term "conservation" in Article XX(g) does not have to be read simply as meaning "preservation" of natural resources. The Panel stated that, in accordance with the general public international law principles of sovereignty over natural resources in line with various United Nations and other international instruments as described above in this section, each WTO Member may take into consideration its own internal conditions and may decide autonomously on how to reach the needs and objectives of sustainable development when preparing or adopting laws or regulations related to the conservation of exhaustible natural resources. However, the Panel clarified that "conservation" did not allow Members to adopt measures to control or manipulate the international market for a specific natural

¹⁸⁸ Panel Report, *China - Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WTO Doc. WT/DS431/R, WT/DS432/R, WT/DS433/R (Mar. 26, 2014). It is relevant to note that in the Section 7.3.2.1.8 of the Panel Report, ¶¶7.118 - 7.120, there is a "Separate Opinion by One Panelist." This panelist "is unable to agree with some of the findings and conclusions contained in Paragraphs 7.63 to 7.117 above. This section reflects the views of that panelist. I agree with the ultimate conclusion reached by this Panel that, in this dispute, China cannot justify its export duties on rare earths, tungsten, and molybdenum products pursuant to Article XX(b) of the GATT 1994 (GATT Article XX(b))." So, even if Article XX(b) was applicable to justify China's export duties, those duties were not "necessary to protect human, animal, or plant life or health," as required under Article XX(b). Under the concrete circumstances, China's imposition of the export duties in question was considered to be inconsistent with China's WTO obligations. The Panel then stated:

However, contrary to the finding made by the Panel's majority, I believe that a proper interpretation of the relevant provisions at issue leads to the conclusion that the obligations in Paragraph 11.3 of China's Accession Protocol are subject to the general exceptions in Article XX of the GATT 1994... I am well aware of the findings of the Panel and the Appellate Body in the *China - Raw Materials* dispute regarding the availability of Article XX of the GATT 1994 (GATT Article XX) to justify violations of Paragraph 11.3 of China's Accession Protocol. In my view, China has submitted new arguments in this dispute that have helped the Panel to appreciate the legal complexity of this issue. The Panel's majority has undertaken a long and careful evaluation of the parties' arguments concerning this matter. I agree with many parts of the Panel's majority's analysis of this issue and I respect this Panel's majority decision. Nonetheless, I respectfully disagree with certain key aspects of its reasoning and findings...

This was an important statement and clarification may be used as point reference in future cases, but under the concrete circumstances, terms and conditions of the Chinese measures at issue in this case.

resource, which is what the challenged export quotas were designed to do. In particular, the main objective of the measures adopted by the Chinese Government was to favor domestic extraction and secure preferential use of those raw materials by Chinese domestic industries.

Another relevant issue that was examined at the Appellate Body level relates to China's claim of "intrinsic relationship" between Article XII:1 of the Marrakesh Agreement¹⁸⁹ and Paragraph 1.2 of China's Accession Protocol. The Appellate Body stated that "the Marrakesh Agreement, the Multilateral Trade Agreements, and China's Accession Protocol form a single package of rights and obligations that must be read together."¹⁹⁰ The Appellate Body found that Paragraph 1.2 of China's Accession Protocol, which provides that the Protocol "shall be an integral part of the WTO Agreement," builds a bridge between the package of Protocol provisions and the package of existing WTO rights and obligations.

However, this statement does not provide an answer to whether there is an objective link between *an individual provision* in China's Accession Protocol and China's existing obligations under the Marrakesh Agreements and the Multilateral Trade Agreement or whether China can rely on the existing general exceptions in these Agreements to justify a breach of its commitments under China's Accession Protocol for NTCs, in general, and environmental concerns, in particular.¹⁹¹

The WTO has crossed a long road when it comes to balancing the relation between trade and NTCs where the Panels' and Appellate Body's jurisprudence has ensured respect for NTCs including environmental matters at the expense of trade in several cases, as it was shown above. However, the accession of new WTO Members resulted in new obligations (WTO Plus Obligations) upon the acceding countries (most of them developing or emerging economies) which were stipulated in their Accession Protocols.

There is an ongoing debate as to whether such an increase of WTO Plus Obligations is fair and, as described through the case law above, whether the WTO commitments included in the Accession Protocols can be violated on the basis of expectations stated in the GATT, mainly Article XX, since they should represent "a single package of rights and obligations that must be read together." It is arguable that these potential limitations on the use of Article XX of the GATT may be considered a new form of unfair discrimination perpetuated against developing countries which are gradually entering the WTO. This is even less justifiable if it

¹⁸⁹ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

¹⁹⁰ Appellate Body Report, *China - Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, ¶5.28, WTO Doc. WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (Aug. 7, 2014).

¹⁹¹ Panel Report, *China - Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WTO Doc. WT/DS431/R, WT/DS432/R, WT/DS433/R (Mar. 26, 2014); Appellate Body Report, *China - Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WTO Doc. WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (Aug. 7, 2014).

may impede the adoption of reasonable and non-discriminatory measures that have the sole objective of protecting the environment and facilitating sustainable development.

This paradigm is yet to be clarified through supplementary WTO multilateral negotiations or the Panel or Appellate Body to avoid the risk of revitalized limitations on the applications of NTCs in the near future on the basis of the WTO Plus Obligations imposed on newly acceding WTO Members.

So far, the decisions of the Panels and Appellate Body in the different cases which were filed against China adopted different attitudes and/or different justifications in their rulings, but generally it seems that their legal reasoning and clarifications (including the use of dissenting opinions among the Panelists), even when the final decisions were not in favor of the specific measures at issue which were consequently not justified under Article XX of the GATT, showed that the Panels and Appellate Body are more and more willing to carefully consider the environment and sustainable development.

3. *Ensuring Respect for Human Rights Matters in the Multilateral Trade System*

In recent decades, the WTO has increasingly come under pressure for reconciling the requirements of free trade with requests for protecting NTCs related to public health.¹⁹² The conflict between trade and public health is multifaceted, spanning the clash between trade-related intellectual property rights and human rights, investments in research and development, the right to health and access to medicine,¹⁹³ and the

¹⁹² Sieglinde Gstohl, *Blurring Regime Boundaries: Uneven Legalization of non-Trade Concerns in the WTO*, 9 J. INT'L TRADE L. & POL'Y. 275, 275 (2010).

¹⁹³ Frederick M. Abbott, *WTO TRIPS Agreement and its Implications for Access to Medicines in Developing Countries* 8-10 (Study Paper 2a, United Kingdom Commission on Intellectual Property Rights, Feb. 14, 2002), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1924420; PAUL HUNT et al., *NEGLECTED DISEASES: A HUMAN RIGHTS ANALYSIS* 35 (2007); World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/2 (2002), https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm; Alexandra G. Watson, *International Intellectual Property Rights: Do TRIPS' Flexibilities Permit Sufficient Access to Affordable HIV/AIDS Medicines in Developing Countries?*, 32 BOSTON COLLEGE INT'L & COMP. L. REV. 143, 145-48 (2009); JAKKRIT KUANPOTH, *TRIPS-Plus under Free Trade Agreements*, in *INTELLECTUAL PROPERTY & FREE TRADE AGREEMENTS* 27, 30 (Christopher Heath & Anselm Kamperman Sanders eds. 2007); Peter Drahos, *Four Lessons For Developing Countries From The Trade Negotiations Over Access To Medicines*, 28 LIVERPOOL L. REV. 11, 14 (2007); Rochelle Cooper Dreyfuss & César Rodríguez-Garavito, *The Battle over Intellectual Property Laws and Access to Medicines in Latin America: A Primer on Global Administrative Law, Intellectual Property and Political Contestation*, in *BALANCING WEALTH AND HEALTH: THE BATTLE OVER INTELLECTUAL PROPERTY AND ACCESS TO MEDICINES IN LATIN AMERICA* 1, 17 (Rochelle Dreyfuss & César Rodríguez-Garavito eds., 2014); DILIP K. DAS, *THE DOHA ROUND OF MULTILATERAL TRADE NEGOTIATIONS: CAUSAL FACTORS BEHIND THE FAILURE IN CANCÚN* 12 (2003); UNITED NATION COMMISSION ON TRADE AND DEVELOPMENT & INTERNATIONAL CENTER FOR TRADE AND SUSTAINABLE DEVELOPMENT, *RESOURCE BOOK ON TRIPS AND DEVELOPMENT* 484 (2005); CYNTHIA HO, *ACCESS TO MEDICINE IN THE GLOBAL ECONOMY:*

protection of tangible and intangible cultural heritage.¹⁹⁴

In particular, the TRIPs Agreement sets international minimum standards for the protection and enforcement of intellectual property rights, and allows WTO Members to insert public health concerns into their national intellectual property laws.¹⁹⁵ The Doha Declaration concerning the TRIPs Agreement and Public Health includes seven paragraphs, and indicates the importance that WTO Members ascribe to effectively addressing public health concerns.

The modern multilateral trade regime and the international human rights movement constitute products of post-World War II phenomena. Since the States have committed to liberalize trade in goods and services under international economic law, there is the potential for conflict between a State's obligations under international human rights law and its obligations under international economic law.¹⁹⁶

Each of these regimes has a strong impact on the respective area of competence and they are closely interconnected, but unfortunately they did not develop instruments for solving problems and frictions between the two systems and conflicts of overlapping jurisdiction. Yet, human rights violations have increased in quantity and sometimes become more sophisticated (e.g. abuses connected to the respect of a State contract signed with a multinational company). For these reasons, the international community must rethink the instruments used to protect human rights.

Since it is not possible to determine conclusively whether globalization has had a positive or negative effect on human rights, the international community, including governments, international organizations, civil society, policy makers, and scholars, must isolate the negative effects of globalization so they can be reframed to protect human rights without foregoing economic development. If the sole term of reference for a successful private enterprise is to decrease the prices of products as much as possible and increase company profits without considering the impact on the wealth and health of society, the endeavor will be unsustainable in the long-term. This is also the direct effect on the behavior of producers who are less and less inclined to spend more

INTERNATIONAL AGREEMENTS ON PATENTS AND RELATED RIGHTS 218 (2011); Andrew D. Mitchel & Tania Voon, *The TRIPs Waiver as a Recognition of Public Health Concerns in the WTO*, in INCENTIVES FOR GLOBAL PUBLIC HEALTH: PATENT LAW AND ACCESS TO ESSENTIAL MEDICINES 56, 75-76 (Thomas Pogge, Matthew Rimmer & Kim Rubenstein eds., 2010).

¹⁹⁴ Paolo D. Farah & Riccardo Tremolada, *Conflict between Intellectual Property Rights and Human Rights: A Case Study on Intangible Cultural Heritage*, 94 OREGON LAW REVIEW. 125, 125-78 (2015) [hereinafter FARAH & TREMOLADA, CONFLICT BETWEEN INTELLECTUAL PROPERTY RIGHTS AND HUMAN RIGHTS]; Paolo D. Farah & Riccardo Tremolada, *Diritti di Proprietà Intellettuale, Diritti Umani e Patrimonio Culturale Immateriale*, 2 RIVISTA DI DIRITTO INDUSTRIALE. 21, 21-47 (2014) [hereinafter FARAH & TREMOLADA].

¹⁹⁵ HUNT, *supra* note 193, at 35.

¹⁹⁶ Koen De Feyter, *Introduction to ECONOMIC GLOBALISATION AND HUMAN RIGHTS: EIUC STUDIES ON HUMAN RIGHTS AND DEMOCRATIZATION* 1, 7-8 (Wolfgang Benedek, Koen De Feyter & Fabrizio Marrella eds., 2007).

resources to provide adequate protection for their workers.¹⁹⁷ However, we cannot overlook the fact that globalization and increased trade may improve conditions for a larger share of the population to come out of poverty. In this way, globalization may improve human welfare and indirectly create the basis for the formation of a middle class that, after having reached an independent economic status and achieving a degree of stability, will demand political freedoms.¹⁹⁸

As described above, trade liberalization has been criticized for its emphasis on economic outcomes and GDP growth at the expense of human rights and other societal values.¹⁹⁹ The WTO is accused of having, among the provisions of the Agreements, requirements that may conflict with a State's human rights obligations and societal objectives, while limiting the ability of WTO Members to retaliate against other States for breaching human rights obligations through the use of trade sanctions.²⁰⁰ In addition, the elimination of quantitative restrictions and the application of non-discrimination principles between domestic and imported products might encourage States to boost the competitiveness of their own industries by adopting new laws and regulations for limiting or watering down human rights, such as the labor rights of workers permitting private companies to apply for new contractual conditions that reduce the minimum wage or other rights.²⁰¹ Nevertheless, defenders of the WTO state explicitly that the rationale behind the WTO approach is that, in cases of human rights violations, trade sanctions may conceal a disguised form of protectionism where the measure taken strictly for protectionism purposes is not motivated by human rights concerns.²⁰² Furthermore, the WTO would govern trade and not issues such as human rights, and some of them even argue that the WTO indirectly promotes human rights through stimulation of trade and an improved global governance of international trade and international economic law, not to mention that the substantive rules and practices of the organization are increasingly incorporating human rights issues within their framework.²⁰³

As a matter of fact, Article XX of the GATT allows human rights protection through its general exceptions for measures necessary to protect public morals (XX(a)), to protect human life (XX(b)), and for

¹⁹⁷ *Id.* at 7-8.

¹⁹⁸ Jessica M. Karbowski, *Grocery Store Activism: A WTO Compliant Means to Incentivize Social Responsibility*, 49 VA. J. INT'L L. 727, 734 (2009).

¹⁹⁹ Rebecca Bates, *The Trade in Water Services: How Does GATS Apply to the Water and Sanitation Services Sector?*, 31 SYDNEY L. REV. 121, 133-35 (2009).

²⁰⁰ Karbowski, *supra* note 198, at 734-35.

²⁰¹ SARAH JOSEPH, *BLAME IT ON THE WTO?: A HUMAN RIGHTS CRITIQUE* 3-4 (2013).

²⁰² Michael J. Trebilcock, *Trade Policy and Labour Standards: Objectives, Instruments and Institutions* 18-24 (Law and Economics Research Paper NO. 02-01, Faculty of Law, University of Toronto, Conference on "International Economic Governance and Non-Economic Concerns," Vienna, Austria, European Community Studies Association, Dec. 10-11, 2001).

²⁰³ OLUFEMI AMAO, *CORPORATE SOCIAL RESPONSIBILITY, HUMAN RIGHTS AND THE LAW: MULTINATIONAL CORPORATIONS IN DEVELOPING COUNTRIES* 218-19 (2011).

measures relating to the products of prison labor (XX(e)).²⁰⁴ Article XX(g) is primarily an economic and environmental provision since it relates to natural resources, but it has human rights ramifications in some circumstances.²⁰⁵ Moreover, Article XX(a), XX(b), and XX(e) require that a measure satisfy the "necessity" test to justify non-economic objectives, which implies that trade issues are prioritized over other objectives.²⁰⁶ The jurisprudence of the Panel and Appellate Body in several WTO cases related to either environmental or health concerns, such as the *US-Shrimp* case,²⁰⁷ highlights the fact that Article XX offers a significant mechanism, and room for State sovereignty, for justifying discriminatory treatment to respond to measures from other Member States that affect NTCs. It was shown through the *US-Shrimp* case that Article XX imposes limitations on the use of trade measures for non-trade policy purposes, but those measures may find justification under Article XX.²⁰⁸ Yet, Member States have rarely mentioned the reference to *human rights* in their petitions or arguments developed before the WTO, and they are not present in the Panel or Appellate Body findings.²⁰⁹ This is due to the restrictive interpretation of Article XX applied in the Panels' decisions and reasoning based on their views about the very deep meaning and purposes of the GATT, while the Appellate Body's decisions regarding Article XX show that an exception, in particular a general exception like the ones included in Article XX, should be treated like any other treaty provision which must be interpreted according to its terms, context, and in light of the core object and purpose of such a treaty.²¹⁰

Furthermore, the GATT 1979 Agreement on Technical Barriers to Trade,²¹¹ also called Tokyo Round Standards Code, adopted the notion of

²⁰⁴ SARAH H. CLEVELAND, *Human Rights Sanctions and the World Trade Organisation*, in ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE 199, 233 (Francesco Francioni ed., 2001).

²⁰⁵ ADAM MCBETH, INTERNATIONAL ECONOMIC ACTORS AND HUMAN RIGHTS 119 (2011).

²⁰⁶ AMAO, *supra* note 203, at 224.

²⁰⁷ Panel Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/RW (June 15, 2001); Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998); Panel Report, *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); Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products Recourse to Article 21.5 of The DSU by Malaysia*, WTO Doc. WT/DS58/AB/RW (Oct. 22, 2001).

²⁰⁸ ANTHONY CASSIMATIS, HUMAN RIGHTS RELATED TRADE MEASURES UNDER INTERNATIONAL LAW 336 (2007).

²⁰⁹ NIELS BEISINGHOFF, CORPORATIONS AND HUMAN RIGHTS: AN ANALYSIS OF ATCA LITIGATION AGAINST CORPORATIONS 57 (2009).

²¹⁰ ANDREW NEWCOMBE, *General Exceptions in International Investments Agreements*, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 351, 363-64 (Marie-Claire Cordonier Segger, Markus W. Gehring & Andrew Paul Newcomb eds., 2010).

²¹¹ At the end of the Tokyo Round in 1979, after several years of negotiations since year 1947, 32 GATT Contracting Parties signed the plurilateral Agreement on Technical Barriers to Trade (TBT) which was called the Tokyo Round Standards Code. Its provisions were further expanded through the adoption of the TPB Agreement in 1995 with the creation of the WTO. See *Technical Barriers to Trade: Technical Explanation, Technical Information on Technical Barriers to Trade*, WORLD TRADE ORGANIZATION,

Non-Product-Related (NPR) Process and Production Methods (PPM). The NPR PPM requirements refer to measures that target the production methods of goods, starting from the consideration that not all the processes are in themselves equivalent in terms of the societal effects to obtain a specific final product.²¹² PPM measures are divided into two categories: Product-Related measures that may have detectable and identifiable leftovers in the final product and Non-Product Related measures that do not have any visible or verifiable leftovers in the final product, but may still have effects beyond the product itself.²¹³ The GATT 1947 and WTO Panel and Appellate Body reports have not adopted any cases with a leading ruling, which clarified in a definitive or at least clear way the treatment to be granted to the NPR PPMs under general trade liberalization rules.²¹⁴ Nevertheless, it appears that exceptions in GATT Article XX have the capacity to protect unilateral NPR PPM measures as the *Tuna/Dolphin Case II* of 2011 (“*Dolphin-Safe*” Labeling), where consumers’ choice was based on the method of production rather than the product itself, as previously showed.²¹⁵ The further relevant step in this legal reasoning is the application of the NPR PPMs to human rights issues. It has to be highlighted that the Panel and Appellate Body cases have developed and clarified the conditions for evaluating the “likeness” of two products through the use of the four criteria analysis (set by the *Border Tax Adjustments*) which do not need to be cumulative: (i) the properties, nature, and quality of the products; (ii) the end-uses of the products; (iii) consumers’ tastes and habits—more comprehensively termed consumers’ perceptions and behaviors—in respect of the products; and (iv) the tariff classification of the products.²¹⁶ If the NPR PPMs would become, for example, a fifth criteria in this list, it would be more likely for countries to adopt trade-related human rights measures despite their

https://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm.

²¹² OECD, PROCESSES AND PRODUCTION METHODS (PPMS): CONCEPTUAL FRAMEWORK AND CONSIDERATIONS ON USE OF PPM-BASED TRADE MEASURES 15-16, OECD Doc No. OECD/GD(97)137 (1997), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD\(97\)137&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(97)137&docLanguage=En).

²¹³ KATERYNA HOLZER, CARBON-RELATED BORDER ADJUSTMENT AND WTO LAW 93 (2014).

²¹⁴ ILONA CHEYNE, *Consumer Labelling in EU and WTO Law*, in LIBERALISING TRADE IN THE EU AND THE WTO: A LEGAL COMPARISON 309, 319 (Birgitte Egelund Olsen, Karsten Engsig & Sanford E. Gaines Sørensen eds., 2014).

²¹⁵ *Id.* See also Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/R (Sept. 11, 2011); Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 of the DSU by Mexico*, WTO Doc. WT/DS381/RW (Apr. 14, 2015).

²¹⁶ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, *supra* note 138, at ¶101. See also Panel Report, *Japan – Taxes on Alcoholic Beverages (“Japan – Alcoholic Beverages”)*, WTO Doc. WT/DS8/R, WT/DS10/R, WT/DS11/R, (adopted 1 November 1996, as modified by the Appellate Body Report, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R); Appellate Body Report, *Japan – Alcoholic Beverages*, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted 1 November 1996).

inconsistency with the WTO system, because these measures would be covered under Article XX.

Additionally, another subject that remains unsolved and highly relevant for NTCs is the concept of extraterritoriality that we already examined in this paper; however, we focused our reasoning and evaluation on environmental concerns, when we compared the *United States - Tuna and Tuna Products from Canada* case,²¹⁷ the *Tuna/Dolphin Case I*²¹⁸ and the *Tuna/Dolphin Case II* of 2011 ("*Dolphin-Safe*").²¹⁹ In those cases, this issue was gradually addressed with an evolution that started in the first two disputes with a very narrow interpretation stating that a given State's regulations cannot be enforced in another State's jurisdiction on the basis of international trade rules under the auspices of the expectations of Article XX (b, g). In the last dispute, which was actually adopted after the creation of the WTO and inclusion of the WTO Preamble, the interpretation favored measures that have the sole objective of protecting the environment and promoting sustainable development. Whether this last interpretation of the extraterritoriality principles will be consistently applied to trade measures adopted for the protection of human rights or other areas of NTCs in the future remains to be seen.²²⁰

Along with Article XX, Article XXI(c) provides proof of the willingness to consider human rights concerns when the WTO assesses compliance with trade measures. Article XXI(c) states the following: "Nothing in this Agreement shall be construed [...] (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."²²¹ Likewise, the Panels and the Appellate Body have made use of general principles of international law to support their interpretations based on the ordinary meaning of the terms of the WTO Agreement as was proved in the *US-Standards for Reformulated Gasoline and Conventional Gasoline*²²² where the Appellate Body held

²¹⁷ Report of the Panel, *United States - Prohibition of Imports of Tuna and Tuna Products from Canada*, L/5198 - 29S/91, ¶¶4.10 - 4.12 (Feb. 27, 1982).

²¹⁸ Report of the Panel, *United States - Restrictions on Imports of Tuna*, ¶45, DS21/R (Sep. 3, 1991).

²¹⁹ Panel Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/R (Sept. 11, 2011); Appellate Body Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/AB/R (May 16, 2012); Panel Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 of the DSU by Mexico*, WTO Doc. WT/DS381/RW (Apr. 14, 2015).

²²⁰ SANDRA L. WALKER, ENVIRONMENTAL PROTECTION VERSUS TRADE LIBERALIZATION: FINDING THE BALANCE: AN EXAMINATION OF THE LEGALITY OF ENVIRONMENTAL REGULATION UNDER INTERNATIONAL TRADE LAW REGIMES 97-98 (1993).

²²¹ General Agreement on Tariffs and Trade, art. XXI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

²²² Panel Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996); Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/9 (May 20, 1996).

that the WTO agreement should not be read in "clinical isolation from Public International Law".²²³

The above-mentioned matters create additional challenges for the WTO legal system that strives for trade openness, however, while taking NTCs into consideration. If the WTO succeeds in fully integrating human rights issues into the system through the adoption of further provisions in the WTO Agreements and/or thanks to a more straightforward and solid case law, it would constitute a further tool to protect and guarantee human rights even when trade is concerned, recognizing the existing (and necessary) interdependence between the two systems. As a matter of fact, a completely different analysis should be dedicated to the indirect impact that accession to the WTO may produce in terms of domestic legal reforms of the WTO acceding Member States, including new regulations that would strengthen the protection of human rights. It has to be noted that following China's accession to the WTO in 2001, the 10th National People's Congress (NPC) at its 2nd Session on March 14, 2004, approved important amendments to the Chinese Constitution²²⁴ relevant to the discussion. While the WTO accession was not the sole reason for this move toward reforms, it is to be noted that several internal political concerns played an essential role in fastening and creating the political consensus for the adoption of those amendments in the Chinese Constitution, even as an *internal response* to WTO membership and consequent liberalization.

The more leftist intellectuals in China sharply contested China's WTO accession because of the impact it would have had on a country that still describes itself in Article 1 of its Constitution as "a socialist State under the People's democratic dictatorship led by the working class and based on the alliance of workers and peasants". Those intellectuals considered globalization, free-trade, and liberalistic principles, which are intrinsic parts of the WTO, to be disruptive for the interests of the Chinese people.

If we carefully analyze the amendments to the Chinese Constitution, we can find many relevant and interesting changes. In particular, a third paragraph has been added to Article 33: "The State respects and preserves human rights." After the adoption of this amendment, the question which arose was whether the Chinese Government would take actions and implement reforms to respect the spirit of the law or whether Article 33 would remain hollow. It seems that the *Labor Contract Law of the People's Republic of China*,²²⁵ which went into effect on 1 January 2008, is one of the first relevant consequences of the human rights

²²³ CHIEN-HUEI WU, *WTO AND THE GREATER CHINA: ECONOMIC INTEGRATION AND DISPUTE RESOLUTION* 99 (2012).

²²⁴ XIANFA (1982) (China). See also Chen Jianfu, *The Revision of the Constitution in the PRC*, 53 *CHINA PERSPECTIVES*, 1, 4-9 (2004).

²²⁵ *Zhonghua Renmin Gongheguo Laodong Hetong Fa* (中华人民共和国劳动合同法) [Labor Contract Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008, amended Dec. 28, 2012).

amendment to implement the Chinese Constitution in the Chinese legal system, followed by the *Law of the People's Republic of China on the Prevention and Control of Occupational Diseases*²²⁶ and by the *Work Safety Law of the People's Republic of China*.²²⁷ Then, it is also significant to highlight the clear reference in the Chinese Constitution to the protection of private property ("Citizens' lawful private property is inviolable")²²⁸ and the obligation to compensate in case of expropriation or requisition.²²⁹ Furthermore, the second paragraph of Article 11 of the Chinese Constitution states that the "State protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors of the economy. The State encourages, supports and guides the development of the non-public sectors of the economy and, in accordance with law, exercises supervision and control over the non-public sectors of the economy."²³⁰ A fourth paragraph was added to Article 14: "The State establishes a sound social security system compatible with the level of economic development." This article further develops the meaning of Article 33 of "the respect and preservation of human rights" calling for a concrete change in the lives of Chinese citizens by establishing a "sound social security system." The Chinese Government has adopted several different laws to implement this principle in the Chinese legal system like the *Law of the People's Republic of China on Protection of the Rights and Interests of the Elderly*,²³¹ the *Mental Health Law of the People's Republic of China*,²³² and, to a certain extent, also the Resolution of the Standing Committee of the National People's Congress on Adjusting and Improving the Family Planning Policy. Of course, beyond the letter of all these laws and regulations, the Chinese authorities and officials need to effectively implement the spirit of these laws in day-to-day practice to meet the relevant and overreaching objectives to improve the Chinese population's quality of life.

Having taken into consideration all these issues, in the author's opinion, the WTO has indirectly contributed to these Chinese legal reforms, which better protect the rights of Chinese workers and citizens

²²⁶ *Zhonghua Renmin Gongheguo Zhiyebing Fangzhi Fa* (中华人民共和国职业病防治法) [Law of the People's Republic of China on the Prevention and Treatment of Occupational Diseases] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001, amended Dec. 31, 2011).

²²⁷ *Zhonghua Renmin Gongheguo Anquan Shengchan Fa* (中华人民共和国安全生产法) [Work Safety Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2002, amended Aug. 27, 2009).

²²⁸ XIANFA art. 13 (1982) (China).

²²⁹ *Id.*

²³⁰ *Id.* art. 11.

²³¹ *Zhonghua Remin Gongheguo Laonian Ren Quanyi Baozhang Fa* (2012 Nián Xiūding) (中华人民共和国老年人权益保障法(2012年修订)) [Law of the People's Republic of China on Protection of the Rights and Interests of the Elderly] (Promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2012).

²³² *Zhōnghuá Rénmín Gònghéguó Jīngshén Wèishēng Fǎ* (中华人民共和国精神卫生法) [Mental Health Law of the People's Republic of China] (Promulgated by the Standing Comm. Nat'l People's Cong., June 26, 2012, effective May 1, 2013).

as a whole and balance the effects that globalization and free trade would have brought in the Chinese internal legal system. In sum, when the link between trade and human rights is taken into account, we need to carefully evaluate, from a comparative law perspective, the new Member States' internal legal reforms to protect human rights, following their WTO accession, and not only those reforms that are specifically addressed by the WTO Agreements and practice.

4. *Guaranteeing Food Security at the National Level while Embracing International Trade Regulations*

The United Nations established the Food and Agriculture Organization (FAO) in 1945 as a specialized agency during the First Session of the FAO Conference held in Quebec City, Canada. The FAO is certainly the international organization designed to cover most of the issues related to food security, food safety, and agricultural products, but the relations and conflicting areas among these relevant issues and international trade regulations are quite evident. Since GATT 1947, NTCs have been included in agriculture trade policy and negotiations, mainly for the important role they play in this specific field for the national security and stability of the countries. During the ongoing negotiations and in particular during the Uruguay Round, this definition has evolved such that the NTCs include "food security, food safety and quality, rural development and animal welfare".²³³ Food security emerged as a NTC that shall be taken into account in the reform of agricultural trade.²³⁴ Food security was, for the first time, defined at the global level during the 1974 World Food Summit as the "availability at all times of adequate world food supplies of basic foodstuffs to sustain a steady expansion of food consumption and to offset fluctuations in production and prices."²³⁵ This definition gives us the idea that when the issue started to appear as a global concern, States mainly considered food security in terms of volume and stability of food supplies. Throughout the years, this concept has evolved and has been redefined at various World Summits, Conferences, and FAO Reports such as those in 1983, 1996, and 2001²³⁶ and reports from other International Organizations and *fora*, such as the 1986 World Bank (WB) Report on "Poverty and Hunger"²³⁷

²³³ Simpson & Schoenbaum, *supra* note 25, at 402.

²³⁴ MICHAEL BLAKENEY, INTELLECTUAL PROPERTY RIGHTS AND FOOD SECURITY 10 (2009).

²³⁵ World Food Conference, Rome, Nov. 5-16, 1974, *Report of the World Food Conference*, U.N. Doc. E/CONF.65/20.

²³⁶ Director General of the FAO, *World Food Security: A Reappraisal of the Concepts and Approaches*' CFS 83/4, Rome, 1983; World Food Summit, Nov. 13-17, 1996, *Rome Declaration on World Food Security and World Food Summit Plan of Action*, WFS 96/REP Part One, Rome, 1986.; Food and Agriculture Organization, *The State of Food Insecurity in the World 2001*, Rome, 2002.

²³⁷ WORLD BANK, POVERTY AND HUNGER: ISSUES AND OPTIONS FOR FOOD SECURITY IN DEVELOPING COUNTRIES (1986), <http://documents.worldbank.org/curated/en/166331467990005748/Poverty-and-hunger-issues-and-options-for-food-security-in-developing-countries>.

and the 1994 United Nations Development Program (UNDP) Human Development Report,²³⁸ including a definition of food security as "access to vulnerable people," with attention to the relevant differences between chronic and temporary food insecurity connected to natural disasters and armed conflicts. This characterization has expanded to also cover the need of food safety and better quality of food in terms of nutritional balance. The link between food security and food safety became a focal point to construct so-called "human security".²³⁹

The definition adopted in Rome in 2001 in *The State of Food Insecurity in the World 2001* gave more importance to consumption and the right of individuals to have access to food: "Food security [is] a situation that exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life."²⁴⁰

On a different level, national food security was described as the "ability of a country to secure an adequate total supply of food to meet the nutritional needs of its population at all times, through domestic production, food imports and/or the temporary use of national food stocks."²⁴¹ We are living in a more and more interconnected world, but each Nation State needs to attain or preserve food security for its population within its borders as independently as possible from external intervention or even, in certain circumstances, a foreign country's efforts to protect its national security and sovereignty.²⁴² In order to achieve a sufficient level of independence, governments need to have a clear food security plan, in particular with a balance among internal production, food reserves, and availability for the most vulnerable people.²⁴³

The concept of national sovereignty in the food security field is also very aligned with the principles and objectives of sustainable development. If a country is able to produce internally what it needs to satisfy the subsistence rights of its population, it also means less use of transportation to transfer goods from one country to another and less impact and consequences for the environment and climate change.

Unfortunately, we do not live in a perfect world, but rather in one

²³⁸ UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1994 (1994), http://hdr.undp.org/sites/default/files/reports/255/hdr_1994_en_complete_nostats.pdf.

²³⁹ *Id.* See also Patricia Bonnard, *Improving the Nutrition Impacts of Agriculture Interventions: Strategy and Policy Brief 6* (Food and Nutrition Technical Assistance Project 2001). Carmen G. Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries*, 27 COLUM. J. ENVTL. L. 431, 466-67 (2002).

²⁴⁰ FAO, THE STATE OF FOOD INSECURITY IN THE WORLD 2001 (2002).

²⁴¹ FAO, REPORT OF THE EXPERT CONSULTATION ON INTERNATIONAL FISH TRADE AND FOOD SECURITY 65 (2003).

²⁴² GEORGE KENT, FREEDOM FROM WANT: THE HUMAN RIGHT TO ADEQUATE FOOD 200 (2005).

²⁴³ V.P. Raghavan, *Food Security Concern for India under WTO Regime: An Analysis*, in WTO, INDIA, AND EMERGING AREAS OF TRADE: CHALLENGES AND STRATEGIES, 95, 96 (P. Rameshan ed., 2008).

with incredible disharmonies and conflicting interests in which the lack of truly enlightened global governance means that most actions have not been based on global justice and sustainable development. Many sovereign States are not able to produce independently what they need or, even when they could, are not able to fully exercise their own decisions. Free trade, liberalism, and neo-liberal economic reforms have certainly improved the situation in many developing countries, reducing poverty and increasing wealth for quite some time and for a growing part of the population. However, too much room has been given merely to "economics," and the lack of robust laws and regulations to balance economic analysis and objectives with sustainable development²⁴⁴ has left the global governance, and indirectly the decision making process, in the hands of a handful of multinational companies or, even worse, groups that exercise control beyond the borders, operating without any transparent legal identity.

Most multinational corporations are not interested in sovereignty, national security, and food security issues other than to protect and profit from their business investments. Actually, they benefit from the fragmentation of international law,²⁴⁵ and they operate more easily in countries where the rules are less stringent, generally in developing countries.²⁴⁶ The limited presence of laws and regulations eases the environment for corporations because they can operate more freely. Multinational corporations are generally profit-driven and may implement their objectives more thoroughly when deep liberalism is adopted, which gives individuals and private initiatives wide latitude as opposed to the invasive involvement of the State. However, it is now clear that strong liberalist principles do not create a fairer world on their own, but they risk facilitating a world ruled by unelected, authoritarian, and profit-driven (opposed to human development oriented) organizations such as some (not all) multinationals. They do what they are supposed to do to make a profit and otherwise benefit their shareholders. It is not formally and institutionally their role to auto-regulate their actions if they are not requested to do so or if the rules of the game do not directly

²⁴⁴ Regarding the risks posed by neoliberalism for food security and sustainable development, see Carmen G. Gonzalez, *Trade Liberalization, Food Security and the Environment: The Neoliberal Threat to Sustainable Rural Development*, 14 *TRANSNAT'L L. & CONTEMP. PROBS.* 419, 465-69 (2004).

²⁴⁵ On the fragmentation of international law, see PATRICK DAILLIER & ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC* 642-728 (7d ed. 2002); MIREILLE DELMAS-MARTY, *LES FORCES IMAGINANTES DU DROIT (II). LE PLURALISME ORDONNE* 7-8 (2006) ("Ce qui domine le paysage, loin de l'ordre juridique au sens traditionnel, c'est le grand désordre d'un monde tout à la fois fragmenté à l'excès, comme disloqué par une mondialisation anarchique, et trop unifié, voire uniformisé par l'intégration hégémonique qui se réalise simultanément dans le silence du marché et le fracas des armes.") See also Francis Snyder, *Governing Economic Globalisation: Global Legal Pluralism and European Law*, 5 *EUR. L. J.* 334, 334-35 (1999).

²⁴⁶ Laurence Boy, *Le Déficit Démocratique de la Mondialisation du Droit Économique et le Rôle de la Société Civile*, 3 *REVUE INTERNATIONALE DE DROIT ÉCONOMIQUE* 479-82 (2003).

(laws and regulations) or indirectly (corporate social responsibility - CSR and accountability for the good public image of the company) impose to act accordingly.²⁴⁷

Moreover, the view that liberalism has enabled many countries to reduce poverty is correct, but at the same time and to a certain extent, it is an assumption because what has to be examined is at what costs, in the long-term, has this wealth been achieved. The negative production externalities of industrialization are enormous; the externalities of the excesses of globalization, free trade, and neo-liberal thoughts are even more dramatic, in terms of loss of quality of life, water and air pollution, climate change, environmental risks and natural disasters, health problems, and new diseases connected to industrialization without control and rules.

This long excursus is essential to highlight the pivotal role that food security²⁴⁸ and food safety may have in the paradigm shift which is foreseeable from an import-export oriented model to the need to reestablish more locally oriented production. This change would allow communities to re-appropriate control of local production including cultural components and choice of domestic production and consumption. At the same time, this more local community criterion is already being adopted from the bottom, within a growing number of societies, through civil society involvement in creating new and innovative ways for product commercialization like exchanges that allow communities to trade without the use of common currency (with the use of alternative currency) or like other methods or metrics to measure progress.

In the author's opinion, achieving food security by establishing local independence has become increasingly urgent considering the current economic crisis, the systemic problems created by the exacerbated import-export model and a debit and credit system that is not sustainable and has brought our society down a dead-end street of defaults, unemployment, and social unrest, as seen in the recent examples of Argentina and Greece and as the incredible financial turmoil underway in China may indicate.

To try to solve or find constructive solutions to some of the problems discussed above, in the context of the Doha Development Agenda (DDA),

²⁴⁷ PATRIZIO MERCIAL, *LES ENTREPRISES MULTINATIONALES EN DROIT INTERNATIONAL* 37 (1993); FRANCESCO FRANCONI, *IMPRESE MULTINAZIONALI, PROTEZIONE DIPLOMATICA E RESPONSABILITÀ INTERNAZIONALE* 13 (1979); ALBERTO SANTA MARIA, *DIRITTO COMMERCIALE COMUNITARIO* 245 (2008); ANGELICA BONFANTI, *LE IMPRESE MULTINAZIONALI TRA RESPONSABILITÀ E ACCOUNTABILITY NEL DIRITTO INTERNAZIONALE* (Doctoral Thesis, Università di Milano, 2007); PIA ACCONCI, *Responsabilità Sociale d'Impresa, Imprese Multinazionali e Diritto Internazionale*, in EMILIO D'ORAZIO, *LA RESPONSABILITÀ SOCIALE D'IMPRESA: TEORIE, STRUMENTI, CASI, POLITEIA*, XIX, 72, 71, 71-80 (2003); STEFANO ZAMAGNI, *L'Impresa Socialmente Responsabile nell'Epoca della Globalizzazione*, in EMILIO D'ORAZIO, *LA RESPONSABILITÀ SOCIALE D'IMPRESA: TEORIE, STRUMENTI, CASI, POLITEIA*, XIX, 72, 71, 71-80 (2003).

²⁴⁸ Matias E. Margulis, *The World Trade Organisation and Food Security After the Global Food Crises*, in *LINKING GLOBAL TRADE AND HUMAN RIGHTS: NEW POLICY SPACE IN HARD ECONOMIC TIMES* 236, 249 (Daniel Drache & Lesley A. Jacobs eds., 2014).

the European Union promoted the establishment of a "Food Security Box" to enhance the trading capacities of developing countries. Among the different objectives was a proposal to include special provisions to support the agriculture sector.²⁴⁹ It has been proposed that any future WTO Agreement must grant the right to any other WTO Member State to produce domestically a certain percentage of agricultural production to feed the population. This domestically produced agricultural production should also have minimum standards in terms of quantity of calories consumed or some other objective quantity and quality measurements without any possibility for other countries to forbid these practices.²⁵⁰ This measure would be particularly important for developed countries to counterbalance the potential strong negative effects of tariff reductions on their agricultural sector.

When it comes to evaluating WTO case law involving food security issues, one must immediately look at the *EC-Hormones* case²⁵¹ in which the EU imposed a ban on the domestic sale and import of meat or meat products from cattle that were treated with six kinds of natural or synthetic hormones for the purpose of growth promotion. The US and Canada challenged the measure on the basis of the Agreement on Sanitary and Phytosanitary Measures (SPS),²⁵² while the EU justified it on the basis of the precautionary principle.²⁵³ The Appellate Body upheld the Panel's finding that the EU import prohibition was inconsistent with Articles 3.3 and 5.1 of the SPS Agreement, but rejected the Panel's interpretation, stating that the requirement that SPS measures be "based on" international standards, guidelines or recommendations under Article 3.1 is not equivalent to requiring that SPS measures must "conform to" such standards. In particular, under Article 3.3 of the SPS Agreement, "Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of

²⁴⁹ Michael John Westlake, *Addressing Marketing and Processing Constraints that Inhibit Agrifood Exports a Guide for Policy Analysts and Planners*, FAO AGRICULTURAL SERVICES BULLETIN No. 160, at 12 (2005), <http://ucanr.edu/datastoreFiles/234-2088.pdf>.

²⁵⁰ Simpson & Schoenbaum, *supra* note 25, at 406-08.

²⁵¹ Panel Report, *EC - Measures Concerning Meat and Meat Products (Hormones) Complaint by the United States*, WTO Doc. WT/DS26/R/USA (Aug. 18, 1997); Appellate Body Report, *EC - Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

²⁵² World Trade Organization, *Understanding the WTO Agreement on Sanitary and Phytosanitary Measures*, WORLD TRADE ORGANIZATION, (MAY 1998), https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm (last visited May 23, 2017).

²⁵³ This principle means that precautionary action must be taken before scientific certainty of cause and effect is established. See Lucy Emerton et al., *Economics, the Precautionary Principle and Natural Resource Management: Key Issues, Tools and Practices*, in *BIODIVERSITY AND THE PRECAUTIONARY PRINCIPLE: RISK, UNCERTAINTY AND PRACTICE IN CONSERVATION AND SUSTAINABLE USE* 253, 253-254 (Rosie Cooney, Barney Dickson & FAUNA FLORA INTERNATIONAL eds., 2005).

sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5." According to Article 5.1, "Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations." Both the Panel and the Appellate Body stated that the EU measures did not comply with the WTO Agreements because the EU measures were not based on a risk assessment as required under Articles 5.1 and 5.2 of the SPS Agreement in order to prove its claims;²⁵⁴ however, the Appellate Body reversed the Panel's finding where it stated that Article 5.1 requires that there should be a "rational relationship" between the measure at issue and the risk assessment.²⁵⁵

It is relevant to note that the Appellate Body had also reversed the Panel's finding that the EU import prohibition was inconsistent with Articles 3.1 and 5.5 of the SPS Agreement because, as stated by the Appellate Body, the EU measure did not apply arbitrary or unjustifiable treatments and differences in protection levels in respect of added hormones in treated meat and naturally-occurring hormones in food.²⁵⁶ In fact, the Appellate Body found that the EU demonstrated enough evidence that there were genuine anxieties concerning the safety of those added hormones in treated meat instead of the naturally-occurring hormones in food;²⁵⁷ that the necessity for harmonizing the internal regulations of its Member States was part of the effort and mandate to establish a common internal market for beef;²⁵⁸ and that the Panel's finding was not supported by the "architecture and structure" of the measures to consider them in violation of the WTO. Furthermore, the Appellate Body clarified that the SPS Agreement does not allocate the "evidentiary burden" on the WTO Member State imposing the SPS measure.

The Appellate Body's reversals of the Panel's finding and its related reasoning clearly demonstrate to WTO Member States how to design their policies in a way that is justifiable under the provisions of the SPS Agreement.

Following the Appellate Body ruling in 1998, the EU Commission funded 17 scientific studies concerning the impact that hormone residues

²⁵⁴ Veena Jha, *Environmental and Health Regulations*, in ENVIRONMENTAL REGULATION AND FOOD SAFETY: STUDIES OF PROTECTION AND PROTECTIONISM 14, 19 (Veena Jha ed. 2006).

²⁵⁵ Mitsuo Matsushita, *WTO Dispute Cases Relating to Food Safety Issues*, in TRADE DISPUTES AND THE DISPUTE SETTLEMENT UNDERSTANDING OF THE WTO: AN INTERDISCIPLINARY ASSESSMENT 283, 288 (James C. Hartigan, Hamid Beladi & Kwan Choi eds., 2009).

²⁵⁶ Appellate Body Report, *EC - Measures Concerning Meat and Meat Products (Hormones)*, ¶¶219-226, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998)..

²⁵⁷ *Id.*

²⁵⁸ *Id.* ¶¶245-46.

in meat have on human health.²⁵⁹ In this dispute, the GATT and the WTO were unable to achieve compliance since the EU maintained the ban,²⁶⁰ but the ruling discouraged other WTO Members from banning the hormones in question.²⁶¹

Another relevant case for our analysis is *Japan - Measures Affecting Agricultural Products*.²⁶² In this case, the WTO Panel and Appellate Body respectively found the Japanese Government's requirement to test and confirm the efficacy of a particular quarantine treatment for each variety of eight agriculture products coming from the US to be inconsistent with the SPS Agreement.²⁶³ The US challenged the Japanese restrictions on imports of apples, cherries, peaches (including) nectarines, walnuts, apricots, pears, plums, and quince in order to prevent the infestation of Japanese orchards with the parasitic codling moth, an insect that can damage fruits.²⁶⁴ In such a case, the Member State must be able to show a "rational or objective relationship" between the SPS measure and the scientific evidence,²⁶⁵ which was unsuccessful and thus the measures had to be eliminated.²⁶⁶ The Appellate Body upheld the Panel's finding under Article 5.7 according to the fact that a measure may be provisionally adopted in respect of a situation where relevant scientific information is insufficient and on the basis of available pertinent information, and may be maintained so long as the Member which adopted the measure "seek[s] to obtain the additional information necessary for a more objective assessment of risk" and "review[s] the [...] measure accordingly within a reasonable period of time".²⁶⁷

The *EC - Approval and Marketing of Biotech Products*²⁶⁸ dispute concerns two distinct matters: (1) the operation and application by the European Union (formerly EC - European Communities) of its regime for the approval of biotech products, and (2) certain measures adopted and maintained by EU Member States prohibiting or restricting the marketing of biotech products. 'Biotech products' in this dispute refers to

²⁵⁹ Bernard Hoekman & Joel Trachtman, *Continued Suspense: EC-Hormones and WTO disciplines on Discrimination and Domestic Regulation*, in *THE WTO CASE LAW OF 2008*, 151, 157 (Henrik Horn & Petros C. Mavroidis eds., 2010).

²⁶⁰ For further information please see supra note 256 at proceedings under Article 22 of the DSU (remedies), https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm

²⁶¹ CHARAN DEVEREAUX, ROBERT Z. LAWRENCE & MICHAEL D. WATKINS, *CASE STUDIES IN US TRADE NEGOTIATION, VOLUME 2: RESOLVING DISPUTES* 83 (2006).

²⁶² Panel Report, *Japan - Measures Affecting Agricultural Products*, WTO Doc. WT/DS76/R (Oct. 27, 1998); Appellate Body Report, *Japan - Measures Affecting Agricultural Products*, WTO Doc. WT/DS76/AB/R (Feb. 22, 1999).

²⁶³ CATHERINE BUTTON, *THE POWER TO PROTECT: TRADE, HEALTH AND UNCERTAINTY IN THE WTO* 5 (2004).

²⁶⁴ SCHEFER, supra note 112, at 199.

²⁶⁵ Appellate Body Report, *Japan - Measures Affecting Agricultural Products*, ¶¶79-85, WTO Doc. WT/DS76/AB/R (Feb. 22, 1999).

²⁶⁶ *Id.* ¶¶86-91; EPPS, supra note 143, at 233.

²⁶⁷ TERRY MARSDEN et al., *THE NEW REGULATION AND GOVERNANCE OF FOOD: BEYOND THE FOOD CRISIS?* 250 (2012).

²⁶⁸ Panel Report, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, WTO Doc. WT/DS291/R (Sep. 29, 2006).

plant cultivars that have been developed through recombinant deoxyribonucleic acid (recombinant DNA) technology. The European Union adopted a regime to control the release into the environment of genetically modified organisms and to conduct a case-by-case evaluation of the potential risks biotech products may have with the objective of protecting human health and the environment. On the basis of that evaluation, the marketing of a particular biotech product is either approved or not, and individual EU Member States may provisionally restrict or prohibit the use and commercialization of these products. The WTO Panel did not consider the EU's general moratorium to be a valid SPS measure because the EU did not adopt a transparent risk assessment procedure and, instead, consisted only in a procedural decision to delay the final substantive approval decision in breach of SPS Annex C(1) (a) and Article 8. Furthermore, beside the undue delay, the safeguard measures should have been adopted only in case sufficient evidence to conduct a risk assessment was not a viable option, which was not actually proved and therefore violated the provisions of Article 2.2.

The above-mentioned disputes highlight a lack of WTO cases concerning food security matters other than health concerns, and therefore Member States may be willing to challenge unjustifiable, discriminatory, or disguised food security practices, other than those related to health, allowing the Dispute Settlement Body to contribute through its case law to the ongoing debate concerning global food security governance via the WTO.

As stated in the above analysis, food security constitutes a national security concern in many developing countries such as China.²⁶⁹ For instance, prior to China's accession to the WTO, the Member States raised questions about the impact of WTO accession on China's long-term food security as well as the implications on its agricultural policy and agricultural sector.²⁷⁰ The general view is that the Chinese Government has adopted new laws and regulations in the agricultural sector to comply with its WTO requirements, but at the same time it has also adopted policies to control the immediate or long-term negative effects that those liberalization measures would have produced against the interests of the Chinese farmers and of the population, in general. In particular, the Chinese Government tried to move towards policies that favored the

²⁶⁹ Baris Karapinar, 'Sustainability' in *Chinese Agriculture: Stakeholders' Perceptions and Policy Trade-offs* 10 (NCCR Trade Regulation, Swiss National Center of Competence in Research, Working Paper No 2009/43, 2009).

²⁷⁰ Fen Lu, *China's WTO Accession: The Impact on its Agriculture Sector and Grain Policy*, in *AGRICULTURE AND FOOD SECURITY IN CHINA: WHAT EFFECT WTO ACCESSION AND REGIONAL TRADE ARRANGEMENTS?* 55, 69 (Chunlai Chen & Ron Duncan eds., 2010). See also Chunlai Chen & Ron Duncan, *Achieving Food Security in China: Implications of WTO Accession*, in *AGRICULTURE AND FOOD SECURITY IN CHINA: WHAT EFFECT WTO ACCESSION AND REGIONAL TRADE ARRANGEMENTS?* 55, 69 (Chunlai Chen & Ron Duncan eds., 2010); Jikun Huang & Scott Rozelle, *Agricultural Development and Policy Before and After China's WTO Accession*, in *AGRICULTURE AND FOOD SECURITY IN CHINA: WHAT EFFECT WTO ACCESSION AND REGIONAL TRADE ARRANGEMENTS?* 55, 69 (Chunlai Chen & Ron Duncan eds., 2010)].

modernization of the agricultural sector to be able to face globalization and world competition.²⁷¹

As already pointed out, food security is certainly closely linked to the right to food. China is not so willing to publicly discuss its human rights records, and it is of particular interest to note China's general behavior towards UN Special Rapporteurs, which is far from supportive as it has shown reluctance to accept their pending requests to visit.²⁷² The Special Rapporteurs' roles are quite important both for raising relevant questions but also for conducting fact-finding processes in target countries through their missions and country visits. However, China decided to invite the UN Special Rapporteur on the right to food, Olivier De Schutter, to visit China from 15 to 23 December 2010.²⁷³ China considers the human right to adequate food (and, to some extent, also the other trade related human rights to water and sanitation) a less political and sensitive topic on which the government has established a growing set of policies and the political will to improve the internal context in favor of the Chinese population. The UN Special Rapporteur on the right to food had indeed recognized China's advances on food availability and in the programs to reach self-sufficiency in basic food supply and challenges in ensuring the sustainability of agricultural production.²⁷⁴ He also examined the remaining challenges affecting access to adequate food, in particular, among poor rural and urban households, including increasing land degradation, pollution and climate change.

All these matters cannot avoid, of course, raising the need for scrutiny and monitoring of the general context of the Chinese legal and political framework that may affect the right to adequate food. For these reasons, the list of recommendations to the Chinese Government included in the Final Report of the UN Special Rapporteur on the right to food, following his mission and country visit, in regards to the support of small agricultural producers, includes the need to "[i]mprove transparency and limit the risks of corruption of local officials in land deals, thus ensuring effective compliance with the 2007 Property Law, for example by creating a system whereby the buyers authorized to develop land would pay the compensation due into a trust fund, which in turn would compensate the land-losing farmer, *without the amount transiting through the local public officials*".²⁷⁵ Another recommendation in favor of small

²⁷¹ HUANG & ROZELLE, *supra* note 270, at 69.

²⁷² KATRIN KINZELBACH, *THE EU'S HUMAN RIGHTS DIALOGUE WITH CHINA: QUIET DIPLOMACY AND ITS LIMITS* 190 (2015).

²⁷³ Olivier De Schutter, Mandate of the Special Rapporteur of the Right to Food, Preliminary Observations and Conclusions, Mission to the People's Republic of China from 15 to 23 December 2010, Beijing, China, Dec. 23, 2010, <http://www.srfood.org/images/stories/pdf/officialreports/de-schutter-china-statement.pdf>; Olivier de Schutter (Special Rapporteur on the Right to Food), *Report of the Special Rapporteur on the Right to Food*, U.N. Doc A/HRC/19/59/Add.1 (Jan. 20, 2012), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add1_en.pdf.

²⁷⁴ *Id.*

²⁷⁵ *Id.* ¶41, Letter b (emphasis added).

agricultural producers included in Paragraph 41 suggests that the Chinese Government "[b]etter circumscribe the possibility for the collective to impose readjustments, as well as the possibility for the State to evict land users in the public interest, including by allowing courts to apply much stricter scrutiny to the authorities' reliance on these exceptions to the security of tenure of the land user."²⁷⁶ Both recommendations perfectly align with the amendments to the Chinese Constitution adopted in 2004 that were described in the previous paragraph, i.e. the added third paragraph of Article 33 for the respect and preservation of human rights,²⁷⁷ the second paragraph of Article 11 ("Citizens' lawful private property is inviolable"),²⁷⁸ and the obligation to compensate in case of expropriation or requisition.²⁷⁹ It is necessary to stress that land as real property is treated differently than other properties. According to Article 10 of the Chinese Constitution, "[l]and in the cities is owned by the State. Land in the rural and suburban areas is owned by collectives except for those portions which belong to the State in accordance with the law; house sites and private plots of cropland and hilly land are also owned by collectives. The State may in the public interest take over land for its use in accordance with the law. No organization or individual may appropriate, buy, sell or lease land, or unlawfully transfer land in other ways. All organizations and individuals who use land must make rational use of the land."²⁸⁰ Although individuals cannot privately own land, they may obtain transferable land-use rights for a number of years for a fee. In this sense, the UN Special Rapporteur recommended to "[e]nsure a greater security of land use rights, including by automatically extending such rights beyond the current 30-year term, unless no member of the household to whom the land has been contracted still lives on the land."²⁸¹

The agricultural sector and the connected land ownership and rights are of course very sensitive issues from a political, cultural, and historical point of view. Nevertheless, in his report, the UN Special Rapporteur stressed that the special legal and political treatment of the land and connected land rights in China are substantially affecting the right to adequate food. He also suggested specific options and solutions to the Chinese Government like "allowing courts to apply much stricter scrutiny to the authorities' reliance on these exceptions to the security of tenure of the land user."²⁸² Then it is left to China to find appropriate solutions ("Better circumscribe the possibility for the collective to impose readjustments, as well as the possibility for the State to evict land users

²⁷⁶ *Id.* ¶41, Letter c.

²⁷⁷ XIANFA art. 33 (1982) (China).

²⁷⁸ *Id.* art. 13.

²⁷⁹ *Id.*

²⁸⁰ *Id.* art. 10.

²⁸¹ de Schutter, *supra* note 273, at ¶41, Letter a (*emphasis added*).

²⁸² *Id.* ¶30.

in the public interest")²⁸³ that are compatible with the specific cultural and historical context to protect the right to adequate food, following the recommendations.

In Paragraph 43, letter "d", the UN Special Rapporteur on the right to food also referred to social security as a human right. There he suggested to the Chinese Government to "[d]efine the right to social security as a human right, which beneficiaries may claim before courts or administrative tribunals, and inform beneficiaries about their rights, which is essential to ensuring respect for the right to social security and reducing the risks of corruption or favoritism at the local level."²⁸⁴

Again, this recommendation aligned with the 2004 Amendment to the Chinese Constitution which added a fourth paragraph to Article 14: "The State establishes a sound social security system compatible with the level of economic development." Of course, assuming that the Chinese Government follows the recommendation and implements a law establishing social security as a human right compatible with the "level of economic development," it is unknown whether the measure will be considered sufficient by the UN or other international standards.

As this short analysis shows, the issue of food security and the related human right to food implies many more legal and political reforms that go beyond issues strictly related to food security and safety. These topics raise issues of transparency, independence, administrative, procedural and judicial fairness, access to knowledge and information, property and land rights that are all critical for the real and full achievement of food security and safety and the right to food in the territory of the People's Republic of China.

5. *Restriction of Trade Openness on Cultural Products on the Basis of Public Morals*

The concept of public morals includes a wide range of cultural, social, and ethical values.²⁸⁵ It is clear that mores, ethics, beliefs, ideals, and dogmas may vary depending on the different communities and the national or regional context.

As a matter of fact, WTO rules impact culture in many different ways, and it is not possible to create a universal, common sense instrument to handle all the aspects related to public morals.²⁸⁶ So, through case law, the WTO must try to find a balance between free trade and relevant national or regional characteristics like public morals and public order, forbidding any means of arbitrary and unjustifiable discrimination among domestic and imported products. *Cultural products* are the tangible or intangible creations from a specific culture or societal

²⁸³ *Id.* ¶41, Letter c.

²⁸⁴ *Id.* ¶43, Letter d.

²⁸⁵ MATTHIAS HERDEGEN, *PRINCIPLES OF INTERNATIONAL ECONOMIC LAW* 206 (2013).

²⁸⁶ NICOLA WENZEL, *Article XX lit a GATT, in* WTO: TECHNICAL BARRIERS AND SPS MEASURES 2, 82 (Rüdiger Wolfrum, Peter-Tobias Stoll & Anja Seibert-Fohr eds. 2007).

practice,²⁸⁷ like audiovisual products (film, video, television radio, etc.) and printed publications (magazines, books, periodicals, etc.). The failure of the US and the EU to agree on the definition of cultural products by the end of the Uruguay round resulted in the establishment of WTO rules that contain little explicit guidance on how WTO law applies to cultural products.²⁸⁸

Article XX (a) of the GATT states that “[...] nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures [...] necessary to protect public morals” which is also included in Article XIV GATS,²⁸⁹ together with the reference to the maintenance of public order.²⁹⁰

In the *US-Gambling* case,²⁹¹ Antigua and Barbuda (hereinafter also “Antigua”) requested consultations regarding measures applied by central, regional, and local authorities in the United States of America that affected the cross-border supply of gambling and betting services. According to Antigua, those US Federal and State measures, including federal laws such as the “Wire Act”, the “Travel Act,” and the “Illegal Gambling Business Act,” whose cumulative impact resulted in making unlawful the supply of gambling and betting services on a cross-border basis, had dramatically affected Antigua’s market and economy. Following implementation of the US measures, the Antiguan market registered a tremendous loss of 24 billion USD in one year (and corresponding loss of GDP) and a loss of employment caused by the rapid reduction from 119 gambling companies registered in Antigua down to 28 companies.

In this case, the Panel considered the term “*public morals*” to denote standards of right and wrong conduct maintained by or on behalf of a community or nation. The dictionary (*Shorter Oxford English Dictionary, 2002*) definition of the word “order” that appears to be relevant in the context of Article XIV(a) reads as follows: “A condition in which the laws regulating the public conduct of members of a community are maintained and observed; the rule of law or constituted authority; absence of violence

²⁸⁷ FARAH & TREMOLADA, *supra* note 194, at 21-47; FARAH & TREMOLADA, CONFLICT BETWEEN INTELLECTUAL PROPERTY RIGHTS AND HUMAN RIGHTS, *supra* note 194, at 125-78.

²⁸⁸ Tania Voon, *Culture, Human Rights and the WTO*, in *THE CULTURAL DIMENSION OF HUMAN RIGHTS* 186, 187 (Ana Vrdoljak ed. 2014); DAVID J. BEDERMAN, *GLOBALIZATION AND INTERNATIONAL LAW* 126-27 (2008).

²⁸⁹ *Services: GATS: The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm. (last visited May 23, 2017).

²⁹⁰ General Agreement on Trade in Services, art. XIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183. See also ROLF H. WEBER & MIRA BURRI, *CLASSIFICATION OF SERVICES IN THE DIGITAL ECONOMY* 131 (2012).

²⁹¹ Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/R (Nov. 10, 2004); Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R (Apr. 7, 2005).

or violent crimes.”²⁹²

The drafters of the GATS clarified in footnote 5 that “[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.” Hence, in our view, the dictionary definition of the word “order,” read together with footnote 5, suggests that “public order” refers to the preservation of the fundamental interests of a society, as reflected in public policy and law. These fundamental interests can relate, inter alia, to standards of law, security and morality.²⁹³

The Antiguan Government declared that it has taken steps since the mid-1990s to build up a primarily Internet-based, “remote-access” gaming industry as part of its economic development strategy. Additionally, it has established a very solid set of laws and regulations to avoid foreign or domestic companies using this flourishing industry to hide other illicit objectives, such as money-laundering or any other forms of financial or organized crime.

In fact, the US stated that the close enforcement cooperation between federal and state authorities with an overreaching set of laws and regulations was essential to taking action against criminal organizations that use interstate commerce and interstate communications with impunity in the conduct of their unlawful activities. As such, the US legislation was mainly concerned with effectively curtailing gambling operations because the profits from illegal gambling are huge and they are the primary source of the funds which finance organized crime.²⁹⁴

Moreover, Antigua listed a vast array of gambling and betting games and services which are offered on a commercial basis in the US (and elsewhere) and which had clearly showed that the US was also strongly exploiting the market opportunities that this sector may provide to the domestic economy in terms of employment and taxes that US Federal and State authorities could collect. For these reasons, Antigua considered unacceptable or unjustifiable similar statements like the ones that the US reported at the DSB meeting of June 24, 2003 that cross-border gambling and betting services are prohibited because of “the social, psychological dangers and law enforcement problems that they created, particularly with respect to Internet gambling and betting.”²⁹⁵ The US also expressed its “grave concerns over the financial and social risks posed by such activities to its citizens, particularly but not exclusively children”.²⁹⁶ In the opinion of Antigua, those arguments had to be rejected

²⁹² Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶6.465 – 6.467, WTO Doc. WT/DS285/R (Nov. 10, 2004). See also MIRINA GROSZ, SUSTAINABLE WASTE TRADE UNDER WTO LAW 440 (2011).

²⁹³ Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶6.465 – 6.467, WTO Doc. WT/DS285/R (Nov. 10, 2004). See also MIRINA GROSZ, SUSTAINABLE WASTE TRADE UNDER WTO LAW 440 (2011).

²⁹⁴ *Id.* ¶3.262.

²⁹⁵ *Id.* ¶3.253. See also Minutes of the DSB meeting, June 24, 2003, WTO Doc. WT/DSB/M/151, ¶47.

²⁹⁶ Christitine Kaufmann & Rolf H. Weber, *Reconciling Liberalized Trade in Financial*

as well considering that these concerns should have been applied by the US authorities against their domestic market as well and not only foreign providers.

The Appellate Body decided that the US GATS Schedule included specific commitments on gambling and betting services and that the entry of "other recreational services (except sporting)" in the US Schedule must be interpreted as including "gambling and betting services" within its scope. Reversing the decision of the Panel, the Appellate Body also found that "the United States has demonstrated that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are measures *necessary to protect public morals or maintain public order*, in accordance with paragraph (a) of Article XIV, but that the United States has not shown, in the light of the Interstate Horseracing Act, that the prohibitions embodied in those measures are applied to both foreign and domestic service suppliers of remote betting services for horse racing and, therefore, has not established that these measures satisfy the requirements of the chapeau" of Article XIV.²⁹⁷ Even though the final decision went partially against the US, it is relevant to stress its application to the Wire Act, the Travel Act, and the Illegal Gambling Business Act of the exception under Article XIV(a) to protect public morals and to maintain public order.

The public morals exceptions under Article XX(a) and its relation to cultural products was considered in the *China – Publications and Audiovisual Products* case,²⁹⁸ in which the US challenged several Chinese measures that limited the number of entities having the right to import and distribute reading materials, audiovisual home entertainment products, sound recordings, and film for theatrical release. All these products may qualify as "cultural goods and services" under the legal definition contained in the UNESCO Convention.²⁹⁹

China claimed that these measures and mechanisms for selecting those private and business entities were essential for avoiding the importation into China of reading materials and finished audio-visual products with inappropriate content. This Chinese provision was a necessary means to protect public morals within the country, according to the meaning of Article XX (a) of the GATT.³⁰⁰ The US claimed that the

Services and Domestic Regulation, in THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES 411, 418 (Kern Alexander & Mads Tønnesson Andenæs eds., 2008).

²⁹⁷ Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶173, WTO Doc. WT/DS285/AB/R (Apr. 7, 2005). See also SCHEFER, *supra* note 112, at 238; BERTA ESPERANZA HERNÁNDEZ-TRUYOL & STEPHEN JOSEPH POWELL, JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS 147 (2012).

²⁹⁸ Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/AB/R (Dec. 21, 2009).

²⁹⁹ WILLIAM J. DAVEY, NON-DISCRIMINATION IN THE WORLD TRADE ORGANIZATION: THE RULES AND EXCEPTIONS 258 (2012).

³⁰⁰ ANGELICA BONFANTI, *Public Morals in International Trade: WTO Faces Censorship*, in INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW: ESSAYS IN

Chinese laws and regulations provided preferential treatment to Chinese-sourced products over foreign publications and entertainment products in addition to the fact that the Chinese regulations restricted market access to foreign material in contrast with trade commitments included in its Accession Protocol, the GATS, and the GATT.³⁰¹ In this case, the Panel decided in favor of the US, but left the door open to consider cultural concerns as it interpreted broadly the public moral exception under Article XX (a) GATT.

The *US – Gambling, China – Publications and Audiovisual Products*, and *EU – Seals* decisions constitute important and relevant landmarks concerning the possible clash between trade expansion and the protection of public morals in the WTO case law.³⁰² Through these cases, the dispute settlement jurisprudence confirmed that WTO Member States have the right to determine the level of protection that they consider appropriate, and as such States should receive “some scope to define and apply for themselves the concepts of public morals and public orders in their respective territories, according to their own systems and scales of values.”³⁰³

6. Concluding Remarks

Globalization has transformed and shaped the contemporary world, which is more and more interconnected without borders. Globalization is the result of a combination of factors, which include the role of technology, the improvement of telecommunications, such as the internet, and advances in transport for the movement of goods and services.

But globalization is not limited to trade in goods and society has to face challenges and risks such as environmental crises, energy security, terrorism, and the role of multinational companies in the production chain and the effects on society.

The idea of limiting the excesses of globalization may be, to a certain extent, justified. There is an increasing need to establish innovative instruments, new forms of global governance and democratic control to

HONOUR OF TULLIO TREVES 687, 695 (Nerina Boschiero, et al. eds., 2013). See also Julia Qin, *Pushing the Limit of Global Governance*, 10 CHINESE J. INT'L L. 271, 271-322 (2011).

³⁰¹ Bryan Mercurio & Mitali Tyagi, *China's Evolving Role in WTO Dispute Settlement: Acceptance, Consolidation and Activation*, in EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 2012, 89, 104 (Christoph Herrmann & Jörg Philipp Terhechte eds., 2011); Mira Burri, *The Trade Versus Culture Discourse: Tracing Its Evolution in Global Law*, in CULTURE AND INTERNATIONAL ECONOMIC LAW 104, 115 (Valentina Vadi & Bruno de Witte eds., 2015); Frieder Roessler, *Comment: Appellate Body Ruling in China-Publications and Audiovisual Products*, in THE WTO CASE LAW OF 2009: LEGAL AND ECONOMIC ANALYSIS 119, 119 (Henrik Horn & Petros C. Mavroidis eds., 2011).

³⁰² Panagiotis Delimatsis, *The Puzzling Interaction of Trade and Public Morals in the Digital Era*, in TRADE GOVERNANCE IN THE DIGITAL AGE: WORLD TRADE FORUM 276, 277 (Mira Burri & Thomas Cottier eds., 2012).

³⁰³ Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶6.461, WTO Doc. WT/DS285/R (Nov. 10, 2004). See also MIRINA GROSZ, WTO LAW, SUSTAINABLE WASTE TRADE UNDER WTO LAW 441 (2011).

limit the risk that important societal values, which should be upheld to balance the excesses of globalization, are directly or indirectly affected by the global expansion of world trade. Globalization without local concerns can endanger relevant issues such as good governance, human rights, right to water, right to food, social, economic and cultural rights, labor rights, access to knowledge, public health, social welfare, consumer interests and animal welfare, climate change, energy, environmental protection and sustainable development, product safety, food safety, and security.

In this paper, the legal reasoning and clarifications of the Panels and the Appellate Body (including the use of dissenting opinions among the Panelists) following the passage from GATT to the WTO have also been explored. Even when the final decisions were not in favor of the specific measures at issue (which were therefore not justified under Article XX of the GATT), the adjudicatory bodies were more and more willing to carefully consider the environment, sustainable development and other NTCs.

Furthermore, in the author's opinion, the WTO has indirectly contributed to some of the Chinese legal reforms, even outside the areas of WTO and international trade law. These reforms aim to better protect the rights of Chinese workers and citizens as a whole and balance the negative effects that globalization and free trade would have had on the Chinese internal legal system.

The increase of WTO Plus Obligations for new WTO Member States and the potential limitation on the use of Article XX of the GATT is raising concerns. In particular, they might be considered new forms of unfair discrimination perpetuated by those who until now had the power against developing countries that are gradually entering the WTO. This is even less justifiable if it may impede the adoption of reasonable and non-discriminatory measures that have the sole objective of protecting the environment and facilitating sustainable development. Therefore, these matters must be clarified either through supplementary WTO multilateral negotiations or the Panel or Appellate Body case law. China is having a leading role in these issues.

The WTO and other international economic organizations will have to find a balance between globalization, sustainable development, and local concerns. The inclusion of more developing countries and emerging economies in the international economic system is making this necessity very urgent. It is also revealing the potential unfairness and inconsistencies in the system. What will be seen in the years to come is whether China, and other emerging economies, will represent a solution to find a balance between globalization and sustainable development or will become the means to rupture the system. Keeping in mind the stepping stones of the WTO, environmental-friendly case law, and the ongoing WTO negotiations, one can be positive of the need for the WTO to continue on the path toward sustainable development.