

# WTO-GATT, Economic Growth, and the Human Rights Trade-Off

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## INTRODUCTION – FREE TRADE AND HUMAN RIGHTS

In the debate on trade and development, a common point of contention between economists, activists, politicians, and corporate boards is whether to include or exclude human rights, environmental, and labor considerations from the World Trade Organization General Agreement on Trade and Tariff trade regime (“WTO-GATT”).<sup>1</sup> Doctrinal and institutional constraints inherent in international law make enforcement of human rights untenable for all but the most egregious of violations. This prompts arguments for increased linkages between trade and human rights.<sup>2</sup> Proponents of these arguments suggest that trade law, particularly the WTO charter and constituent instruments,<sup>3</sup> should be interpreted in the light of the pervasive customary norms of international human rights law.<sup>4</sup> A related argument often heard on the streets, one that is perhaps

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<sup>1</sup> Compare 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. OF INT'L L. 597 (2002), available at <http://www.ejil.org/journal/Vol13/No3/art1.html> (last visited June 25, 2005), and Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. OF INT'L L. 753 (2002), available at <http://www.ejil.org/journal/Vol13/No4/art1.html> (last visited June 25, 2005), with Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. OF INT'L L. 815 (2002), available at <http://www.ejil.org/journal/Vol13/No4/art2.html> (last visited June 25, 2005), and CLAUDE BARFIELD, *FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION* (2001). This debate can also be framed in terms of WTO constitutionalism. See Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?*, in *DELIBERATELY DEMOCRATIZING MULTILATERAL ORGANIZATION* (Marco Verweij & Tim Josling eds., 2003).

<sup>2</sup> Doctrinal constraints include the *jus ad bellum* (i.e. those laws regulating when the use of force is legal) limitations on the legitimacy of humanitarian intervention. Presently, international law recognizes Security Council authorization and self-defense as the only grounds for the legitimate use of force. See U.N. Charter art. 42, 51. Furthermore, the doctrine of state sovereignty often shields against even the legitimate use of force, not to mention other milder forms of human rights enforcement. See generally Thomas M. Franck, *Recourse to Force* (2002). Institutionally, the Security Council, which is competent to handle grave human rights abuses that pose a threat to international peace and security, is often hamstrung by political logjam. INDEP. TASK FORCE SPONSORED BY THE COUNCIL ON FOREIGN RELATIONS AND FREEDOM HOUSE, *ENHANCING U.S. LEADERSHIP AT THE UNITED NATIONS* (2002). Enforcement of less egregious human rights violations, such as squashing labor unions, is left to UN agencies and treaty bodies, such as the International Labor Organization or the Commission Against Torture, whose means are limited to diplomatic persuasion and reprimand, not the use of physical coercion. See Frederic L. Kirgis, Jr., *Enforcing International Law*, *American Society of International Law*, January 1996, at <http://www.asil.org/insights/insight1.htm> (last visited July 28, 2005).

<sup>3</sup> Proponents of these arguments are also critical of regional international trade law agreements, such as the North American Free Trade Agreement (NAFTA) and the Free Trade Agreement of the Americas (FTAA), currently under negotiation, which both aggressively advance free trade objectives. The GATT permits NAFTA and FTAA. General Agreement on Tariffs and Trade, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, art. XXIV(5), Annex 1A [hereinafter WTO Agreement], available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf) (last visited July 10, 2005).

<sup>4</sup> See Ernst-Ulrich Petersmann, *Human Rights and the Law of the World Trade Organization*,

more normative than legal in nature, posits the moral and rhetorical importance of human rights over the commanding pillars of “free,” “liberalized,” or “open” trade and markets.<sup>5</sup> Of course, there are no ready answers for the correct interpretation of international law, and often the former legal tack is only a sophisticated cover for the latter, more visceral intuition.

The normative approach often fails to recognize that, when left unadulterated by outside considerations such as human rights, free trade may possess instrumental value in stimulating economic growth and efficiency, which in turn indirectly contributes to improvements in human rights.<sup>6</sup> Arguments for the exclusion of human rights linkages in free trade – whether by expansive interpretation or by amendment of treaty language – insist that trade liberalization rightly remains the WTO-GATT’s sole preoccupation.<sup>7</sup> This doctrinal and institutional isolationism springs from many of the same normative humanistic concerns embodied in its most ardent opponents’ arguments.<sup>8</sup> For example, in discussing the case for a Central American Free Trade Agreement (CAFTA), U.S. Trade Representative Robert B. Zoellick, U.S. Trade Representative, relates:

Five small countries took a courageous decision last year to seek a free trade agreement with their giant neighbor to the North. They placed their faith in free markets, in openness, and in democracy. We have worked with them to produce an agreement that will bring benefits to workers, farmers and consumers in all our countries.<sup>9</sup>

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37 J. OF WORLD TRADE 241 (2003).

<sup>5</sup> PUBLIC CITIZEN, “WTO – SHRINK OR SINK!” THE TURNAROUND AGENDA INTERNATIONAL CIVIL SOCIETY SIGN-ON LETTER, *at* [http://www.citizen.org/trade/wto/shrink\\_sink/articles.cfm?ID=1569](http://www.citizen.org/trade/wto/shrink_sink/articles.cfm?ID=1569) (last visited July 28, 2005).

<sup>6</sup> See Petersmann, *supra* note 1, at 13; see generally AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

<sup>7</sup> See Jagdish Bhagwati, *Trade Linkage and Human Rights*, in THE URUGUAY ROUND AND BEYOND 241 (Jagdish N. Bhagwati & Mathias Hirsch eds., 1998).

<sup>8</sup> See *id.*

<sup>9</sup> OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, FREE TRADE WITH CENTRAL AMERICA FACTSHEET (May 2004), *at* [http://www.ustr.gov/assets/Document\\_Library/Fact\\_Sheets/2004/asset\\_upload\\_file582\\_5688.pdf](http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2004/asset_upload_file582_5688.pdf) (last visited July 28, 2005); see also OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, IDENTIFICATION OF TRADE EXPANSION PRIORITIES PURSUANT TO EXECUTIVE ORDER 13116 (April 2001), *at* <http://www.cptech.org/ip/health/ustr/super301.pdf> (last visited July 28, 2005).

Free and open trade creates new jobs and new income. It lifts the lives of all our people, applying the power of markets to the needs of the poor. It spurs the process of economic and legal reform. And open trade reinforces the habit of liberty that sustains democracy over the long haul.

*Id.* (quoting President George W. Bush at the Summit of the Americas in Quebec City).

*A. Assumptions . . . Assumptions*

The “instrumentalist” argument affirmatively supports free trade because free trade ultimately improves human rights. This argument rests on a number of inter-related assumptions:

- 1) *Definitional Determinacy*: There exists a conceptually discrete policy of free trade, which is to some extent incompatible with human rights regulations, yet does not necessarily undermine the achievement of human rights goals.
- 2) *Free Trade – Economic Efficiency/Growth Nexus*: Free trade stimulates economic growth.
- 3) *Legal Practicability*: A legal regime can be successfully instituted to realize the free trade theoretic.
- 4) *Economic Growth – Human Rights Nexus*: Economic growth promotes human rights.

*B. Outline*

This paper focuses primarily on the first two “economic” assumptions, which link a “pure notion” of free trade to economic growth and efficiency. A straightforward deconstruction of the second assumption will problematize the first, thereby destabilizing free trade discourse and reframing, or even reconciling, the free trade-human rights dialectic. This discussion will be supplemented intermittently by observations on the third assumption insofar as arguments about the theoretical model of free trade necessarily implicate its legal practicability, and will include a separate comment on the last assumption. While an in-depth empirical examination of the socio-political issues raised by legal practicability and the economic growth-human rights nexus would no doubt contribute to the debate, this analysis will only be offered in passing.

Part I sets the stage for the free trade critique. It lays out an introduction to comparative advantage, the backbone of international free market theory that buttresses the free trade-efficiency nexus, and contrasts comparative advantage with conventional free market economics. Part II explores the three major weaknesses at the confluence of comparative advantage and free market theory. This section considers the market-distorting implications of imperfect markets’ pre-conditions, externalities, and non-monetary “invaluables” particularly in the context of the current international trade regime. Part III exposes the indeterminacy of free trade arising from a deconstruction of neo-liberal free trade discourse, and provides a final comment on the legal practicability of a

trade regime. Part III also addresses the fourth instrumentalist assumption, with a brief inspection of its own destructive potential. In conclusion, the subjectivity and indeterminacy of free trade suggests that human rights, despite its shortcomings, can act as a normative foothold for moving beyond the free trade-human rights debate and towards structuring a better market.

## I. COMPARATIVE ADVANTAGE: AT THE FREE TRADE – ECONOMIC EFFICIENCY/GROWTH NEXUS

### *A. Comparative Advantage: “[A]rguably, the single most powerful insight into economics.”<sup>10</sup>*

The principle of comparative advantage is central to the instrumentalists’ second assumption that free trade leads to economic efficiency and growth. Comparative advantage was first articulated in 1815 when Roberts Torrens distinguished it from the more straightforward and intuitive logic of absolute advantage discussed by Adam Smith in his 18<sup>th</sup> century work *An Inquiry into the Nature and Causes of the Wealth of Nations*.<sup>11</sup> David Ricardo further clarified that idea in 1817.<sup>12</sup> Under absolute advantage, a country was advised to trade any product it could produce, and thus sell, for less than another country.<sup>13</sup> While the theory of comparative advantage leads to similar results in certain situations, a Ricardian hypothetical illustrates its more nuanced contours. Suppose Britain and Spain both produced wine and cheese, however Spain did so more efficiently at lower production costs. According to Smith’s absolute advantage model, Britain should consign itself to importing both wine and cheese from Spain.<sup>14</sup>

In contrast, Ricardo argued that the most efficient arrangement almost always resulted when each country specialized in an industry in which it produced “most best.”<sup>15</sup> Thus, Spain would produce only wine if that was what it produced “most best,” while at the same time England would have a

<sup>10</sup> WTO, THE CASE FOR OPEN TRADE, at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact3\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm) (last visited June 28, 2005).

<sup>11</sup> ROBERT TORRENS, ESSAY ON THE EXTERNAL CORN TRADE (J. Hatchard, 1815), available at <http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/ricardo/prin/> (last visited June 28, 2005).

<sup>12</sup> DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (John Murray, 1821).

<sup>13</sup> See TORRENS, *supra* note 11.

<sup>14</sup> See ADAM SMITH, THE WEALTH OF NATIONS bk. 4, ch. II (1776), available at <http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/smith/wealth/wealbk04> (last visited July 28, 2005). “If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage.” *Id.*

<sup>15</sup> See RICARDO, *supra* note 12.

comparative advantage in cheese if that is what it produced “least worst.”<sup>16</sup> England’s response to the market is rational because comparative advantage takes special regard of opportunity costs across industries. Moreover, even if England was marginally superior in cheese-making than Spain, according to the Ricardian model, it should forego both altogether and specialize in manufacturing industries where it is presumably much more productive.<sup>17</sup> When considering all possible industries, Britain’s comparative advantage is in manufacturing, not cheese.

Unlike absolute advantage, the theory of comparative advantage has several interesting implications. First, it demonstrates that the most efficient arrangement of economies is the one where every country specializes in producing the product with which it has a comparative advantage (i.e. is “most best” or “least worst” at producing). This means that all developing countries, no matter how relatively inferior their technological capacity compared to developed countries, will command the market in at least one product and thus ensure export revenue. By the same token, developed countries, no matter how undercut by cheap labor in developing countries, will also retain some export industries and thus preserve jobs within that country. In addition to these “static” gains, the increased free trade in the Ricardian model elicits “dynamic” gains, such as the long-term benefits of increased competition, which in turn stimulate innovation and lower prices, trigger greater productivity and investment, and ultimately generate more wealth.<sup>18</sup>

These attractive results, and the mathematical rigor with which “static gains” can be demonstrated, have led many economists to hail the virtues of comparative advantage.<sup>19</sup> Often rightly, these economists lament the commonly misguided conflation of comparative advantage with absolute advantage resulting from its counter-intuitive complexity.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> RALPH E. GOMORY & WILLIAM J. BAUMOL, GLOBALIZATION: PROSPECTS, PROMISE, AND PROBLEMS (Georgetown U. L. Center Sloan Interdisciplinary Workshop, Discussion Paper No. 5, April 23, 2004) (on file with author); Joel R. Paul, *Do International Trade Institutions Contribute to Economic Growth and Development?*, 44 VA. J. INT’L L. 285, 291 (2003).

<sup>19</sup> When mathematician Stanislaw Ulam once challenged Nobel laureate Paul Samuelson to “name me one proposition in all of the social sciences which is both true and non-trivial,” he responded with the theory of comparative advantage. “That it is logically true need not be argued before a mathematician; that that is not trivial is attested by the thousands of important and intelligent men who have never been able to grasp the doctrine for themselves or to believe it after it was explained to them.” P.A. Samuelson, *The Way of an Economist*, in INTERNATIONAL ECONOMIC RELATIONS: PROCEEDINGS OF THE THIRD CONGRESS OF THE INTERNATIONAL ECONOMIC ASSOCIATION 1-11 (P.A. Samuelson ed., 1969); see also *The great hollowing-out myth*, THE ECONOMIST, Feb. 19, 2004, available at [http://www.economist.com/agenda/displayStory.cfm?story\\_id=2454530](http://www.economist.com/agenda/displayStory.cfm?story_id=2454530) (last visited July 28, 2005).

### B. Comparative Advantage and Free Market Liberalism

Despite its complexity, the global market suggested by comparative advantage has straightforward micro-economic objectives: to ensure the production of goods and services by the most efficient producer and allocate their consumption to the most desirous consumer. To these ends, comparative advantage functions by the conventional logic of supply and demand. Consequently, in a perfect market, the demand for and supply of a given good generates two price curves as a function of quantity; at their intersection are the optimal levels of production and consumption. In these respects, comparative advantage is built on the bedrock of classical economic theory of free market liberalism and has been readily incorporated by neo-liberalism, a school of political thought aimed at structuring a more stable society on these economic principles.<sup>20</sup> As such, the anti-mercantilist tariff-reduction historically envisioned by comparative advantage comes as part of a package of neo-liberal policies, which include privatization, deregulation, unencumbered capital flows and investment.<sup>21</sup>

Before moving to the flaws that comparative advantage inherited by virtue of its association to the basic theory, it should be noted that the Ricardian world is not a simple transposition of domestic microeconomics onto the international level of the global economy. Comparative advantage ostensibly differs from a conventional analysis of domestic markets in two important respects: 1) the relevant market actors and 2) the conceptual role of competitiveness. The note will consider these in turn.

#### I. State-Centrism

True to the field of modern international relations, the Ricardian model places the constellation of states at the center of attention. It does so by a number of critical assumptions that simplify local markets into a single state actor. Thus a country's demand becomes the average demand of all of its consumers, and more problematically, the country's supply becomes the average supply of all its

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<sup>20</sup> Neo-liberalism is a modern revival of the "laissez-faire" economic liberalism prevalent in the United States through the 1800s and early 19<sup>th</sup> century, but interrupted shortly by the Great Depression, Keynesian economics, the New Deal, and Legal Realism. It has its roots in the post-bellum Bretton Woods conference and rose to prominence during the Reagan-Thatcher era. However, this was not immediately translated *de rigueur* into international trade policy. Despite the fact that the Tokyo Rounds of the 1970s set the stage for removing non-tariff trade barriers, critics contend that the period following the 1986-1994 Uruguay Rounds trade negotiations, which established the WTO, has witnessed an unprecedented "decade of free trade fever." Ronnie Hall, *A Decade of Free Trade Fever*, FOEI LINK MAG., July/September 2001, available at <http://www.foei.org/publications/link/98/e981100.html> (last visited July 10, 2005).

<sup>21</sup> See Joseph Stiglitz, *What I Learned at the World Economic Crisis*, THE NEW REPUBLIC, Apr. 17, 2000, for a comic, albeit discontented, account of neo-liberalism today.

producers, no matter how great the regional variability in productivity. To return to the example of Spain and England, the Ricardian model would disregard the acclaimed English sparkling wine of Nyetimber and West Sussex or the tasty wheels of Spanish Garrotxa from the valleys of Catalonia, while it would favor the bland white wines of Andalucia. Here, the model is efficient insofar as it necessarily bundles all wine production into one country's export and compares the aggregate balance of production and opportunity costs to another country's wine industry. Conceptually, this may be justified if it is presupposed that competitive domestic free markets create homogenously efficient producers. However the assumption of perfect markets, as elaborated below, is misguided in both international and domestic contexts.<sup>22</sup>

Instead of analogizing states to individual market actors, as if states had no internal variability and specialized in only one or two products, one could conceptually dissolve all national borders and envision a global market of subnational market actors, where specialization does not occur by country, rather by individuals. In many ways, this model better reflects our intuition and experiences of the world. It also summarily obviates the role of comparative advantage. Of course, to erase any and all distinctions between international and domestic trade, is premature considering the important role states still play in unifying markets through regulations, prohibitions, cultural norms, and tariffs.<sup>23</sup> Nonetheless, it is paradoxical that the farther trade harmonization progresses, the more one approaches this borderless model and the less nations enjoy the theoretical gains of comparative advantage.

## 2. Conceptual Subterfuge

Even if states had the unified status of a market actor, consider how the ideal textbook market criteria, competitiveness and no barriers to entry, contrast with the drive for stable, hyper-specialization under a Ricardian model. Where one conception appears fixated on numerous producers, forever competing to capture the market in a melee of start-ups and bankruptcies, the other speaks of a timeless and stoic distribution of comparative advantage amongst national producers. Nonetheless, what first appears to be another distinction turns on a shift of perspective. While conventional microeconomics highlights the dynamic, changing nature of markets over time, comparative advantage represents a momentary snapshot of its effects. In reality, Ricardian markets

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<sup>22</sup> See *infra* Part II.

<sup>23</sup> In fact, the state continues to constrain one of the most important factors of production, labor, in exercising its absolute jurisdictional powers to define, grant, and limit nationality. See generally, Robert H. Frank, MICROECONOMICS AND BEHAVIOR 50 (2000); RESTATEMENT (THIRD) OF INTERNATIONAL LAW §§ 201, 206.



will also be subject to constant change and jostling as countries' relative productivity fluctuates over time and competitive national markets similarly take on a semblance of fixed stability over brief lapses of time. In this way, a process-effects dichotomy is really two sides of the same coin.

## II. INHERITED, INHERENT FLAWS

As this note has illustrated, the distinctions between the Ricardian model and conventional free market liberalism are cosmetic, either sustained by derivative assumptions or just plain illusory.<sup>24</sup> As such, the Ricardian model, built upon the core foundations of supply and demand theory, must confront the intrinsic problems of classical economic theory. These are the devils of market imperfection, externalities, and utility valuation that plague the field.<sup>25</sup>

### *A. Imperfect Markets*<sup>26</sup>

The efficiency gains and welfare maximization promised by the micro-economic model is predicated on the existence of a perfect market characterized by three essential and interrelated preconditions: homogeneity of goods, competitiveness (non-monopoly or monopsony conditions), and perfect information.<sup>27</sup> The absence of any of these elements is a source of market distortion. While neo-liberal economists rarely claim that perfect market conditions exist, this rarely seems to tarnish the proffered value of their model, especially as it applies to international markets where the pre-conditions may be even weaker than in their domestic counterparts.<sup>28</sup>

#### 1. Homogeneity

While most goods are rarely homogenous, basic economic theory anticipates a market of identical and substitutable products distinguished only on the basis

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<sup>24</sup> See discussion *supra* Part I(B).

<sup>25</sup> See, e.g., BALIHAR SANGHERA, MARKET SOCIETY: ECONOMIC ORDER, at [http://uk.geocities.com/balihar\\_sanghera/mseconomicorder.html](http://uk.geocities.com/balihar_sanghera/mseconomicorder.html) (last visited July 28, 2005); Bernard Guerrien, *Is There Anything Worth Keeping in Standard Microeconomics?*, POST-AUTISTIC ECONOMICS REVIEW, Mar. 15, 2002, art. 1, available at [http://www.btinternet.com/~pae\\_news/review/issue12.htm](http://www.btinternet.com/~pae_news/review/issue12.htm) (last visited July 28, 2005); Frank Ackerman, *Priceless Benefits, Costly Mistakes: What's wrong with cost-benefit analysis?*, POST-AUTISTIC ECONOMICS REVIEW, May 21, 2004, available at [http://www.btinternet.com/~pae\\_news/review/issue25.htm](http://www.btinternet.com/~pae_news/review/issue25.htm) (last visited July 28, 2005).

<sup>26</sup> Paul, *supra* note 18, at 292-96.

<sup>27</sup> *Id.* at 294.

<sup>28</sup> *Id.* at 294, 297. Indeed, perhaps the only near-perfect international markets are those for raw minerals, financial assets, and foreign exchange; however, the note will discuss other problems with these markets. See discussion *infra* Part II(B), III(C).

of price.<sup>29</sup> Rational buyers will necessarily favor the cheapest product, which is *ipso facto*, the most efficiently produced good. In the real world, products also vary in quantity, quality, packaging, advertisement, production method, origin, and a host of other factors, which consumers take into consideration when purchasing a product.<sup>30</sup> Products and the companies that supply them carry a name and an image that confers status through a complex array of sociological signifiers. Indeed, the competitive market pushes products to become infinitely differentiable. The more differentiated the products, the less substitutable and price-elastic they become, thereby creating infinite non-competitive quasi-markets.<sup>31</sup>

Arguably, international markets are more prone to such fragmentation because the diversity of national origin will exacerbate differences in quality, packaging, advertisement, production method, name, and image. As such, two otherwise identical bottles of equally-priced wine, one from France and the other from England, will invariably occupy different quasi-markets because a number of discriminating consumers do not treat them as substitutable. Of course, not all goods are as differentiable as wine, but few if any are perfectly homogenous.<sup>32</sup>

## 2. Competitiveness

Few goods enjoy a market that has the kind of pluralism of buyers and sellers that ensures market competitiveness.<sup>33</sup> The primary reason is likely what economists have termed “transaction costs” for consumers and “barriers to entry” for producers. Transaction costs are impediments that close off markets to potential buyers, such as accessibility, distance, time, and high-interest financing.<sup>34</sup> Barriers to entry are mainly the start-up costs, including the capital investments needed for equipment and machinery and the learning curve for labor, exacerbated by economy-of-scale effects. These are inevitable realities of any market. It is foreseeable that transaction costs are greater in international markets given the challenges of accessibility. Similarly, international markets

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<sup>29</sup> Paul, *supra* note 18, at 292-93.

<sup>30</sup> Admittedly, health and safety codes, labeling and disclosure regulations, and product liability and consumer protection law are all efforts by the state to ensure some degree of homogeneity, as well as complete information.

<sup>31</sup> Paul, *supra* note 18, at 297. This is especially true for trade in services – a substantial portion of international trade – which is also highly regulated. Although the WTO also aims to liberalize the regulation of services, most services will likely never be traded in perfect markets. WTO, SERVICES TRADE, at [http://www.wto.org/english/tratop\\_e/serv\\_e/serv\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/serv_e.htm) (last visited July 28, 2005).

<sup>32</sup> Paul, *supra* note 18, at 297.

<sup>33</sup> Paul, *supra* note 18, at 294-95.

<sup>34</sup> See Oliver E. Williamson, *Transaction Cost Economics: How it Works; Where it is Headed*, 146 DE ECONOMIST 3 (1998).

may entertain higher barriers to entry because the greater output demanded by a larger market necessitates higher capital and labor investments.<sup>35</sup> Moreover, in developing countries both buyers and sellers may often be burdened by a lack of adequate credit opportunities.

Indeed, large multinational corporations exert market dominance in many of the internationally-traded commodity markets such as oil, pharmaceuticals, and software, and their non-competitive intra-firm transfers constitute a sizeable percentage of the total volume of international trade.<sup>36</sup> This monopolistic behavior is attributable to high market barriers in the context of weak antitrust regulations.<sup>37</sup> Not only do most developing, socialist, and transitional national economies lack effective antitrust legal regimes, but their governments actually control exports and imports through state trading enterprises.<sup>38</sup>

Another source of market-distorting constructive monopoly and heterogeneity is intellectual property protection, such as patents and copyrights, which effectively prohibits other market actors from reproducing an identical processed or artistic good.<sup>39</sup> Indeed, trademark law encourages much of the phenomenon of differentiation discussed above by requiring different producers to re-package functionally identical products under different trade names, logos, and brands. While intellectual property rights are neither a market distortion *per se*<sup>40</sup> nor as well-developed in international markets as domestic ones, Joel R. Paul counters “there has been a general trend towards over-protection [and that] industrialized countries, like the United States, almost exclusively export [protected] goods.”<sup>41</sup> Furthermore, the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS Agreement”),<sup>42</sup> an important element of the WTO portfolio, is making large strides in guaranteeing intellectual property protection under a strong international legal regime that, with industrialized nations as its greatest proponents, is sure to continue the current trend of

<sup>35</sup> Although the law of diminishing returns should at least partially counteract the economy-of-scale effects. Of course, quotas, tariffs, duties, taxes, and a wide variety of non-tariff trade barriers such as foreign exchange and price controls, government subsidies, customs regulations and inspections, licensing and government procurement policies, and health and safety protocols, all act as barriers to market entry – but these are exactly the measures that the WTO-GATT seeks to minimize or harmonize. *Id.* at 295.

<sup>36</sup> Paul, *supra* note 18, at 292-96.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* Paul notes that the need for competitiveness in international markets has actually led to less vigorously enforced antitrust laws in developed countries as well. Japan especially allows for giant conglomerates, so-called “keiretsu’s,” that link banks, manufacturers, suppliers, and distributors with the Japanese government in horizontal and vertical monopolies. *Id.*

<sup>39</sup> *Id.* at 293-94.

<sup>40</sup> See *supra* text accompanying note 18.

<sup>41</sup> *Id.* at 293.

<sup>42</sup> WTO Agreement, *supra* note 3, annex 1C.

overprotection.

### 3. Perfect Information

Neither homogeneity nor competitive markets help if market actors do not possess the relevant knowledge to participate in the market. Buyers, for example, need to know what products exist and how they differ. Unfortunately, this information is often too decentralized, technical, overwhelming, or incomplete for consumers to process effectively.<sup>43</sup> In this respect, advertising as discussed above has been a force of both product information and disinformation, insofar as aggressive and under-regulated marketing misrepresents the qualities, costs, and benefits of a product.<sup>44</sup> With the greater size, distances, and forms of communication inherent in international markets, information is only more likely to be decentralized, overwhelming, and/or incomplete.<sup>45</sup> Furthermore, even simple price information is hindered, both superficially, by the variance of currencies, and more profoundly, through the distortion of foreign exchange rates.<sup>46</sup>

#### B. Counting Social Costs

The problems of perfect markets notwithstanding, the simple microeconomic model recognizes that market failure will also result when costs and benefits are not reflected in the price of the market commodity.<sup>47</sup> For example, placing

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<sup>43</sup> Paul, *supra* note 18, at 295.

<sup>44</sup> See Jon Hanson & Douglas Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARVARD L. REV. 1420, 1420-1572 (1999). In light of "bounded rationality" advertising has been quite successful at manipulating consumer behavior even when literally "truthful." See discussion *infra* note 65. Whether the state has a responsibility to regulate such corporate expression raises visceral, and constitutional issues of free speech and anti-libertarian paternalism. While *Nike v. Kasky* purported to address such questions as "whether a corporation participating in a public debate may 'be subjected to liability for factual inaccuracies on the theory that its statements are 'commercial speech' because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions,'" the U.S. Supreme Court dismissed the writ of certiorari on grounds of non-finality, standing, and premature adjudication of a novel constitutional issue. *Nike v. Kasky*, 123 S. Ct. 2554, 2555 (2003) (quoting Pet. for Cert. i).

<sup>45</sup> Paul, *supra* note 18, at 295-96. While the World Wide Web has significantly re-centralized information regardless of its geographic origins, on-line information can still be incomplete and often undermines its usefulness to the consumer by its overwhelming abundance.

<sup>46</sup> Paul, *supra* note 18, at 296. Paul observes that the U.S. dollar has appreciated against its trading partners despite a persistent - nearing trillion dollar - trade deficit because of its monopolistic status as the preferred medium of exchange and investment. As a result, foreign imports to the U.S. will seem cheap at their dollar value, while U.S. exports abroad will look expensive once converted to foreign currency; thus foreign production is favored even if the U.S. enjoys comparative advantage.

<sup>47</sup> See generally DAVID COLANDER, MICROECONOMICS 241 (3d ed. 1998).

wineries on former brown-fields may help alleviate an aesthetic eyesore. Consumers, however, are unlikely to consider this social benefit when they purchase a bottle of wine. The social benefits remain external to the wine's market value, and this undervaluation results in lower levels of consumption than if the social benefits were part of the product. As such, the producer never realizes a return on the provision of these benefits, effectively dis-incentivizing their further production unless, of course, the benefits are incidental to private benefits at no additional cost. This undervaluation through externalization of social benefits of land-reclaiming wine results in suboptimal social levels of supply and demand: a market failure.

Alternatively, the use of pesticides by wineries may inflict social costs, in the form of ground and surface water contamination, environmental spoliation, and adverse health effects that are rarely reflected in the wine's price tag, unlike the private costs of production (labor, technology, inputs).<sup>48</sup> This leads to higher levels of consumption than if the negative externalities were realized by the producer and passed on to the consumer. Overvaluation once again distorts the optimal social levels of supply and demand, encouraging producers to continue incurring these costs borne by society. While the market may produce both social costs and benefits, it is reasonable to expect that it will fail to do so equally. Producers are likely to actively seek out and exploit any negative externalities that increase private gain, while haphazardly providing only the positive externalities that are incidental to their market activity.

Any given process of production will have countless effects, both positive (benefits) and negative (costs). It is not immediately clear, however, where the boundary separating the private from the social or public effects should fall. In other words, when do the repercussions of an action ripple beyond an individual's private economic ledger? The question is better posed in reverse: when and how is one ever made to feel the positive and negative effects of our actions? In some cases, one can speak coherently of personal effects that are a direct and proximate result of our actions. Winery owners, for example, may benefit from the aesthetic enjoyment of the reclaimed land but suffer from illness due to contaminated groundwater. When large enough, these private costs and benefits are proxies for internalized social effects. In most cases, however, impacts – especially negative effects – fall disproportionately on third parties to the market transaction because they occur largely in the “commons:” those public spaces and common pool resources that are difficult to manage or restrict access.<sup>49</sup>

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<sup>48</sup> See generally Richard B. Stewart, *The 1991 Bellagio Conference on U.S.-U.S.S.R. Environmental Protection Institution: Models for Environmental Regulation: Central Planning Versus Market-Based Approaches*, 19 B.C. ENVTL. AFF. L. REV. 547, 547 (1992).

<sup>49</sup> Consider here Garrett Hardin's oft-cited article, *Tragedy of the Commons* offering the simple

In the general social context these external third-party effects are regulated according to a complex system of societal mores that “internalizes” (privatizes) public costs by various means of sanction – including, at its most primitive, social opprobrium and marginalization – otherwise known as “reputational costs.” For modern economic markets in particular, these normative standards have been codified into formal legal concepts,<sup>50</sup> pressing law to play the predominant role in regulating externalities and thereby defining the contours of the private sphere, as well as the action-effect that stands outside of it: the externality. Thus property, tort, contract, administrative, labor, environmental, health, criminal, tax, and intellectual property<sup>51</sup> law collectively transpose the external impacts of our actions into private costs and benefits, ranging from imprisonment and penalties to awards, fines, injunctions, royalties, and tax breaks.

Compared to smaller markets, international markets exacerbate the potential for unaccounted externalities, and thus for the market failures that lead to deviations from theoretically optimal levels of supply and demand. This occurs principally because the more dispersed nature of the international market creates an attendant decrease in privatization and increase in social costs. As discussed above, the market distorting effect of externalities applies mainly to social costs, not benefits.

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hypothetical of a group of herdsmen grazing their livestock on a grassy pasture. For each herdsman, the marginal benefits of allowing one animal to graze on the pastoral commons are direct and substantial, while the marginal costs are significantly attenuated, spread out over all the herdsmen. Each rational herdsman is thus destined to graze as many of his or her animals – the land’s natural carrying capacity notwithstanding – leading to the tragic “ruin [that] is the destination toward which all men rush.” Garrett Hardin, *Tragedy of the Commons*, 162 *SCI.* 1243, 1243-48 (1968). *But see* Bryan E. Burke, *Hardin Revisited: A Critical Look at Perception and the Logic of the Commons*, 29(4) *HUM. ECOL.* 449 (2001). In this example, the costs of grazing one’s herd were largely externalities, unaccounted for in each herdsman’s rational calculus.

<sup>50</sup> Setting legal constructs and social mores within the same system of social regulation of externalities is not to deny the differences between law and morality – a heated topic of debate in the legal literature – however it does replace a categorical dichotomy with a more nuanced recognition of the degree to which social norms are formalized and institutionalized. *See* EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* 159-78, 197-217 (1973); HERBERT LIONEL ADOLPHUS HART, *THE CONCEPT OF LAW* (1st ed., 1961); Herbert Lionel Adolphus Hart, *Positivism and the Separation of Law and Morals*, 71 *HARVARD L. REV.* 593 (1958); LON FULLER, *THE MORALITY OF LAW* (1964). The aversion to conflating law and morality has been largely driven by legal realists who criticized the existence of a natural law based on absolute moral truths. Nonetheless, when one appreciates the seeming relativity of both, law and morality tend to collapse into one another as mutually legitimating social constructs. This is particularly evident in customary international law where the line between perceived legal obligations and moral duty is thin.

<sup>51</sup> Rather than “rewarding” innovation, patents, copyrights, and trademarks can be viewed as a way of internalizing the initial cost of research and development, which subsequent firms would not otherwise incur because knowledge and information generally disseminate into the public commons.

### 1. Less Privatization

First, and most predominantly, international markets are less likely to internalize social costs because of the spatially and politically decentralized nature of the global economy. Thus, in terms of personal effects, the individual economic actor is less likely to experience significant direct and proximate costs arising from international activity. For example, a producer of wine in the international market may own several vineyards in numerous countries or contract foreign laborers, and ship and sell to various other countries, while running the whole enterprise from management headquarters in yet another country. Moreover, the relationship of the board of directors and principle shareholders to the production process and products may be even more remote. Any hypothetical contamination costs from pollution at the winery that would have been suffered by the family owners, *in situ*, are now many steps removed in the modern, international context.

More importantly, international trade tends towards deeper market failure because the economic actor is less likely to have the external costs of its activities internalized by the conventional social mechanisms, and according to the societal standards, discussed above. Cultural norms regulating human conduct by social sanction are weaker across distant ethnic lines and geopolitical space. Thus, the media and civil society that traditionally impose reputational costs and exert consumer pressures on domestic economic actors will not only be less aware of and concerned with external costs that these same actors may commit abroad, but less empowered to do anything about it. As for legal mechanisms, arguably the emergence of international free markets for most developing countries in dire need of economic growth or those lacking responsible governance structures may well cause legal regimes to under-regulate externalities in order to gain comparative advantage – the infamous “race to the bottom.”<sup>52</sup> Furthermore, these externalities are largely immune to or exempted from many forms of unilateral and multilateral legal regulation due to limitations on other states’ extraterritorial jurisdiction, the principle of sovereignty, and the transaction costs of multi-lateral cooperation.

Despite the fact that many states may not have exercised their full powers of regulation as an empirical matter, it remains to be determined, as a matter of law, what the actual extent of that power is within a multi-lateral free trade regime. This implicates one of the most complex and tendentious debates surrounding the free trade movement. Insofar as free trade implies the

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<sup>52</sup> Whether this would occur in a mercantilist economy set on economic development is open for debate; history proves equivocal. While under-regulation would be unnecessary to increase competitiveness, it may promote short-term productivity gains.

minimization, or at best the harmonization,<sup>53</sup> of tariff and non-tariff trade barriers under the WTO-GATT regime, what is the role of national legislation and regulation that attempts to internalize the social costs of a given economic activity arising in a foreign country? Affirming the importance of state sovereignty and the inherent duty of states to protect their citizens, Article XX(b) of the GATT states “nothing in this Agreement should be construed to prevent the adoption or enforcement by any Member of measures... necessary to protect human, animal or plant life or health.”<sup>54</sup> This provision seems to preclude a state from pursuing policy objectives that address non-life or health-based social costs, unless they fall under any of the other narrow exceptions of the “chapeau.”<sup>55</sup> Furthermore, the qualifier “necessary” in Article XX(b) has been interpreted to limit the power of states over extra-jurisdictional harms,<sup>56</sup> as well as to require that trade measures be demonstrably effective<sup>57</sup> and have no alternative that is less trade-restrictive.<sup>58</sup> In the absence of binding international legal regimes to compensate for these constraints on the traditional national regulatory machinery,<sup>59</sup> international trade will bar a greater proportion of negative social costs from being privatized through the legal regulation of externalities. Thus the current international legal trading regime is complicit in market failure.

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<sup>53</sup> See WTO Agreement, *supra* note 3, arts. I, III (requiring most favored nation and national treatment for like products imported into member-states’ markets). Thus, countries must subject all imports, regardless of country of origin, to the same trade restrictions as their own national products. Article II, on the other hand, envisions the absolute reduction of trade barriers. *Id.* at art. II.

<sup>54</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX(b), 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

<sup>55</sup> See GATT art. XX(a), for a moral exception; see GATT XX(e), for a prison labor exception; see GATT XXI, for a national security exception.

<sup>56</sup> See, e.g., GATT Panel Report on United States Restrictions on Imports on Tuna, DS21/R-39S/155 (Sep. 3, 1991) [hereinafter Tuna/Dolphin I]; GATT Panel Report on EC Tariff Preferences, WT/DS246/R (Dec. 1, 2003) [hereinafter EC – Tariff Preferences]. *But see* GATT Panel Report on United States Restrictions on Imports on Tuna, DS29/R (June 16, 1994) [hereinafter Tuna/Dolphin II].

<sup>57</sup> See, e.g., Tuna/Dolphin II, *supra* note 56; EC – Tariff Preferences, *supra* note 56; WTO Dispute Settlement Appellate Body Report on European Communities Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (March 12, 2001) [hereinafter EC – Asbestos].

<sup>58</sup> See, e.g., GATT Panel Report on Thailand Restrictions on Importation of and Internal Taxes on Cigarettes, DS10/R-37S/200 (November 7, 1990) [hereinafter Thailand – Cigarettes]; Tuna/Dolphin I, *supra* note 56; WTO Dispute Settlement Appellate Body Report on United States Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (May 20, 1996) [hereinafter U.S. – Gasoline]; EC – Tariff Preferences, *supra* note 56.

<sup>59</sup> This is not to say that international law cannot address the problem of externalities, it is simply to recognize the greater transaction costs and collective action problems that plague any such attempt. Compare the strength of the largely unenforceable and voluntarist international environmental, health, and labor protection schemes to their more rigorous national counterparts.



## 2. Greater Externalities

The second reason that international trade poses a greater risk of market failure with respect to externalities is that international trade introduces more social costs than those already inherent in the process of production, through the increased role of shipping. This increase is not trivial if one considers that comparative advantage, taken to its theoretical limits, represents a radical restructuring of domestic economies through the hyper-specialization of a nation's economic base and the displacement of all other production abroad.<sup>60</sup> Consequently, the global market relies on shipping activity over longer routes and in greater volumes than ever before.<sup>61</sup> Dependent on marine, terrestrial, and tropospheric ecosystems, as well as carbon and other pollution "sinks," these air, land, and sea trade-ways are replete with externalities that impact the global commons and are difficult to regulate and internalize.<sup>62</sup>

### *C. Monetizing Utilitarianism*

What this note has dealt with so far is the existence of externalities or social costs (and benefits) as sources of market failure and the lack of national and

<sup>60</sup> Indeed, the heightened volume and shipping distance of exchanged goods also implicates increased private costs, i.e. shipping costs. Depending on the product and available transportation technologies, these costs may be insignificant in proportion to the total costs of production or they may constitute an overwhelming part of the overhead so as to preclude competition in international markets. In the case of the latter, the diversion of national capital and labor away from the products in which the country has a comparative advantage effectively tempers the thrust of the Ricardian model.

<sup>61</sup> According to the International Chamber of Shipping & International Shipping Federation, total seaborne shipping, which accounts for ninety percent of world trade, has quadrupled in the last forty years, reaching a volume of roughly twenty-three trillion tonne-miles in 2002. INTERNATIONAL CHAMBER OF SHIPPING & INTERNATIONAL SHIPPING FEDERATION, SHIPPING FACTS: VALUE OF VOLUME OF WORLD TRADE BY SEA, at <http://www.marisec.org/shippingfacts/worldtradevolume.htm> (last visited July 10, 2005).

<sup>62</sup> Insofar as shipping is predicated on trade in material goods, a counter-argument would point to the general post-industrial revolution decline in the production and trade of goods with respect to intangible services. This raises an interesting "Silicon Age Paradox." While a service sector based on real-time, virtually unbounded, communication technologies may vitiate concerns about shipping costs and even some resource depletion-based externalities, it also seems to question the traditional *raison d'être* of Ricardo's model: to harness the variable advantages of disparate and arbitrary resource distribution. Consider the most probable reason why Spain produces better wine than England and you will likely point to the inferiority of English grapes. This is not to downplay the importance of differing manufacturing processes and superior technology, however these are relatively more ephemeral variables in the context of a globalizing information society. Likewise, quality of labor and infrastructure are sooner a transitory issue of governmental policy on human resource management and public spending, than any inherent cultural or intellectual superiority (indeed, most of us balk at the idea). However, if this is less the age of wine production, than wine television shows, are we prepared for a radical Ricardian economic restructuring now that ostensibly less stable variables confer comparative advantage?

supranational institutional capacities to effectively internalize them. Unfortunately, even if one overtakes this stumbling block, the mere existence of externalities summons an even greater conceptual crisis, one that economists will have much more difficulty reconciling. The note will explore this crisis by developing the notion of inter- and intra-subjective utility comparisons.

Most economists seek to maximize the social aggregate of individual utility functions.<sup>63</sup> In other words, they wish to do what results in the most good for the most people. The difficulty arises in determining an individual's utility function - the direction and intensity of their preferences - and then comparing it to that of another individual. Hence, the virtue of free markets is that they enable an accurate quantification of preferences and a reliable inter-subject utility comparison through the relative willingness to buy, sell, and trade.<sup>64</sup> Assuming that individuals are rational market actors,<sup>65</sup> any voluntary exchange in the perfect market<sup>66</sup> is inherently utility-maximizing for the parties to the transaction. Otherwise, the exchange would not have occurred.

Even conceding the assumption of rationality, the money rubric of subjective utility comparisons poses major problems for utilitarian economics.<sup>67</sup> The first

<sup>63</sup> There is some disagreement as to what utility actually means in the economics literature, although it is largely deemed synonymous with individual preferences. Contrary to its literal sense, fulfilling subjective desires is generally regarded as equally important as attending to objective needs in maximizing utility. Indeed, objective needs may not be a coherent distinction in the market setting. Nonetheless, some philosophers have argued for a moral differentiation between certain low- and high-order subjective preferences. See generally MITCHELL POLINSKI, AN INTRODUCTION TO LAW AND ECONOMICS (3rd ed. 2003); ROBERT H. FRANCK, MICROECONOMICS AND BEHAVIOR (4th ed. 2000); AMARTYA SEN, ON ETHICS AND ECONOMICS ch. 2 (1987).

<sup>64</sup> It is important to recognize that unlike bartering, where the cost is the loss of the traded item itself, spending money is best represented as an opportunity cost - i.e. the cost of foregoing something else that one could have purchased with the same money. Note that the opportunity costs referred to in the analysis of comparative advantage not only displaced capital, but also labor, resources, and other factors of production. Of course, in reality, the consumer also expends irreplaceable time and effort.

<sup>65</sup> Rational individuals are assumed to make choices that will "pursue consistent ends using efficient means [as a function of] preferences which are complete, reflexive, transitive, and continuous." NICHOLAS MERCURO & STEVEN G. MEDEMA, ECONOMICS AND THE LAW FROM POSNER TO POST MODERNISM 57 (Princeton University Press 1997). Note that the assumption of rationality has been contested by scholars of the emerging school of Behavioral Law and Economics [hereinafter BLE] notably Herbert Simon, Mark Kelman, Christine Jolls, Cass R. Sunstein, Richard Thaler, and Mathew Rabin amongst others. Armed with insights from behavioral and evolutionary psychology, BLE holds individuals to be characterized by "bounded rationality," susceptible to certain irrationalities such as the endowment effect, hyperbolic discounting, the status quo bias, the hindsight bias, addiction, and over-optimism. *Id.*

<sup>66</sup> This assumes, amongst others, perfect information and no transaction costs. See discussion *supra* Part II(A).

<sup>67</sup> Money, or the willingness to buy and sell, is the measure of a commodity's value because money has come to become so central to the economy both for its fungibility and its practicality. Nonetheless, the following critiques would apply to most anything used as a proxy for a good's value.

problem arises amongst parties to a transaction whose willingness to buy or sell does not actually reflect their stable preferences. Such failure of money to act as a metric for inter-subjective utility comparison results because an individual's valuation of money depends on surrounding opportunity costs and the magnitude of these opportunity costs is susceptible to wealth effects. Take for example, a forlorn vagabond possessing only a nickel, loitering longingly aside a multi-millionaire at a concession stand. Suppose the penniless vagabond is starving while the multi-millionaire is overcome with ennui and perhaps a bit irritated that the concession stand does not offer a better selection. Would the fact that the vagabond walks away empty handed, while the millionaire haughtily purchases an over-priced hot dog, suggest that the millionaire really valued the hot dog more than the poor man? The less wealth one owns, the more each dollar spent forecloses the opportunity to buy anything else: relative opportunity costs loom large. However, as one gains wealth, any one purchase represents a smaller fraction of one's total wealth, causing the opportunity cost of the transaction to diminish.<sup>68</sup> Insofar as such wealth effects distort expressions of preference through the willingness to buy, sell, or trade, it poses a challenge to the utility-maximizing assumption of free markets.

The second, and more critical, problem of the monetary rubric is inherent to intra-subjective utility comparisons. Here, the problem is not the comparative valuations of two different people, but rather the difficulty of comparative valuations by the same person. While humans buy, sell, and trade any number of goods and services on the open market, a number of these "commodities" fiercely resist commodification. These "invaluables" include one's life and limb, ecosystems, liberty, and dignity.<sup>69</sup> For whatever reason, a cognitive dissonance occurs when people are asked to consciously monetize or trade-off these sacred invaluables, despite the fact that they are forced to make such decisions everyday.<sup>70</sup> As a result, most people fail to include these invaluables in their cost-benefit calculations in any meaningful way.

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<sup>68</sup> The same analysis can be employed for any rational actor in the market, sellers and buyers alike.

<sup>69</sup> This resistance may be cultural, biological, and/or evolutionary, but is nonetheless extremely robust. Consider the impassioned and often paternalistic reactions to paid surrogacy, organ sales, and prostitution, as well as economist Kip Viscusi's attempts at price tagging everything from a human life to an endangered fish. Kip Viscusi, *Strategic and Ethical Issues in the Valuation of Life*, in *FATAL TRADEOFFS, PUBLIC & PRIVATE RESPONSIBILITIES FOR RISK* (Oxford University Press 1992). For most people, such things are indeed priceless – and no theory of rationality provides a convincing argument to the contrary – nonetheless Viscusi would impress upon us that hard decisions, however dissonant, must be made in a limited world of finite resources. *Id.*

<sup>70</sup> Reducing risk to life and limb always comes at a cost, whether we are deciding on maintaining the speed limit on the way to work, the type of health insurance coverage, or having a child. In fact, most of our decisions in the face of these costs reflect an extremely low valuation of our very own life and limb. *See id.*

Negative externalities often entail physical, rather than monetary, harms to third parties, the environment, and other "invaluables." Institutional efforts to internalize or privatize such public costs are thus overwhelmingly plagued by the need to engage in intra-subjective utility valuations, most often by translating these costs into the monetary form of penalties, fines, fees, non-pecuniary damages, and taxes. The intractability of invaluable externalities leads to incessant and irreparable market failure, especially in international trade where costs are more likely to be indirect, removed, and external.<sup>71</sup>

### III. ASSESSING THE DAMAGE

#### *A. The Indeterminacy of "Free Trade"*

Viewed together, the points outlined above present difficulties for the free trade-economic efficiency/growth nexus of comparative advantage by challenging the viability of perfect market preconditions, incorporating the economic concept of externalities, and more problematically, creating the notion of the "invaluable." However, the implications of these insights reach beyond the mere contamination of a perfect economic theory by the grit of less-than-perfect reality; they act on the level of discourse, threatening to undermine the very precept of free trade central to neo-liberalism. This is because free trade, the leading instrumentalist assumption in the human rights-trade debate, is understood as the idea that markets work best when unencumbered by non-market forces.

Consider that most markets, especially international ones, are distorted due to a lack of perfect homogeneity, competitiveness, and information.<sup>72</sup> As suggested above, state (or alternatively supranational) regulation can roughly impose these preconditions, or at least remedial surrogates to offset the otherwise inherent market failure.<sup>73</sup> As such, health and safety codes, labeling and disclosure regulation, product liability, and other consumer protections all ensure some measure, albeit uncertain in nature, of homogeneous products, competitive actors, and accurate information. Nonetheless, these interventions stand at uncomfortable odds with the dictates of free expression, individual liberty, and free enterprise.

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<sup>71</sup> See discussion *supra* Part II(B).

<sup>72</sup> Paul, *supra* note 18, at 298, estimates that, at the very most, twenty-five percent of world markets would come close to fulfilling the perfect market preconditions, benefiting countries with estimated static gains of 0.1 to 0.5 percent of their GDP. Admittedly, the more inchoate dynamic gains may be somewhat higher. See Gomory & Baumol, *supra* note 18, at 5. However, these gains are also weakened by market distortion.

<sup>73</sup> See *supra* Part II(B).

Consider further that all market activity produces externalities, the most relevant being the negative social costs to long-term health, aesthetic beauty, energy and resource supply, and environmental degradation.<sup>74</sup> However, this laundry list is deceptive because it includes only those costs that traditionally have not been internalized. To reiterate, a complex system of property, tort, contract, administrative, labor, environmental, health, criminal, tax, intellectual property, antitrust, and consumer protection law have, for a long time, imposed imprisonment, penalties, awards, fines, injunctions, royalties, and tax breaks in order to rectify market imperfections and internalize a host of externalities incident to the market. Moreover, in modern, advanced industrial and service-oriented international markets, a government's expenditures on infrastructure, education, and scientific research and development play an essential role in constructing its own comparative advantage.<sup>75</sup>

As such, the argument can hardly be sustained that a market, nor the trade that makes the market possible, is free in any meaningful sense of the word. Indeed, one cannot reasonably speak of a market absent this governmental framework, nor could one determine which exact laws and regulations should accompany the market *a priori*. What, exactly, is the correct level of intellectual property protection that rectifies externalities without producing market distortion? What amount of free speech promotes perfect information? Moreover, due to the incoherence of intra-subjective utility comparisons (privatizing invaluable), it is equally indeterminate what amount of prison time or monetary damages are appropriate to effectuate a proper internalization of externalities.

All this demonstrates not only that the "free market" must be created – and maintained – by state intervention, but that no determinate and rational guidelines exist to structure this creation.<sup>76</sup> The great variability and

<sup>74</sup> See generally HUGH D. YOUNG & ROGER A. FREEMAN, UNIVERSITY PHYSICS 559-60 (1996). The underpinnings for these externalities can be traced to a combination of ecology, the second law of thermodynamics, and the law of conservation of matter. Firstly, markets, seen as an ordered – and increasingly so – system, require a constant input of energy. Harvesting non-renewable sources of energy from carbon sinks has tremendous effects, amongst other things, on atmospheric carbon levels; while harvesting renewable energy from a fixed solar source alters natural energy pathways. Second, both energy harvesting and most manufactured products require raw materials made from non-renewable resources (at least in the time frames of fast-growth economies). Thirdly, and as a result of the structure of resource flows in the manufacturing of products mentioned above, the economy generates outputs that cannot be reintegrated into the system. While there is room for serious debate as to whether current levels of economic growth can be sustained by a more conservative matrix of resource flows or whether raw materials are a perfectly substitutable factor of production, it remains to be shown that these three parameters of market activity do not automatically produce some form of externality in even the most minor perturbation of the ecosystem.

<sup>75</sup> See discussion *supra* note 62, for a discussion of the "Silicon Age Paradox."

<sup>76</sup> In the context of international markets, there is an extensive legal framework inhering in the WTO-GATT, as well as the domestic laws that animate it. See generally, WORLD TRADE

disagreement that markets and their proponents have manifested throughout history testifies to this uncertainty. Furthermore, this discussion leads to the conclusion that, insofar as its core assumptions are unattainable, a market is bound to fail on its own theoretical terms. It does not follow that markets are necessarily undesirable or useless, rather this discussion shatters the assumption, perhaps even the mythology, that a singular “free market” exists as a coherent idea for consumption in public and political discourse. Thus it suggests that any new regulatory constraints placed upon markets are a change in the contours of the market – ones that will surely implicate different efficiency or distributive outcomes<sup>77</sup> – and not, in fact, an affront to its inherent “free-ness.”<sup>78</sup> Further refuting the first instrumentalist assumption, human rights law then is not *a priori* incompatible with a free market.

### B. A Final Note on the Legal Practicability of the WTO-GATT

The third instrumentalist assumption presupposes that a trade liberalization and integration regime is feasible. While one can readily point to the relative success and strength of the WTO-GATT on the international stage<sup>79</sup> this nonetheless underrates the political difficulties the WTO-GATT faces as an institution of numerous, independent member-states. The principle tension in

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ORGANIZATION, WHAT IS THE WTO?, at  
[http://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm) (last visited July 10, 2005).

<sup>77</sup> Consider the TRIPS Agreement, which anticipated the erection of new trade barriers in order to more promote efficient innovation through patent protections. Recently however, the Doha Declaration at the WTO’s 2001 Ministerial Conference, as well as the August 30 Agreement and the General Council Chairperson’s Statement, have relaxed some of these trade restrictions in order to promote more equitable distributions of generic pharmaceuticals to combat widespread and growing epidemics. The Fourth WTO Ministerial Conference held in Doha, Qatar, Ministerial Declaration, WT/MIN(01)/DEC/1 (Nov. 20, 2001), available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm) (last visited July 10, 2005); WTO General Council, General Council Meeting, WT/GC/M/82 (Aug. 3, 2003), available at [http://www.wto.org/english/tratop\\_e/trips\\_e/gc\\_stat\\_30aug03\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/gc_stat_30aug03_e.htm) (last visited July 10, 2005).

<sup>78</sup> We should be wary of associating a market only with the goals of efficiency because all markets, and the “freeing up” of markets, have distributive effects. Furthermore, holding efficiency to be an indicator of market “free-ness,” while defining free markets as the result of a constellation of efficient rules (private property, voluntary exchange, etc.), is circular as well as premature. See *supra* note 53, for a counter-intuitive, yet good, example of market freedoms diverging from efficiency goals towards distributive ones.

<sup>79</sup> Since the Uruguay Rounds from 1984-1994, the WTO-GATT has driven some 184-member states from mere trade concessions to commitments for liberalization of non-tariff trade barriers, agriculture, services, investment, and intellectual property. Merit Janow, *The WTO and Global Trade*, Lecture at Columbia University School of International and Public Affairs (Feb. 21, 2005). The WTO-GATT’s dispute settlement system has been particularly robust. See generally Peter Van den Bossche, *The Doha Development Round Negotiations on the Dispute Settlement Understanding*, in *NEW AGENDAS IN THE 21ST CENTURY* (WTO Conference, Nov. 2003), available at <http://www.worldtradelaw.net/articles/vandenbosschedohadsu.pdf> (last visited July 10, 2005).

the free trade debate is between protectionism – the ultimate vice that the free trade regime aims to quash – and the traditionally legitimate practices of a sovereign authority to safeguard its citizens' public health, safety, welfare, and morals. Part I demonstrates that the WTO-GATT has drawn the line restrictively vis-à-vis traditional governmental powers and often meets much disagreement on this point.<sup>80</sup> Whether the WTO-GATT has the clout to curtail these state powers, thereby redefining sovereignty, the relationship of governance with its people, and the very identity of the nation-state itself, is yet to be seen.

A good test case will no doubt emerge from the current genetically modified organism (GMO) labeling controversy, which arguably sits in the twilight zone of protectionism and public welfare.<sup>81</sup> At issue is whether the European Union can mandate disclosure of products containing genetically modified organisms.<sup>82</sup> Politically active groups of European consumers claim to exercise a right to know if a product contains GMOs, but WTO-GATT rules prohibit non-tariff trade barriers on like products with no measurable threat to health, welfare, or public morals.<sup>83</sup>

The labeling controversy underscores the often-fundamental paradox inherent in the modern Westphalian system of nation-states, one that sets the external obligations of international cooperation against the internal responsibility to a state's populace. With the greater historical weight and perceived legitimacy of state sovereignty, the latter exerts the decisively stronger pull in cases of widespread opposition to the free trade measure because this undermines the very legitimacy of the state, despite the WTO-GATT's impressive dispute settlement record.<sup>84</sup> Indeed, in the extreme cases, the affected state or group of

<sup>80</sup> Cf. GATT art. XX(b), *supra* note 3; Thailand – Cigarettes, *supra* note 58; Tuna/Dolphin I and II, *supra* note 56; U.S. – Gasoline, *supra* note 58; EC – Asbestos, *supra* note 57; and EC – Tariff Preferences, *supra* note 56.

<sup>81</sup> Brett Grosko, *Genetic Engineering and International Law: Conflict or Harmony? An Analysis of the Biosafety Protocol, Gatt, and the WTO Sanitary and Phytosanitary Agreement*, 20 VA. ENVTL. L. J. 295, 318-20 (2001).

<sup>82</sup> *WTO to Probe Europe's GMO Policy*, BBC WORLD NEWS, Aug. 29, 2003, at <http://news.bbc.co.uk/2/hi/business/3191395.stm> (last visited July 10, 2005); see also David Safford, *U.S. Protests New EU Biotech Rules, Saying They May Violate WTO Agreement*, 18(23) Int'l Trade Rep. (BNA) 891, 891-92 (June 7, 2001).

<sup>83</sup> GATT art. XX, *supra* note 3.

<sup>84</sup> Upon a finding by the WTO panel or Appellate Body that a state has violated its legal obligations and the subsequent failure of the offending party to bring itself into timely conformity with its recommendations, the Dispute Settlement Body (DSB) may authorize the complaining party to impose bilateral sanctions to the extent needed to compensate for the economic harms the infringement may have incurred. WTO Agreement, *supra* note 3, annex 2. Despite the weakness of this self-help mechanism for any but the strongest economies, compliance with dispute settlement recommendations has been so high that only five out of 273 complaints required the authorization of trade sanctions. WTO, UPDATE OF WTO DISPUTE SETTLEMENT CASES, WT/DS/OV/9 (Oct. 25,

states will likely withdraw from the agreement or threaten to do so. However, long before such threats jeopardize the regime itself, states are likely to seek modifications relaxing the international obligations at stake.

Because international law is fundamentally state-driven, a free trade regime can only survive as long as it remains within this sphere of acceptability to most states and their citizens. For now, the major trading powers that enjoy the economic push for their global neo-liberal agenda perceive economic integration to be in their interest. Still, while the regime is relatively young, grassroots environmental and social justice movements already assail it.<sup>85</sup> Considering the shortcomings of comparative advantage discussed above, an international trading regime may seem less compelling as the trumpeted gains fail to materialize. One serious economic slump and the safeguards against economic protectionism may be thrown by the wayside as governments re-prioritize the pressing domestic issues of unemployment and recession over weakly-enforced international obligations.<sup>86</sup> Of course, if free trade significantly and pervasively promotes improvements in human rights, none of this nay-saying is likely to happen.

### C. Economic Growth-Human Rights Nexus

Finally, a brief comment is appropriate concerning the last instrumentalist assumption: the nexus between economic growth and human rights. Assuming for a moment that comparative advantage delivers on its promise to maximize wealth, how then does this translate to improved human rights? It is often contended, that a higher gross national product generally means a higher standard of living and a more stable political climate. The former advances social, cultural, and economic rights, while the latter encourages the realization of civil and political rights.<sup>87</sup> Indeed, it is true that wealth correlates roughly with a country's human rights profile,<sup>88</sup> however there is evidence that free trade

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2002), available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/OV9.doc> (last visited July 10, 2005); see also Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 794 (2001).

<sup>85</sup> The large-scale protests that precipitated at the 1999 Ministerial Conference in Seattle, as witnessed by the author, exemplify the backlash.

<sup>86</sup> *But cf. supra* note 18, at 334-38. Joel argues that the only redeeming value of international trade institutions may be policy coordination and dispute resolution, potentially preventing spiraling protectionism and trade wars. *Id.* What he fails to acknowledge is the possible role of the WTO in creating both expanding the trade networks that would be vulnerable to future trade disputes and the conditions of instability that would prompt them.

<sup>87</sup> See generally SEN, *supra* note 6.

<sup>88</sup> FREEDOM HOUSE, *FREEDOM IN THE WORLD: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES* (2004).



by itself has ambivalent, or even adverse, effects.<sup>89</sup> At the heart of the matter are twin assertions that economic gains from increased trade are not evenly distributed and are accompanied, perhaps even offset, by certain unavoidable conversion costs.<sup>90</sup>

Empirically, a number of studies suggest income inequality, both between countries and/or within them, is rising as world trade increases.<sup>91</sup> These studies arguably reflect a bias in the current system of economic integration towards developed trading nations, their wealthy elites, corporate leaders, and big business over small local ventures.<sup>92</sup> Intra-state inequality in industrialized nations certainly results, at a minimum, in increasing opportunities for trade in international markets, combined with more competitive labor markets.<sup>93</sup> This

<sup>89</sup> With respect to universal human rights “[t]he WTO is a veritable nightmare... [and] what is required is nothing less than a radical review of the whole system of trade liberalization and a critical consideration of the extent to which it is genuinely equitable and geared towards shared benefits for rich and poor countries alike.” J. OLOKA-ONYANGO & DEEPIKA UDAGAMA, *THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: GLOBALIZATION AND ITS IMPACT ON THE FULL ENJOYMENT OF HUMAN RIGHTS, FINAL REPORT OF THE U.N. SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS 13-19*, U.N. Doc. E/CN.4/Sub.2/2000/13 (2003), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0811fcbd0b9f6bd58025667300306dea/21a92d3d0425a0cec125693500484d2f?OpenDocument> (last visited July 10, 2005).

<sup>90</sup> *Id.*; Gomory & Baumol, *supra* note 18, at 12-20.

<sup>91</sup> See, e.g., GIOVANNI ANDREA CORNIA ET AL., *INCOME DISTRIBUTION CHANGES AND THEIR IMPACT IN THE POST-WORLD WAR II PERIOD* (U.N. U. World Inst. Dev. Econ. Res., Discussion Paper No. 2003/28, 2003), available at <http://www.wider.unu.edu/publications/dps/dps2003/dp2003-28.pdf> (last visited July 10, 2005); Steve Shifferes, *World Inequality Rises*, BBC NEWS, Jan. 17, 2002, available at <http://news.bbc.co.uk/1/hi/business/1763410.stm> (last visited July 10, 2005); Branko Milanovic, *True World Income Distribution, 1988-1993: First Calculation Based on Household Surveys Alone*, 112 ECON. J. 51 (2002), available at [http://econ.worldbank.org/files/978\\_wps2244.pdf](http://econ.worldbank.org/files/978_wps2244.pdf) (last visited July 10, 2005); SALI-I-MARTIN, *THE DISTURBING ‘RISE’ OF GLOBAL INCOME INEQUALITY* (Colum. U. Dep’t Econ., Discussion Paper Series No. 0102-44, 2002); Robert Hunter Wade, *The Rising Inequality of World Income Distribution*, FIN. & DEV., Dec. 2001, at 37, available at <http://www.imf.org/external/pubs/ft/fandd/2001/12/wade.htm> (last visited July 10, 2005); MATTIAS LUNDBERG & LYN SQUIRE, *THE SIMULTANEOUS EVOLUTION OF GROWTH AND INEQUALITY* (World Bank, 1999), available at <http://www.worldbank.org/research/growth/pdfiles/squire.pdf> (last visited July 10, 2005). *But see, e.g.*, David Dollar & Aart, *Spreading the Wealth*, 81 FOREIGN AFFAIRS 120 (2002); DAVID DOLLAR & AART, *GROWTH IS GOOD FOR THE POOR* (World Bank, Policy Research Working Paper No. WPS 2587, 2001), available at [http://econ.worldbank.org/files/1696\\_wps2587.pdf](http://econ.worldbank.org/files/1696_wps2587.pdf) (last visited July 10, 2005); DAVID DOLLAR & AART, *TRADE, GROWTH, AND POVERTY* (World Bank, Policy Research Working Paper No. WPS 2615), available at [http://econ.worldbank.org/files/2207\\_wps2615.pdf](http://econ.worldbank.org/files/2207_wps2615.pdf) (last visited July 10, 2005). These studies differ widely in results and methodologies. While most of them attest to a discernible trend of rising inequality, they also betray a lack of consensus on the precise relationship of trade, *ceteris paribus*, with inequality.

<sup>92</sup> As the United Nations Development Programme concludes: “The imbalances in economic growth, if allowed to continue, will produce a world gargantuan in its excesses and grotesque in its human and economic inequalities.” UNITED NATIONS DEVELOPMENT PROGRAMME, *1996 HUMAN DEVELOPMENT REPORT* (Oxford OUP, 1996) [hereinafter UNDP].

<sup>93</sup> *Id.*; see also Gomory & Baumol, *supra* note 18.

drives a forceful wedge between the corporate elite, as well as its highly-educated, indispensable employees, and much of the blue-collar working class.<sup>94</sup> In developing countries, the possibilities for an equal playing field are dismal, due to corruption, weak financial institutions, and governments with ineffective and non-responsive public policies leading to even greater income disparities.<sup>95</sup>

The possible reasons for inter-state inequalities are equally complex. At play is the current global division of trade between the North's patent-protected high-volume service and value-added manufactured-goods economies and the South's limited and slumping primary commodity markets.<sup>96</sup> Other factors include: debt, volatile capital markets, and foreign direct investments,<sup>97</sup> WTO-GATT endorsed agricultural subsidies and trade sanctions, and the environmental, social, demographic, and cultural experiences of globalization. A more rigorous analysis is beyond the scope of this note.<sup>98</sup> Suffice it to say, the absolute decrease in income levels that is likely to occur in certain interstate and intrastate regions threatens the favorable standards of living and political climate needed to foster human rights.<sup>99</sup>

Economists would claim that comparative advantage is Kaldor-Hicks efficient; it increases aggregate wealth such that those who gain from it obtain enough to fully compensate those who lose.<sup>100</sup> Even if this was true, what is missing is a compensation mechanism, which leaves no one inevitably worse off

<sup>94</sup> *Id.*

<sup>95</sup> Sierra Leone, the Central African Republic, and Nicaragua claimed the greatest Gini coefficient (a standardized measure of income inequality). CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK (June 30, 2005), at <http://www.cia.gov/cia/publications/factbook/fields/2172.html> (last visited July 10, 2005). Most industrialized nations scored significantly better. *Id.*

<sup>96</sup> *Cf.* Paul, *supra* note 18; UNDP, *supra* note 92.

<sup>97</sup> The high mobility of capital is reflected in today's international financial markets, which exchange \$1.5 trillion a day – indeed 60 times the value of trade in goods and services – of which short-term, often speculative, capital flows constitute a significant fraction. COUNCIL OF ECONOMIC ADVISORS, ECONOMIC REPORT OF THE PRESIDENT 224 (1999).

<sup>98</sup> Gomory & Baumol, *supra* note 18, at 12-20, offer a conceptual model for the inter-state effects of trade. According to the model, there exists an extreme zone of mutual gain where either a country dominates all trade markets or none of them and a larger zone of conflict as two countries near a more equitable distribution. *Id.* Thus “far from invariably leaving all economies better off, globalization can lead to increased prosperity in the less affluent country at the permanent expense of the country that remains, or at least formally was, at the vanguard.” *Id.*

<sup>99</sup> Interestingly, even if free trade does not lower absolute income levels, the relative inequality may still play a role in undermining human rights. *Cf.* Richard G. Wilkinson, Why is Inequality Bad for Health?, in INCOME, SOCIOECONOMIC STATUS & HEALTH: EXPLORING THE RELATIONSHIP 29-43 (J.A. Auerbach & B.K. Krimgold eds., 2001). Wilkinson shows that while health status improves with rising GNP levels, developed countries with more income inequality suffer from worse health than more egalitarian ones. *Id.*

<sup>100</sup> *Cf.* MITCHELL POLINSKI, AN INTRODUCTION TO LAW AND ECONOMICS (1983); ROBIN MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE (1990).

at the end. On the national level, state redistribution efforts can mitigate many of the disparate effects that trade may have on intrastate inequality, although a government's primary means, taxation and public spending, are often discouraged as anathema to the neo-liberal agenda.<sup>101</sup> Moreover, the high degree of capital mobility in international markets undermines even well-intentioned redistributive and regulatory efforts.<sup>102</sup> On the other hand, redistribution to address interstate inequalities arising from free trade is currently limited to discretionary foreign aid pursuant to state policies that are arguably guided by diplomatic, not economic, interests.<sup>103</sup>

In the absence of immediate redistribution, the unequal effects of free trade threaten the universal attainment of human rights, at least during the short-term conversion period before wealth begins to "trickle down" and the dynamic gains really kick in.<sup>104</sup> Structural and frictional unemployment, labor mistreatment, and a deteriorating environment all impose non-pecuniary social costs that directly undermine human rights goals. Furthermore, retooling industries, abandoning factories while constructing new factories elsewhere, and retraining workers all impose economic costs that also offset the touted efficiency gains of comparative advantage.<sup>105</sup> Not only does free trade carry with it the immediate potential for a deterioration of human rights, it may even have difficulty "breaking even" and stoking the kind of economic growth instrumentalists rely on.

#### CONCLUSION – FREE TRADE AND HUMAN RIGHTS

This exploration of neo-liberal instrumentalism, or the proposition that free trade can advance human rights, challenges the notion of free trade on numerous fronts. The theory of comparative advantage is imbedded in the logic of conventional micro-economic theory. As such, it suffers from three major setbacks: a lack of perfect markets, unaccounted externalities, and non-monetary costs.

In short, all market activities occur under somewhat imperfect conditions and create externalities that, even if privatized, resist rational utility comparisons. Market distortion is thus inevitable, and the more imperfections, externalities, and subjectivities that characterize the market, the greater the market failure. International markets are especially vulnerable as they enjoy weaker market pre-

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<sup>101</sup> See *supra* Part I(B).

<sup>102</sup> Cf. *supra* note 63.

<sup>103</sup> Michael Posner, Human Rights and Foreign Policy, Lecture at Columbia University School of Law (Feb. 16, 2005).

<sup>104</sup> Gomory & Baumol, *supra* note 18, at 6-7.

<sup>105</sup> This is especially true for industries where comparative advantage is apt to change frequently. See *supra* note 62, for a discussion of the "Silicon Age Paradox."

conditions and a higher likelihood accruing non-pecuniary externalities that fall outside of national regulation, such as environmental degradation and harm to health. Furthermore, imposing a “free trade” regime may raise problems of legal practicability and is sure to result in inequality and significant social costs of its own.

While many economists recognize the “free trade” straw man,<sup>106</sup> neo-liberal politics thrives on a “free trade” discourse. The rhetoric quickly collapses once one acknowledges that a functioning market requires a complex scheme of regulations to address its built-in market failures as best as possible. However, from finding the balance between free speech and information disclosure to evaluating the social costs of species extinction, remedying market distortions is invariably subjective and indeterminate. There is no rational and absolute solution, no “free market” and “free trade” writ large. Indeed, there can be infinite permutations of possible free markets, all of them equally legitimate in their attempts to determine the indeterminate.

Rejecting the discourse of “free trade” and being realistic about the balance of costs and benefits does not necessarily disavow the creation and institutionalization of a globally integrated and liberalized market. To the contrary, such rejections urges one to be honest with the prospects of increasing net aggregate wealth for various markets and to share these gains where they can be realized. Finally, it is a guidepost for minimizing market distortion through an international regulatory structure that best approximates perfect market conditions and adequately internalizes the subjective externalities of international trade. Considering the difficulty of reaching an international consensus on the system of norms that are needed as a baseline for this latter task, it appears a daunting project indeed.

#### *A. Enter Human Rights*

Turning full circle, it seems human rights norms are far from being incompatible with free trade. Indeed, human rights could represent just such a template for structuring a global market, analogous to the corpus of state laws and constitutional norms that underlie national markets. Unlike the current system of incongruous national jurisdictions, however, human rights law sets forward a comprehensive and globally applicable set of state obligations and proscriptions, which already enjoys near universal support and several decades of legal gloss: codified, customary, and constitutional.<sup>107</sup>

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<sup>106</sup> T.N. SRINIVASAN & JAGDISH BHAGWATI, OUTWARD-ORIENTATION AND DEVELOPMENT: ARE REVISIONISTS RIGHT? 17-18 (Sept. 17, 1999).

<sup>107</sup> The Universal Declaration of Human Rights was unanimously adopted by the 1948 General Assembly (with 10 abstentions). The International Covenant on Civil and Political Rights (with 149

As such, human rights can inform the appropriate evaluation of subjective external costs. Human rights bodies such as the UN Commission on Human Rights, European, African, and American human rights tribunals, and many national courts have long addressed the privatization of invaluable externalities such as labor and environmental abuse.<sup>108</sup> Human rights can frame state obligations and duties with respect to “correcting” market imperfections through provisions on free expression, intellectual property, information, and consumer protection.<sup>109</sup> More indirectly, human rights provide a baseline for the host of other state regulations inherent in a market, including property, contract, criminal law, and so on. Most importantly, human rights can safeguard against the disparate effects and conversion costs that accompany international trade. In all of these ways, human rights may play an integral role in creating a well-functioning market system.

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ratifications); the International Covenant on Economic, Social, and Cultural Rights (with 152 ratifications); the International Convention on the Elimination of All Forms of Racial Discrimination (with 169 ratifications); the Convention on the Elimination of All Forms of Discrimination Against Women (with 177 ratifications); the Convention on the Rights of the Child (with 192 ratifications); and the Convention Against Torture (with 136 ratifications) enjoy the support of at least a two-thirds majority of the international community. OFFICE OF THE UNITED STATES HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES (June 2004), available at <http://www.unhcr.ch/pdf/report.pdf> (last visited July 10, 2005). But see Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 11(8) YALE L. J. 1935 (2002) (finding little correlation with treaty ratification and human rights compliance). Nonetheless, some of the provisions set out in these documents are reflective of widespread, long-standing, and uncontested state practice and evince the *juris opinio* needed to establish binding customary international law. Cf. *Filartiga v. Pena*, 630 F.2d 876 (2nd Cir. 1980) (finding that U.N. human rights treaties evince a customary international law against the use of torture); see generally *North Sea Continental Shelf* (Ger. v. Den./Neth.), 1969 I.C.J. 3 (Feb. 20), reprinted in 8 I.L.M. 340, 357-63 (recognizing the objective and subjective elements of customary international law). Numerous human rights bodies have been established by these international instruments, such as the Committee on Human Rights, the Committee on the Elimination of Racial Discrimination, and the Committee Against Torture, in order to monitor and “enforce” each member-states commitment. At the international level, these treaty bodies are complemented by the work of the U.N. Human Rights Commission, as well as international judiciaries such as the International Court of Justice and the nascent International Criminal Court. Similar structures exist at the regional level including a combination of Inter-American, African, and European human rights charters, commissions, committees, and courts. Finally, a fair number of countries, especially post-colonial states, have incorporated human rights language directly into their constitutions where national courts and commissions have been able to breath into them a sense of legal life. See generally LOUIS HENKIN ET. AL., HUMAN RIGHTS (Foundation Press, 1999).

<sup>108</sup> See *Subash Kumar v. State of Bihar* [1991] A.I.R. 420 (India) (finding redress for a claim against environmental pollution under the constitutional right to life); *Minors Oposa v. Sec'y of the Dep't of Env't & Natural Res.*, 33 I.L.M. 173 (July 30, 1993).

<sup>109</sup> Supreme Court of India Writ Petition, *M.C. Mehta v. Union of India*, [1991] A.I.R. 382 (India) (No. 860), reprinted in 1(1) S. ASIAN ENVTL. L. REP. 46, 46-52 (1994) (requiring movie theatres to air environmental messages in pursuance of the peoples' constitutional right to information).

### B. The Counter-Critique

Like the wishful notion of Free Trade, human rights are certainly not immune from claims of subjectivity, indeterminacy, and legal impracticability.<sup>110</sup> While this analysis is tangential to the focus of this note, it is important to canvass its main points and briefly offer a few contrary insights. Ultimately, an honest critique of human rights may help endow the human rights project with greater legitimacy and efficacy.

Most political moderates and conservatives, those most closely aligned with neo-liberalism, share a general uneasiness in recognizing international rights that raise constitutional federalism and supremacy concerns<sup>111</sup> and are so ostensibly ambiguous, aspirational, and positive (imposing duties rather than prohibitions on the state) as to be un-justiciable, thus detracting legitimacy and attention from the more concrete extant rights.<sup>112</sup> Those on the left have added another distrustful note to the chorus of critique, framing human rights as a neo-imperialist projection of western values, individualism, and market-based economics.<sup>113</sup> Cultural relativists are particularly adverse to human rights' purported universalism. While there is a grain of truth to all of these concerns, they generally overlook the equitable principles upon which most legal systems balance stability and adaptability and the dynamic potential of human rights as an emancipatory discourse.

The admittedly abstract and universal language of human rights actually provides legislative, regulatory, and judicial bodies the flexibility to adopt rights commensurate with the social, economic, cultural, and political realities of their jurisdiction – while constantly pushing for cross-cultural awareness, introspection, and improvements in substantive well-being. Just like the amorphous constitutional rights of free speech, religion, and due process, courts

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<sup>110</sup> See David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HAR. HUM. R. S. R. 102 (2002). Mark Tushnet provides four related critiques of rights discussed in contemporary American legal circles which are no less applicable here: i) rights are unstable such that “significant but relatively small changes in the social setting can make it difficult to sustain the claim that a right remains implicated;” ii) “The claim that a right is implicated in some settings produces no determinate consequences;” iii) “The concept of rights falsely converts into an empty abstraction (reifies) real experiences that we ought to value for their own sake;” and iv) The use of rights in contemporary discourse impedes advances by progressive social forces.” Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363-64 (1984).

<sup>111</sup> See generally Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 344-349 (1995).

<sup>112</sup> See, e.g., BERNARD ROBERTSON, ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A TIME FOR A REAPPRAISAL (New Zealand Business Roundtable, 1997); Jim Kalb, *Human Rights: Is Emphasis on Human Rights an Unmixed Good?*, TURNABOUT ONLINE (2004), at <http://jkalb.org/book/view/44> (last visited July 10, 2005).

<sup>113</sup> See, e.g., Kennedy, *supra* note 110, at 256-58; MAKAU MAUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE 154 (University of Pennsylvania Press 2002).

can and will embellish vague principles with more exacting judicial interpretation.<sup>114</sup> Far from being hopelessly indeterminate, this judicial interpretation can often be guided by objective criteria such as health profiles, emission thresholds, and living wage calculations promulgated by competent national authorities or taken from internationally-established standards. Indeed, it is true that human rights place an increasing onus on the state to affirmatively provide for human well-being. This translates to a due diligence obligation to institute the appropriate bodies, enact and enforce proper laws and regulations, establish and implement standards, all-the-while ensuring liability in the breach (of these standards), as well as public participation and transparency. These are responsibilities with which most governments are already intimately familiar.

Despite, western post-war origins of human right law, developing countries played a significant role in the development of human rights.<sup>115</sup> Furthermore, the rhetoric of cultural relativism deployed by unsavory governments is often rebutted by the adoption of human rights discourse by representative grassroots movements and “third-world” democracies in their struggles against colonialism, tyranny, and even harmful neo-liberal policies.<sup>116</sup> Finally, the individualistic nature of human rights need not be an obstacle because collective rights can be asserted in the aggregate and have been increasingly recognized as legitimate in their own right.<sup>117</sup>

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<sup>114</sup> In February of 2001, the United Nations Office of the High Commissioner for Human Rights organized a workshop on the justiciability of economic, social, and cultural rights, with special reference to the Draft Optional Protocol to the Covenant on Economic, Social, and Political Rights that would give individuals and groups the right to submit complaints of violations of the Covenant. “The Workshop concluded *inter alia* that economic, social, and cultural rights are justiciable not only in theory but also in practice . . . .” Mary Robinson, *The Right to Food: Achievements and Challenges*, in *WORLD FOOD SUMMIT: FIVE YEARS LATER* (World Food Summit Report, June 2002). *But see* *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 160-61 (2d Cir. 2003) (holding that the rights to life and health are insufficiently definite to constitute rules of customary international law).

<sup>115</sup> Mary Ann Glendon, *Foundations of Human rights: The Unfinished Business*, 44 AM. J. JURIS. 1, 4 (1999); *see also* MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (Random House 2001) (describing the influences of continental European and Latin American dignitaries in emphasizing family and community values and how these comport well with Asian and African traditions).

<sup>116</sup> Kenneth Roth, *Human Rights Organizations: A New Force for Social Change*, in *REALIZING HUMAN RIGHTS: MOVING FROM INSPIRATION TO IMPACT* 228 (Samantha Power & Graham Allison eds., 2000).

<sup>117</sup> Consider such emerging “solidarity rights” as the right to a healthy environment, to sustainable development, and to self-determination. *See* Phillip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NETH. INT’L REV. 307 (1985); PHILLIP ALSTON, *HUMAN RIGHTS, SUSTAINABLE DEVELOPMENT AND THE ENVIRONMENT* (Antonio Trindade ed., 1992); Fatma-Zohra Ksentini, *Human Rights, Environment and Development*, in *UNEP’S NEW WAY FORWARD: ENVIRONMENTAL LAW AND SUSTAINABLE DEVELOPMENT* 96 (Sun Lin & Lal Kurukulasuriya eds., 1995).

*C. Last Words in the Debate*

An international regime of trade liberalization such as the WTO-GATT may indeed have something wonderful to offer. However, the free spirit of free trade remains conceptually misguided – and liable to produce unforeseen results – if conceived outside the coherent legal structure necessary to animate it. In the international context, human rights are the most accessible framework to both assess the desirability of the current liberalized trade approach and to guide it onward. Its shortcomings are not fatal. Through further international cooperation, legal development, interpretation, and institutionalization, it has the potential to offer a systematic construct that addresses both economic logic and the principles of justice, fairness, and human dignity. Of course, this suggests an institutional overhaul beyond the bounds of the current political imagination, but perhaps the relatively modest act of introducing human rights law into the WTO-GATT as a rubric for distinguishing legitimate market correction from “bad” protectionism is a good place to start.