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Power, Linkage and Accommodation: The WTO as an International Actor and Its Influence on Other Actors and Regimes

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Power, Linkage and Accommodation: The WTO as an International Actor and Its Influence on Other Actors and Regimes

By
Claire R. Kelly*

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I.
INTRODUCTION

The World Trade Organization's¹ (WTO) primacy and power have a normative and structural impact on other regimes. The WTO's evolution into an international actor that imposes significant costs on defectors has caused it to dominate other regimes and to elevate its own norms over the norms of other regimes. WTO dominance invites calls for linkage² with other regimes, both to ameliorate negative externalities caused to those other regimes and improve WTO efficiency and legitimacy.³ Linkage allows the values or norms from one regime or issue area to influence another.⁴ Some linkage between the WTO and other regimes already exists.⁵ However, the WTO's dominance and linkages also structurally impact other regimes because the other regimes "accommodate" the WTO in their operation and functioning. Today other regimes operate and function in the shadow of the WTO, adapting their structures to fit within a WTO-dominated context. I argue that this accommodation heightens the WTO's normative influence while masking normative conflicts between it and other regimes. I suggest modeling accommodation methods in order to evaluate the WTO's normative and structural effects. I also examine specific instances of linkage and accommodation between the WTO's Agreement on Sanitary and Phytosanitary Measures (SPS)⁶ and the Cartagena Protocol on Biodiversity (Cartagena Protocol or Protocol).⁷

Part II summarizes the WTO's evolution into an international actor and the subsequent calls for linkage stemming from that evolution. It also suggests that other regimes are responding both to WTO normative dominance and linkage by

1. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Legal Instruments—Results Of The Uruguay Round Of Multilateral Trade Negotiations 4, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

2. For example, David Leebron has outlined typology of linkage "structures" including: negotiating linkage, hierarchical linkage, membership linkage, incorporation (of an issue area), issue linkages, interpretive linkage, participatory linkage, and permissive unilateral linkage. David W. Leebron, *Linkages*, 96 AM J. INT'L L. 5, 16-24 (2002) [hereinafter Leebron, *Linkages*]. Each of these structures implicates the "decisions, values, or norms in one area or regime" into another. *Id.* at 16.

3. The WTO has already undertaken some linkage, at times measured and at times *ad hoc*, a phenomenon that has already been discussed and situated in a theoretical framework. *See, e.g., id.* at 16-24 (discussing various linkage structures between trade and non-trade regimes).

4. *Id.* at 16.

5. *See infra* notes 153-158 and accompanying text.

6. *See* Agreement on Sanitary and Phytosanitary Measures, Apr. 4, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round of Multilateral Trade Negotiations, 1867 U.N.T.S. 493, 33 I.L.M. 1128 (1994) [hereinafter SPS Agreement].

7. Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 I.L.M. 1027 (2000), available at <http://www.biodiv.org/biosafety/protocol.asp> (last visited Nov. 12, 2005) [hereinafter Cartagena Protocol]. It is a supplementary agreement to the Convention on Biological Diversity (CBD) negotiated under the United Nations Environment Programme (UNEP), opened for signature at the Earth Summit in Rio de Janeiro in June 1992, and entered into force in December 1993. United Nations Conference on Environment and Development: Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.

accommodating the WTO. Part III models accommodation possibilities, suggesting comity, choice of forum and law, preemption, and deference as accommodation models. These models are useful to address the degree to which accommodation can and does occur, and its structural and normative effects. Part IV outlines general areas of conflict between the WTO and non-trade regimes and some particular conflicts concerning the Cartagena Protocol. Part V explores the conflicts, linkage, and accommodation between the SPS Agreement and the Cartagena Protocol and suggests that other regimes already accommodate the WTO.⁸ Accommodation may be viewed as desirable or as part of a strategy to confront and contest WTO dominance.⁹ Nonetheless, I suggest that accommodation may also have negative effects on the promotion of non-trade norms.

II.

THE WTO AS AN INTERNATIONAL ACTOR AFFECTING OTHER REGIMES

As the WTO has evolved it has become more powerful, expanding its influence by increasing dispute resolution and further harmonization. Not surprisingly, its dominance has resulted in calls for linkage with other regimes and some linkage has already occurred. Given the WTO's dominance and influence, I suggest that other regimes have responded by accommodating the WTO. Some regimes may operate, and sometimes form, in the shadow of WTO dominance and linkage; they adopt WTO language, adapt to WTO rules, and try to avoid conflict with WTO norms.

A. *WTO Primacy*

The WTO has evolved into an actor in international relations, one that imposes significant costs on defectors and dominates other regimes.¹⁰ Since the formation of the General Agreement on Tariffs and Trade (GATT) through the negotiations for the Uruguay Round, the trading regime has gradually evolved from a moderately legalized negotiation forum to a highly legalized adjudication regime¹¹ with precise and obligatory rules, a method to interpret them, and a means to secure compliance with them.¹² The WTO's formation and the Dis-

8. Laurence Helfer has analyzed responsive strategies to WTO dominance. See Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004) (discussing regime shifting as a strategy of NGOs, officials of intergovernmental organizations, and developing countries dissatisfied with TRIPs).

9. For a discussion of regime-shifting as a strategy, see *id.* at 56-58.

10. See *infra* notes 19-21 and accompanying text.

11. See Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 405-06, 418 (2000) (discussing forms of international legalization based on the variability of the three dimensions: obligation, precision and delegation). See also Claire R. Kelly, *Realist Theory and Real Constraints*, 44 VA. J. INT'L L. 545, 581 (2004) [hereinafter Kelly, *Realist Theory*] (noting that the WTO is a highly legalized organization).

12. Kelly, *Realist Theory*, *supra* note 11, at 586-87.

pute Settlement Understanding (DSU),¹³ which provides the rules and procedures governing disputes in the WTO, culminated this transformation and made the WTO more important in world affairs.¹⁴ In particular, the DSU's "automaticity"¹⁵ made it more likely that (1) Members would bring challenges to practices that allegedly violated their trade rights and (2) Members would comply with the WTO rules.¹⁶ Previously, the trading regime's dispute settlement procedure did not ensure that disputes would be heard at all, whereas now the dispute settlement process under the DSU automatically proceeds unless there is a settlement or a consensus that the process should not move forward.¹⁷

As an entity able to promote and, to some extent, enforce its own norms, the WTO has risen to the level of an international actor.¹⁸ As it evolved the WTO gradually expanded its Membership and increased the benefits of Membership. Today, nations cannot afford not to be Members.¹⁹ Thus, the WTO now stands at the point where it is an almost self-enforcing regime whose Members commit to a series of precise obligations.²⁰ Further, those obligations can be adjudicated and compliance can be sought through means that fairly automatically impose real costs on regime defectors.²¹

The WTO's status as an international actor has a number of significant effects, including: (1) raising WTO Members' costs of agreeing to future WTO

13. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results Of The Uruguay Round Of Multilateral Trade Negotiations 354, 1867 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU].

14. See David W. Leebron, *An Overview of the Uruguay Round Results*, 34 COLUM. J. TRANSNAT'L L. 11, 13 (1995) [hereinafter Leebron, *An Overview*] (noting that the Uruguay Round resulted in elevating the WTO to an "international personality"). See also Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333 (1999) [hereinafter Trachtman, *The Domain of WTO Dispute Resolution*] (acknowledging the concern of some about "the magnitude of decision-making power allocated to World Trade Organization (WTO) dispute resolution panels and the WTO Appellate Body").

15. Although Members must affirmatively assert their trading rights under the WTO, once they do, the DSU establishes a mechanism by which those rights will likely be protected. See Leebron, *An Overview*, *supra* note 14, at 14-16.

16. See *id.* (noting that automaticity and "suspension of concessions" effectively "spread the leverage" of Member countries to gain compliance in a WTO dispute settlement). But see Thomas J. Dillon, *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L L. 349, 400 (1995) ("It is questionable whether cross retaliation would be an effective mechanism for ensuring compliance in all circumstances, especially in cases of disputes where the complainant is a developing country and the defendant a wealthy developed country.").

17. DSU, *supra* note 13, art. 6.

18. Kelly, *Realist Theory*, *supra* note 11, at 634.

19. See Arie Reich, *The WTO as a Law-Harmonizing Institution*, 25 U. PA. J. INT'L ECON. L. 321, 362 (2004); Kelly, *Realist Theory*, *supra* note 11, at 586 (discussing the process of "enmeshment").

20. See Kelly, *Realist Theory*, *supra* note 11, at 586 (discussing how states become rationally enmeshed in regimes); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 436 (2000).

21. See DSU, *supra* note 13, arts. 22, 23. See also Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 772 (2001) (discussing how the DSU authorizes individual Members to use the DSU to seek compensation or retaliation).

obligations;²² (2) elevating the WTO to a dominant position among regimes; and (3) increasing the WTO's influence over other regimes.²³ These effects can impede further trade liberalization within the WTO and the development of other regimes.²⁴

The WTO's ability to enforce its norms necessarily influences the development of norms elsewhere and affects domestic constituencies' preferences.²⁵ One may view these shifts in norms and preferences as a surrender of sovereignty or a change in the way a State exercises sovereignty.²⁶ Either way, since the WTO affects state sovereignty, it seems fair to say that the WTO shares in the balance of power among states.²⁷ Thus, when examining the WTO's influence over non-trade issues, its ability to promote trade norms, sometimes to the detriment of non-trade norms, and its effect on domestic practices and preferences to the extent that they affect non-trade norms should be considered.²⁸

The WTO's influence over the balance and distribution of power increases

22. Although the WTO may become more effective at enforcing its norms as a result of its power, this same power and effectiveness may give Members pause when considering whether to submit more issues to the WTO to decide and enforce.

23. See Kelly, *Realist Theory*, *supra* note 11, at 619-22 (explaining constraining regimes). See also Koremenos, *supra* note 21, at 768 (discussing the causal role of some institutions); Abbott et al., *supra* note 11, at 405.

24. Kelly, *Realist Theory*, *supra* note 11, at 624 (noting that regimes that do not obtain higher degrees of legalization and enmeshment may be subjugated to the rules and norms of the regimes that do). Cf. Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303 (2004) [hereinafter Guzman, *Global Governance*] (explaining the WTO's engagement with "domestic rules that are not primarily about trade"); Ryan L. Winter, *Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat It Too?*, 11 COLO. J. INT'L. ENVTL. L. & POL'Y 223, 224 (2000) (noting that "the GATT/WTO and MEAs are based on divergent policy objectives, creating an inconsistent, overlapping body of international law").

25. See Harold H. Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 642-54 (1998) (explaining norm internalization); Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384, 391 (1994) (noting that collective action through rhetorical practices changes others' conceptions of their interests, creates solidarity, and leads to the creation of collective identity and interests); Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487, 489-94 (1997) (noting that while both the instrumentalist and the normative optic seem necessary in understanding norm internalization, neither is sufficient, and that interests, reputation, and institutions are all essential concepts for a coherent account of how rules relate to state action).

26. Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT'L L. 401, 402 (2000) ("The important question is instead a subtler one: whether the development and expansion of multilateral institutions are systematically altering our customary modes of domestic law and politics. Put differently, the question is: have we delegated away a significant part of our capacity for, and manner of, self government in the process of international cooperation?").

27. See Ivan Simonovic, *Relative Sovereignty of the Twenty First Century*, 25 HASTINGS INT'L & COMP. L. REV. 371, 377 (2002) (noting "international relations are experiencing . . . a process of transformation: from an exclusively state-dominated system where states are the exclusive power-holders into a more complex system where states, international organizations, multinational corporations and non-governmental organizations ("NGOs") are sharing the balance of power").

28. Concerns over the WTO's power are all the more pressing because, as Andrew Guzman points out, the WTO occupies a position of power by itself. Guzman, *Global Governance*, *supra* note 24, at 313-14 (noting that there might be less concern about the WTO if there were a similarly situated international environmental organization).

as its jurisdiction expands beyond enforcing non-discrimination trade norms.²⁹ The WTO increased its sphere of influence with the Agreement on the Trade Related Aspects of Intellectual Property (TRIPs)³⁰ as well as the General Agreement on Trade in Services (GATS).³¹ Likewise, other agreements reached in the Uruguay Round, such as the Agreement on Government Procurement or the SPS, harmonized substantive issues.³² More recently, negotiations over the “Singapore Issues” (competition, investment, transparency, and trade facilitation)³³ suggest that the WTO’s formal expansion might continue.

As the WTO’s role in international relations increases, so too does the Dispute Settlement Body’s (DSB) influence within the WTO as the authority that administers disputes (that is, establishes panels and adopts Appellate Body (AB) reports).³⁴ AB interpretations and clarifications reflect more expansive lawmaking in the WTO.³⁵ Although there is no *stare decisis* in WTO jurisprudence, the DSB seems regularly to take account of past decisions in Panel and AB reports.³⁶ The growing influence of the DSB also reflects the WTO’s evolution into a more legalized and thus powerful institution.

Although the WTO’s evolution reflects greater trade liberalization, it also creates new obstacles to its further development.³⁷ While the WTO’s evolution to a norm-enforcing institution secures the benefits of trade liberalization and

29. Some regimes evolve beyond their original mandates in ways not originally intended by the parties. Raustiala refers to these phenomena as “generativity” and suggests that it, combined with the phenomena of insularity (non-transparency), threatens democratic legitimacy. Raustiala, *supra* note 26, at 410-15.

30. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round Of Multilateral Trade Negotiations 365, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPs Agreement].

31. General Agreement on Trade in Services, *in* Uruguay Round Final Act, Dec. 15, 1993, Annex 1B, GATT Doc. No. MTN/FA, 33 I.L.M. 1130 (1994) [hereinafter GATS].

32. See generally Reich, *supra* note 19, at 329-41 (arguing that the WTO is a law-harmonizing institution).

33. Singapore, Ministerial Declaration of Dec. 18, 1996, WT/MIN(96)/DEC, 20-22 (1996), http://docsonline.wto.org/gen_browserDetail.asp?preprog=5#%3Cb%3EFirst+Session%3C%2Fb%3E (last visited Aug. 13, 2004). But see Bruce Odessey, *Struggle Over WTO Framework Agreement Points to Challenges Ahead*, Aug. 4, 2004, U.S. DEP’T OF STATE, <http://usinfo.state.gov/ei/Archive/2004/Aug/04-636492.html> (last updated Aug. 4, 2004) (noting that the “four so-called Singapore issues were reduced to one issue for the remainder of the Doha round” and that “members agreed to launch negotiations on trade facilitation” only).

34. DSU, *supra* note 13, art. 2.1.

35. Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT’L L. 247, 248 (2004) (noting the debate over WTO activism and arguing that “analysis and evaluation of the WTO dispute settlement system should be reframed to take into account the extent to which the Appellate Body is constrained by international legal discourse and politics, as well as constitutional structure”).

36. *Id.* at 254 (noting that it “may be said that the WTO observes *de facto* *stare decisis*”); Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, *supra* note 14, at 336 (“[D]ispute resolution is not simply a mechanism for neutral application of legislated rules but is itself a mechanism of legislation and of governance.”).

37. These obstacles include States’ fears of surrendering greater sovereignty over important policy issues seemingly to a binding trade forum and a growing backlash against trade liberalization from civil society.

comparative advantage, it imposes significant costs on other regimes and values. Benefits include the WTO's enforcement of trade norms that, theoretically, bring the advantages of trade liberalization. Additionally, and more specific to its evolution as an international actor, the WTO empowers developing nations by moving beyond trade as a function of pure power politics.³⁸ It liberalizes trade in a way that some would argue benefits overall welfare by creating a predictable and stable rule-based system.³⁹

However, these benefits are countered by several significant costs. Even if the WTO decisions are universally accepted, and thus certain to ensure the benefits of comparative advantage to the world, the distributional effects of free trade may benefit some more than others.⁴⁰ Further, the WTO may impede the norms of other regimes.⁴¹ If the WTO undermines other regimes' norms, people may not view its decisions as legitimate.⁴² Already the WTO suffers criticism as a non-transparent and an anti-democratic institution.⁴³ If, in order to protect its trade values, it infringes upon other regimes' values, its transparency and democracy affronts will only seem worse.⁴⁴

Additionally, the WTO's highly-legalized nature can undermine the rule of law where powerful nations ignore its decisions.⁴⁵ The WTO's identifiable and

38. James Bacchus, *Groping Towards Grotius: The WTO and the International Rule of Law*, 44 HARV. INT'L L.J. 533, 548 (2003) (noting the effect the WTO has had with respect to developing countries). See also Kevin C. Kennedy, *Why Multilateralism Matters in Resolving Trade-Environment Disputes*, 7 WIDENER L. SYMP. J. 31, 63-64 (2001) [hereinafter Kennedy, *Why Multilateralism Matters*] (noting that the WTO facilitates stable and predictable global governance as a rule-based regime). One could argue, though, that as an actor itself, the WTO could be used as an agent by other powerful actors. See Helfer, *supra* note 8, at 7 (noting the belief that powerful states are "adroit at shaping regimes to reflect their interests").

39. Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. J. INT'L & COMP. LAW 257, 271-72 (2000). Also, some may argue that we have moved beyond comparative advantage as a useful paradigm. See Ari Afilalo & Dennis Patterson, *Commerce in the Age of Terror. Restructuring the WTO after the Long War*, (forthcoming) (on file with author).

40. Lisa L. Martin & Beth A. Simmons, *Theories and Empirical Studies of International Institutions*, 52 INT'L ORG. 729, 745 (1998) (discussing distributional conflict).

41. Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 AM. J. INT'L L. 231, 240 (1997) (noting that trade tribunals evaluate measures for trade compliance, not for whether they are good for the environment).

42. Cf. Padideh Ala'i et al., *Linking Trade and Sustainable Development: Roundtable Discussion*, 18 AM. U. INT'L L. REV. 1303, 1311 (2002-2003) [hereinafter *Roundtable*] (discussing European resistance to GM products and the danger that imposing these products on Europeans may backfire on the industry).

43. Olivette Rivera-Torres, *The Biosafety Protocol and the WTO*, 26 B.C. INT'L & COMP. L. REV. 263, 302-03 (2003); Kennedy, *Why Multilateralism Matters*, *supra* note 38, at 33 (chronicling environmental groups' grievances with respect to the WTO, including the complaint that dispute settlement is "secretive").

44. Cf. Kevin C. Kennedy, *Resolving International Sanitary and Phytosanitary Disputes in the WTO: Lessons and Future Directions*, 55 FOOD & DRUG L.J. 81, 102 (2000) [hereinafter Kennedy, *Resolving International Sanitary and Phytosanitary Disputes*] (noting that "the WTO has an image problem. Many groups view the WTO as secretive and closed. Meaningfully increasing the role of non-governmental organizations and civil society in the discussions will improve the WTO's legitimacy, increase trust, and polish its tarnished image.").

45. See Daniel Wüger, *The Never-Ending Story: The Implementation Phase in the Dispute*

adjudicable obligations threaten respect for the rule of law when powerful nations ignore them.⁴⁶ Outright lawbreaking cannot be “interpreted” away.⁴⁷ Although there may be political constraints on the flagrant disregard of obligations,⁴⁸ these constraints are limited. Moreover, regime exit may not be feasible.⁴⁹

Finally, if and where the WTO appears to disregard the values of other regimes, it may cause a backlash that threatens further WTO development.⁵⁰ The protests in Seattle were in part a reaction to this concern.⁵¹ Problems continued at Cancún, but fortunately Cancún was no Seattle, as both the protest and the stakes in Cancún were less intense than in Seattle.⁵² Still, if the WTO does not respect the values of other international regimes, acknowledging that these regimes reflect to some extent the sovereign choices of its Members, it risks continued backlash similar to what it suffered in Seattle.⁵³

B. Calls for Linkage

Given the foregoing, it should not be surprising that there are numerous calls for WTO linkage and a host of reasons supporting it, including strategic, altruistic, and fairness rationales.⁵⁴ Others have already discussed linkage ra-

Between the EC and the United States on Hormone-Treated Beef, 33 LAW & POL’Y INT’L BUS. 777, 804 (2002) (discussing the Hormones case and noting that some “see the whole dispute settlement system and the WTO as endangered if the example provided by the EC is followed by other countries because of the advantage the WTO offers—i.e., the binding settlement of trade disputes—would be rendered void”).

46. Kelly, *Realist Theory*, *supra* note 11, at 602; Abbott et al., *supra* note 11, at 412.

47. See Kelly, *Realist Theory*, *supra* note 11, at 600-03. See Abbott et al., *supra* note 11, at 412.

48. Steinberg, *supra* note 35, at 257 (explaining that “strategic space for lawmaking may be constrained by legal discourse, constitutional rules, or politics”).

49. See Helfer, *supra* note 8, at 13 (discussing the disincentives for regime exit).

50. Cf. Kennedy, *Why Multilateralism Matters*, *supra* note 38, at 68 (noting that the “debacle at the WTO’s Seattle biennial meeting in December 1999 was in part fueled by myths and misinformation about the WTO, free trade, and globalization”).

51. Rivera-Torres, *supra* note 43, at 302-03 (explaining that the failure of Seattle made clear the need for the WTO to move beyond the general distinction between a trade and an environmental agreement, and to recognize the interconnectedness between regimes in order to protect its credibility and strength).

52. Jagdish Bhagwati, *Don’t Cry for Cancún*, 83 FOREIGN AFF. 52, 53-55 (2004) (noting that the collapse of the Seattle talks had far more symbolic meaning than the collapse of Cancún). See also Helfer, *supra* note 8, at 68.

53. See Robert Howse & Elisabeth Tuerk, *The WTO Impact on Internal Regulations—A Case Study of the Canada-EC Asbestos Dispute*, in THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 283, 284 (Gráinne de Burca & Joanne Scott eds., 2001) (noting that “if the WTO is to regain citizens’ confidence, it has to prove its ability to balance the freedom of governments to pursue legitimate domestic objectives with the need to secure the benefits of trade liberalization”).

54. Leebron, *Linkages*, *supra* note 2, at 11-15 (discussing substantive linkages focusing on consequentialist and coherence-based arguments and strategic linkage). See also José E. Alvarez, *How Not to Link: Institutional Conundrums of an Expanded Trade Regime*, 7 WIDENER L. SYMP. J. 1, 12 (2001) (noting the various rationales for linking the human rights and trade regimes and citing generally Leebron, *Linkages*, *supra* note 2); Guzman, *Global Governance*, *supra* note 24, at 307, 312 (proposing establishment of departments within the WTO); Andrew T. Guzman, *Trade, Labor,*

tionales. For example,

[h]uman rights issues might justifiably be linked with trade for a number of reasons: (1) normative (because linkage is demanded by justice and fairness); (2) coherence (because a free trade regime simply would not make sense if human rights are ignored); (3) consequentialist (because free trade will adversely affect human rights); (4) strategic (because linking these issues in creative package deals leads to more effective negotiations as to both); or (5) effectiveness (because the more effective WTO approach to dispute settlement can be usefully “borrowed” to the benefit of human rights).⁵⁵

David Leebron outlines the linkage rationales discussed above and chronicles a typology of linkage mechanisms, including negotiating linkage, hierarchical linkage, membership linkage, incorporation (of an issue area), issue linkages, interpretive linkage, participatory linkage, and permissive unilateral linkage.⁵⁶ Scholars have marked their positions along a continuum of possibilities, from a call for global governance⁵⁷ to measured approaches (including implicit linkage based on market access principles, and calls for amendments or reinterpretations of Article XX exceptions).⁵⁸ Others have rejected constitutionalizing the WTO, seeing such attempts as a possible means for powerful countries to impose protectionist goals.⁵⁹

While some sort of measured linkage serves efficiency and normative goals, that linkage, in combination with WTO dominance, has a structural effect on other regimes. Some sort of measured linkage is efficient because, first, respect among decision-makers begets reciprocal respect, as well as greater interaction and collaboration.⁶⁰ WTO linkage based on an efficiency perspective is analogous to comity based on utilitarian arguments.⁶¹ Scholars and jurists supported notions of comity because they “sought to facilitate the growth of international trade and commerce.”⁶² States that exercise comity towards other states encourage commerce and efficiency. So too we might support a system of link-

Legitimacy, 91 CAL. L. REV. 885, 888-89 (2003) [hereinafter Guzman, *Trade, Labor, Legitimacy*].

55. Alvarez, *supra* note 54, at 12 (citing David Leebron, *Linkages, supra* note 2). *But see* John O. McGinnis & Mark L. Movsesian, *Against Global Governance in the WTO*, 45 HARV. INT'L L.J. 353 (2004) (arguing against global governance by the WTO).

56. Leebron, *Linkages, supra* note 2, at 16-24.

57. *See, e.g.*, Guzman, *Global Governance, supra* note 24, at 306.

58. *See, e.g.*, ROBERT HOWSE & MAKAU MUTUA, PROTECTING HUMAN RIGHTS IN A GLOBAL ECONOMY: CHALLENGES FOR THE WORLD TRADE ORGANIZATION 8 (2000) (discussing “re-interpretation of Article XX in light of the norms of international human rights law.”); Debra P. Steger, *Afterword: The “Trade and . . .” Conundrum—A Commentary*, 96 AM. J. INT'L L. 135, 143-44 (2002).

59. *See, e.g.*, McGinnis & Movsesian, *supra* note 54, at 360-65.

60. *Cf.* *Hilton v. Guyot*, 159 U.S. 113, 144 (1895) (citing *Bank v. Earle* (1839) 13 Pet. 519, 589) (noting that comity “produce[s] a friendly intercourse between the sovereignties”); JOSEPH STORY, COMMENTARIES ON THE CONFLICTS OF LAW, FOREIGN AND DOMESTIC § 38.

61. Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 49-50 (1991) (outlining comity’s utility justification).

62. *Id.* at 19 (citing Lord Mansfield). From a Huberian perspective, comity was “sound judicial policy and invited reciprocity.” *Id.* at 17. Likewise, Mansfield saw that comity could facilitate trade and growth, although it should not be allowed to do so at the expense of the forum’s policies. *Id.* at 19.

age because it facilitates greater development and efficiency in international organizations.

Linkage promotes efficiency because it takes advantage of other regimes' expertise, and leaves the WTO free to do what it does best. Linkage allows WTO negotiators and decision-makers to focus their efforts on trade rules, not science, labor, or national security.⁶³ By integrating other regimes' decisions, the WTO frees resources to focus on trade liberalization and facilitation.⁶⁴

Secondly, consideration of other regimes' values arguably serves normative goals, both because it is demanded by fairness and justice⁶⁵ and because it furthers the WTO's normative value of trade liberalization by increasing the likelihood of compliance. Determinations that are perceived as legitimate engender greater compliance.⁶⁶ Legitimacy, as one commentator notes, "leads people (or states) to accept authority—independent of coercion, self-interest, or rational persuasion—because of a general sense that the authority is justified."⁶⁷ As a functional matter, regimes that are perceived as legitimate, as possessing authority to deal with the disputes before them, may be able to seek greater gains and more fully promote their values.⁶⁸ Legitimacy aids organizational efficiency and facilitates acceptance among civil society, which should promote greater acceptance and enforcement of trade regime norms.⁶⁹ In this way, promoting legitimacy (through linkage) can enable further regime development and ultimately greater regime gains.⁷⁰

There is, however, a counterargument that linkage serves neither legitimacy nor efficiency goals. Subtle means of linkage may be lawmaking through the backdoor, imposing norms and obligations upon states that have not acceded to them.⁷¹ Moreover, linkage can sidestep conflicts that could lead to real negotia-

63. Guzman, *Trade, Labor, Legitimacy*, *supra* note 54, at 897 (referring specifically to the WTO's lack of labor expertise).

64. However, one could argue that creating sets of isolated experts will only lead to a system where decision-makers will not be able to even spot issues that implicate other regimes.

65. See *supra* note 54 (discussing the various rationales for linkage).

66. Cf. Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988) (explaining how legitimacy encourages compliance). Franck explains legitimacy as resulting from certain attributes of the rules and whether they have compliance pull. *Id.*

67. See Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 600 (1999).

68. Cf. Guzman, *Global Governance*, *supra* note 24, at 306 (noting that, with respect to the WTO, the non-trade interests "are sufficiently powerful and important that they must be given a voice if relevant trade rules are to be sustained").

69. Peter M. Gerhart, *The Two Constitutional Visions of the World Trade Organization*, 24 U. PA. J. INT'L ECON. L. 1, 6-7 (2003). See also Howse & Tuerk, *supra* note 53, at 284 (noting the need of the WTO to balance values and regain citizens' confidence).

70. See, e.g., Bodansky, *supra* note 67, at 598 (noting that most observers would accept that the EU must improve upon democratic legitimacy in order to achieve further integration).

71. See Alvarez, *supra* note 54, at 9.

We should also be cautious about suggestions that human rights instruments now embedded within other international organizations, including the ILO, and subject to another organization's adjudicatory and enforcement systems, must be routinely applied in radically different contexts by the WTO Appellate Body. There are rules concerning treaty-based remedies, including the principle about *lex specialis*, that need to be carefully considered before

tion and resolution of fundamental normative differences.⁷²

Nevertheless, whatever the rationale, some notion of linkage recognizes that institutions such as the WTO do not exist in a vacuum; they necessarily interact with other organizations and their rules necessarily implicate other rules.⁷³ A proper system to negotiate the relationship between organizations and their rules improves the net gain from these organizations.⁷⁴

Some linkage, whether measured or arbitrary, already occurs in the WTO, as it facilitates WTO functioning and enforcement. The WTO does, can, and should turn to the expertise and deliberative processes of other regimes when the circumstances warrant doing so,⁷⁵ because this will increase compliance with trade rules and increase trade liberalization efforts. Although I believe it would be unlikely for the WTO to establish a fully-integrated labor or environmental department any time soon,⁷⁶ some WTO texts do reflect sensitivity to other regimes.⁷⁷ In applying the DSU, Panel and AB decisions have incorporated other

we recommend that the Appellate Body apply the ILO's core labor rights within the context of trade disputes. Parties to those ILO Conventions could plausibly assert that they committed themselves to, for example, elimination of employment discrimination only for purposes of the (weaker) forms of ILO dispute settlement and only subject to a clear understanding of the types of individuals (e.g., either labor law experts or more political types representing the tripartite divisions within the ILO itself) who would be making interpretative decisions as to the scope of such rights. Further, rights implicating labor issues have been developed by different adjudicatory bodies, from ILO Commissions of Inquiry to the Strasbourg Court, within context-specific settings.

Id. (internal citations omitted).

72. Authors have noted that the WTO may not be the most progressive arena for the adjudication of non-trade issues, since the WTO does not have expertise in the area of non-trade norms and it has a clear bias toward resolving problems in favor of free trade. See Leebron, *Linkages*, *supra* note 2, at 22.

The WTO would be charged with reconciling the potentially conflicting aims of the GATT (or other WTO agreement) and the other agreement. The natural inclination of WTO personnel might be to favor the norms underlying the liberal trading regime (since that is their primary mandate) and to lean toward results that would prohibit trade barriers.

Id. See also Alvarez, *supra* note 54, at 14-15 (suggesting that "those who seek human rights determinations within WTO dispute settlement appear to be relying on faith that such determinations will be favorable to the progressive development of human rights norms and not run counter to interpretations of such obligations elsewhere," and he reminds readers that the Appellate Panel, even if it is adjudicating human rights issues, has "for evident reasons, a built-in bias favoring trade values").

73. Joost Pauwelyn, *Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO*, 15 EUR. J. INT'L L. 575, 589 (2004) (noting that while the WTO panels may have limited jurisdiction, parties to a dispute are not limited to the law that they can refer to in their defense). But see Joel P. Trachtman, *Conflict of Norms In Public International Law: How WTO Law Relates to Other Rules of International Law*, 98 AM. J. INT'L L. 855, 857-59 (2004) (book review) (explaining that "even if other international law were to modify WTO law under international law generally, these modifications would not be applicable law in WTO dispute settlement").

74. Cf. Leebron, *Linkages*, *supra* note 2, at 15 (noting that merits of linkage generally "will ultimately turn on determining the costs and benefits of the particular means employed").

75. See, e.g., Kennedy, *Why Multilateralism Matters*, *supra* note 38, at 68 (noting that the WTO has "no claim to expertise, and certainly no claim to legitimacy, when it comes to resolving environment disputes").

76. See, e.g., Guzman, *Global Governance*, *supra* note 54, at 307, 312 (suggesting the creation of different departments within the WTO).

77. See, e.g., Agreement of Tariffs and Trade, art. XX, Oct. 30, 1974, 61 Stat. A-11, T.I.A.S.

regimes' values, international law, and have sought the advice of experts.⁷⁸ Although this linkage may be *ad hoc*, it invites optimism for those concerned about WTO dominance.⁷⁹ But, as discussed below, WTO dominance affects more than just other regimes' normative development; it also affects structural development, that is, how other regimes form and operate in the shadow of the WTO, and how they respond to WTO linkage.⁸⁰ I will consider whether other regimes respond and react to both WTO dominance and WTO linkage by accommodating their structures and functioning, as well as their norms, to the WTO.

C. Accommodation by Other Regimes

WTO power, primacy, and linkage invite accommodation of WTO norms by other regimes. States negotiating new agreements or protocols are, of course, cognizant of prior commitments, but they are also mindful of the WTO's ability to enforce its own norms and areas where the WTO has left room for linkage. Other regimes' negotiations and decisions consider the WTO's near universal membership, its highly-legalized and enmeshing structure, and its expansive scope.⁸¹

First, the WTO has near universal membership. At this writing, there are 149 Member nations in the WTO with more waiting to join.⁸² Nearly any non-trade dispute can arguably implicate trade and, consequently, implicate the WTO, because nearly every nation on earth commits to abide by the WTO agreements. Thus, linkage occurs naturally, and negotiators in other regimes must address how those regimes will navigate WTO obligations.⁸³

Second, the WTO is a highly-legalized regime that creates hard law, with a fairly precise and obligatory set of rules that can be adjudicated by a neutral

1700, 55 U.N.T.S. 194 (excusing Members from certain GATT obligations under limited circumstances).

78. See Joost Pauwelyn, *How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law*, 37 J. WORLD TR. 997, 997 (2003) [hereinafter Pauwelyn, *How to Win*] (noting that in the Appellate Body Report, *United States—Import Prohibition Of Certain Shrimp and Shrimp Products*, “the Appellate Body interpreted the words ‘exhaustible natural resources’ in GATT Article XX(g) with reference to certain environmental treaties.”) Likewise, Pauwelyn notes that in the Panel Report, *Korea—Measures Affecting Government Procurement*, ¶ 7.96, WT/DS163/R (June 19, 2000), the Panel noted that “[c]ustomary international law applies generally to the economic relations between the WTO Members.” *Id.* at 1002 n.19.

79. Robert Howse, *Back to Court After Shrimp/Turtle? Almost but not Quite Yet: India's Short Lived Challenge to Labor and Environmental Exceptions in the European Union's Generalized System of Preferences*, 18 AM. U. INT'L L. REV. 1333, 1379 (2003) (speculating on AB decisions that might reinforce Shrimp-Turtle and lend legitimacy to linkage between trade and labor rights).

80. See, e.g., Helfer, *supra* note 8, at 30 (referring to the CBD's response to the WTO).

81. See Helfer, *supra* note 8, at 8 (referencing distinctive patterns of bargaining that are developing in response to “the sunk costs and the benefits of extant regimes”).

82. Understanding the WTO: The Organization—Members and Observers, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

83. See, e.g., Negotiations concerning the Kimberley Scheme for conflict diamonds, as discussed in Tracey Michelle Price, *The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate*, 12 MINN. J. GLOBAL TRADE 1 (2003).

party.⁸⁴ Whether other regimes create hard or soft law, if those rules dictate behavior inconsistent with WTO norms, the WTO's highly-legalized nature ensures a forum for conflict resolution.⁸⁵ Moreover, in the event of such a conflict, the DSU provides a forum where states can be reasonably assured that the conflict will be addressed in a timely manner by trade experts.⁸⁶ Finally, as the WTO controls a means of securing compliance, that is, trade, it will likely be able to secure enforcement of its decisions, or at the very least impose significant costs on regime defectors.⁸⁷

Third, although the WTO decides trade non-discrimination issues, it also decides issues that go beyond mere non-discrimination.⁸⁸ It decides issues regarding intellectual property, safety harmonization, and technical standards harmonization.⁸⁹ In deciding these issues and trade issues, it also confronts subsidiary issues related to health, the environment, and national security.⁹⁰ Regimes that regulate these subsidiary issues cannot ignore the WTO influence in these areas.⁹¹ Given the WTO's scope and power, one would expect other regimes to accommodate WTO norms and rules.

Accommodation explains one piece of the new dynamic among international regimes. This idea of accommodation builds upon Laurence Helfer's insights and work on "regime shifting."⁹² By examining intellectual property issues in the wake of the TRIPs, Professor Helfer explains a strategy where various constituencies work to raise intellectual property issues in an "expanding list of international venues."⁹³ Thus, Helfer documents TRIPs' "unanticipated effects on international intellectual property lawmaking."⁹⁴ Professor Helfer offers several rationales as to why developing countries may engage in regime shifting. In addition to providing a forum for the creation of counter-regime norms,⁹⁵ regime shifting also provides an experimental laboratory for policy initiatives,⁹⁶ creates a "safety valve" by "consigning an issue area to a venue where

84. Of course, one can argue that the DSB as an arbitrator of disputes has a trade bias whether conscious or unconscious, and therefore where a dispute implicates non-trade values perhaps the DSB should not be considered neutral. See Leebron, *Linkages*, *supra* note 2, at 22.

85. See DSU, *supra* note 13.

86. See *id.*, *supra* note 13, arts. 12, 16, 17.

87. See Kelly, *Realist Theory*, *supra* note 11, at 604-18 (explaining constraining regimes such as the WTO that impose costs on defectors).

88. See *infra* notes 195-199 and accompanying text.

89. See Raustiala, *supra* note 26, at 404-05; Reich, *supra* note 19, at 362 (discussing the intellectual property regime).

90. Report of the Panel, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, 37S/200 (Nov. 7, 1990), GATT B.I.S.D. (37th Supp.) at 200 (1991); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, DS58/AB/R (Oct. 12, 1998), 38 I.L.M. 118 (1999); Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helm-Burton Act), 22 U.S.C. §§ 6021-91 (1996).

91. See Helfer, *supra* note 8, at 12-13 (discussing the relational aspects of regimes).

92. *Id.* at 6.

93. *Id.*

94. *Id.* at 5.

95. *Id.* at 58.

96. *Id.* at 55-56.

consequential outcomes and meaningful rule development are unlikely to occur,⁹⁷ or provides an integrationist opportunity where new norms can be borrowed by other regimes.⁹⁸ I suggest that accommodation is a part of this new dynamic, possibly a proactive component of regime shifting strategies or a reactive tool independent of larger strategic objectives.

Regimes accommodate the WTO by professing their norms or fashioning their rules in a WTO-compliant manner. Accommodation may take the form of aspirational statements of consistency and support of other regimes, borrowing language and standards of other regimes, or ceding jurisdiction to other regimes in the case of conflict. In other words, accommodation reflects a desire of regime negotiators to promote regime norms only to the point that they do not conflict with the other regime's norms.⁹⁹

Modeling accommodation between the WTO and other regimes can help us understand and evaluate the causal significance of WTO power and primacy. It can also help us assess the need for and suitability of various linkage proposals for the WTO. On one hand, it seems that accommodation appropriately reflects other regimes' sensitivity to WTO norms, just as one might hope for the WTO to account for non-WTO norms through various linkage mechanisms.¹⁰⁰ However, because the WTO already occupies such a dominant position, accommodation may mask important policy and value differences among regimes. The failure to address these differences can ingrain trade-biased structures at the expense of non-trade values.

III. ACCOMMODATION MODELS

Identifying and modeling accommodation approaches can help to track their usefulness and benefits, as well as suggest ways that linkage should proceed between the WTO and other regimes.¹⁰¹ I outline the following accommodation models: comity, choice of forum and choice of law rules, preemption, and deference. Modeling accommodation can also provide insight into WTO linkage mechanisms. Understanding how regimes accommodate themselves to the WTO can help to assess how the WTO can most usefully link itself to other regimes. Part III then outlines where some of these models may arise given the natural linkages that occur between trade and non-trade areas. Part IV explores the specific relationship between the SPS Agreement and the Cartagena Protocol as an example of accommodation and suggests some concerns about the Proto-

97. *Id.* at 56.

98. *Id.* at 61.

99. *Infra* Section III.

100. *See, e.g., Alvarez, supra* note 54, at 12 (citing the discussion of rationales for WTO linkage in Leebbron, *Linkages, supra* note 2).

101. The accommodation methods described below also serve as linkage models. For example, a regime may accommodate the WTO by exercising comity, just as the WTO may link itself to other regimes by exercising comity.

col's accommodation of the SPS.

A. Comity

One might expect comity among international organizations to function as an accommodation model in much the same way as Justice Story's definition of the comity of nations:

The true foundation, on which the administration of international law must rest, is, that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.¹⁰²

Thus, one method to structure accommodation is to "capture[] the reciprocal deference" organizations should have for one another.¹⁰³

Unfortunately, the term "comity" eludes precise definition or boundaries. One commentator notes that "the term seems to describe obligations of deference that are not truly obligatory—good manners rather than rigid rules."¹⁰⁴ Additionally, there have been accounts of comity's morbidity,¹⁰⁵ where comity is viewed as an inartful escape hatch that avoids more fruitful attempts at the negotiation of real conflict.¹⁰⁶ Comity seems least useful where it reflects a vague notion of courtesy.¹⁰⁷ Nevertheless, it may be helpful to think about a system of

102. STORY, *supra* note 60, § 35.

103. Cf. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1052 (1994) (reformulating abstention doctrines based on a notion of comity as reciprocal deference among different parts of the government). Rehnquist calls for abstention doctrine to be based upon comity to emphasize equality among the entities competing for jurisdiction. *Id.*

104. *Id.* at 1067. See also Paul, *supra* note 61, at 53-54 (noting that the bases put forth for comity—"international law, reciprocity, utility, courtesy and morality"—cannot reconcile comity's dual character as both obligatory and discretionary).

105. See Paul, *supra* note 61, at 5 (positing that the "constellation of ideas about comity . . . obscures the underlying political tensions and makes it more difficult to address important policy differences among sovereigns"); see also Michael D. Ramsey, *Escaping International Comity*, 83 IOWA L. REV. 893, 893-94 (1998). See generally Holly Sprague, *Choice of Law: A Fond Farewell to Comity and Public Policy*, 74 CAL. L. REV. 1447, 1448 (1986) (arguing that "[s]ince the doctrines of comity and public policy can no longer serve a useful purpose, they should be abandoned by modern courts and relegated to background studies of the evolution of choice-of-law doctrine in the United States"). But, as Professor Trachtman suggests, comity may be a useful precursor to the development of a more comprehensive conflicts analysis. Cf. Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 VAND. J. TRANSNAT'L L. 975, 1055 (1994) [hereinafter Trachtman, *Conflict of Laws*] (noting that "courts can play a role in developing conflicts law, by experimenting with approaches to reciprocity and comity").

106. See Paul, *supra* note 61, at 5 (concluding that "the peculiar view of comity in the United States is not a sound foundation for private international law and that a better approach would be to resolve the underlying policy conflicts among sovereign states directly through negotiation and harmonized conflicts principles").

107. The comity approach of jurists such as Huber, Story or Mansfield operated more out of courtesy than out of an imperfect obligation. As Professor Paul points out, it was the absorption of comity into the private international sphere that marked comity's redefinition to an imperfect obligation. See *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (noting that comity is "neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will, upon the other"). See also Paul, *supra* note 61, at 44. Absorbing comity back into the public sphere by applying it among in-

accommodation, analogous to Justice Story's vision of comity, where organizations acting within their own self-interest voluntarily consent to the law of another regime, except where that law offends the consenting organization's fundamental policies.¹⁰⁸

Comity may also seem antithetical to notions of democratic legitimacy, namely, that laws should be applied based on the consent of the governed in both the national and international spheres, because comity charges one actor with the application of the other actor's laws. However, Justice Story's articulation of comity among nations renders accommodation more palatable in terms of democratic legitimacy, because comity among nations really means that courts interpret the sovereign's will and, finding no conflict, can act out of comity.¹⁰⁹ Thus, it is the comity of nations that allows the courts to recognize another sovereign's law.¹¹⁰ As such, comity can mediate between different spheres of influence, whether those spheres are national states or international bodies.¹¹¹

Nevertheless, comity as an accommodation model is problematic because it promotes some legitimacy values but undermines others. First, although comity's consideration of other organizations' rules allows it to appear respectful and considerate of other regimes, comity can seem both *ad hoc* and opaque. Where tribunals apply notions of comity in an *ad hoc* or non-transparent manner, they undermine rather than increase the legitimacy of their decisions. Further, when applied in an unpredictable manner, comity obscures the meaningful conflicts between regimes that need to be discussed and negotiated.¹¹² Thus, comity may avoid conflicts without directly addressing them.

Second, even if comity promotes legitimacy, the amorphous nature of comity lessens the likelihood of significant predictability, stability, or efficiency.¹¹³ More respect hopefully leads to a greater sense of fairness and perhaps better enforcement, but arbitrarily bestowing respect does not inform anyone *ex ante* of the best course of action. Without a rigorous structure, comity undermines stability and predictability, both essential to efficiency gains. Thus, without some defined parameters, comity as a method of accommodation will do little to discourage forum shopping or promote faith in international dispute settlement

ternational organizations may limit it once again to a courtesy-based doctrine. In his critique of comity as a doctrine, Professor Paul offers some alternatives: "1. international coordination of regulatory policies, 2. international harmonization of conflicts principles, and 3. judicial deference to domestic legislation and public policy." Paul, *supra* note 61, at 74.

108. STORY, *supra* note 60, § 38.

109. *Id.* (noting "it is derived altogether from the voluntary consent of the latter; and is inadmissible, when it is contrary to its known policy, or prejudicial to its interests").

110. *Id.* Professor Paul points out that in *Hilton*, Justice Gray saw comity as a rule of international law and shifted its interpretation. He "interpreted comity as relying on an imperfect obligation." See Paul, *supra* note 61, at 24.

111. *Cf.* Paul, *supra* note 61, at 49 (discussing reciprocity as a justification for comity, seeing it as "consistent with the idea of comity as mediating between domestic and international law and policy").

112. *Id.* at 5, 77-79.

113. See *id.* at 69 (noting the application of comity can harm predictability).

mechanisms.¹¹⁴

Third, comity can be criticized as an autonomous means of linkage. David Leebron categorizes the relational aspects of linkage as deferential, collaborative, or autonomous.¹¹⁵

The linkage is deferential if one regime defers to the determination of another regime, . . . collaborative if the resolution of any issues relevant to the linkage must be resolved by some joint mechanism . . . [and] autonomous if the regime maintains its authority, without deference or collaboration to make a decision.¹¹⁶

To the extent that comity, as an autonomous form of linkage, excludes the participation of other organizations when determining whether the values of those organizations should be considered, its application risks being viewed as self-serving.

Comity among international regimes attracts the same criticism as the traditional sense of comity adopted by national courts; it is elusive and difficult to define and therefore difficult to apply in a meaningful and coherent fashion.¹¹⁷ International regimes exercising comity subject themselves to the charge that they do so either as a convenient excuse when deciding an issue, or as a meaningless ploy to avoid deciding issues altogether.¹¹⁸

B. *Conflicts Rules: Choice of Forum or Choice of Law*

Regimes can accommodate other regimes through explicit or implicit choice of forum and law rules. Specific conflict rules can coordinate conflict resolution *ex ante*. As Joost Pauwelyn illustrates, these choices may manifest themselves in bilateral agreements, treaties conferring exclusive jurisdiction to another tribunal, treaties mandating a non-exclusive choice of forum, or simply the *res judicata* effect of another tribunal.¹¹⁹ For example, some regimes, such

114. See *id.* at 69-70 (explaining that the lack of predictability does not encourage the greater use of comity by foreign tribunals).

115. Leebron, *Linkages*, *supra* note 2, at 16 (noting that “autonomous linkages may result in increasing pressure for additional linkage structures”).

116. *Id.*

117. See *supra* notes 104-108 and accompanying text.

118. Even within the WTO itself, for example, there may be a problem with comity among its different organs. It is not even clear that the AB would necessarily defer to the decisions of the Committee on Trade and Environment. See Final Texts of the GATT Uruguay Round Agreements, Apr. 15, 1994, Decision on Trade and Environment [hereinafter Decision on Trade and Environment]. The Doha Ministerial Declaration stated that the Committee’s recommendations “shall be compatible with the open and non-discriminatory nature of the multilateral trading system, shall not add to or diminish the rights and obligations of members under existing WTO agreements . . . nor alter the balance of these rights and obligations, and will take into account the needs of developing and least-developed countries.” World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 32, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm [hereinafter Doha Declaration]. See also Ryan L. Winter, *Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat It Too?*, 11 COLO. J. INT’L. ENVTL. L. & POL’Y 223, 240 (2000) (stating that the Committee’s “Report, at best, is merely a set of recommendations” and noting that “[w]ithout subsequent action it becomes meaningless”).

119. Pauwelyn, *How to Win*, *supra* note 78, at 1006-19. For example, Pauwelyn points out

as the North American Free Trade Agreement (NAFTA), provide specific conflict rules.¹²⁰ NAFTA Article 104, "Relation to Environmental and Conservation Agreements," provides:

1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:
 - a. the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended June 22, 1979,
 - b. the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as amended June 29, 1990,
 - c. the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States, or
 - d. the agreements set out in Annex 104.1,

such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.

2. The Parties may agree in writing to modify Annex 104.1 to include any amendment to an agreement referred to in paragraph 1, and any other environmental or conservation agreement.¹²¹

Parties negotiate this model of accommodation. For example, parties may negotiate specific choice of law or choice of forum rules *ex ante*. Alternately, a regime could establish a conflicts group, conflict panel, or arbitrator to facilitate the resolution, not of the substantive conflict but of the jurisdictional conflict be-

that Article 292 of the EC Treaty provides: "Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided therein." *Id.* at 1008 (citing EC Treaty). See also Olivos Protocol for the Settlement of Disputes in MERCOSUR, Feb. 18, 2002, art. 1(2), <http://www.mercosul.gov.br/textos/default.asp?Key=232>, providing:

Disputes falling within the scope of application of this Protocol that may also be referred to the dispute settlement system of the World Trade Organisation or other preferential trade systems that the Mercosur State Parties may have entered into, may be referred to one forum or the other, as decided by the requesting party. Provided, however, that the parties to the dispute may jointly agree on a forum.

Id.

120. See North American Free Trade Agreement, U.S.-Can.-Mex., arts. 103, 104, Dec. 17, 1992, 32 I.L.M. 289, 297-98 (1993) [hereinafter NAFTA] (providing that NAFTA rules prevail over environmental agreements unless an environmental agreement is specifically listed in NAFTA). See also United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261, art. 293 (1983), 1833 U.N.T.S. 3, 397 (stating that "a court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention"); NAFTA, *supra*, art. 1131 (stating that "a Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law" and that "an interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section"); Statute of the International Court of Justice, art. 38 (stating that "the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . international conventions, whether general or particular, establishing rules expressly recognized by the contesting states").

121. NAFTA, *supra* note 120, art. 104.

tween regimes.¹²² Negotiation of choice of law and choice of forum takes place in private international law creation (such as in Unidroit or the Hague Conference),¹²³ where parties meet to arbitrate the scope of their various endeavors. Given the potential for conflict or tension or overlap, the negotiators or drafters must work around that tension.

Specific provisions, such as those in NAFTA, promote efficiency and legitimacy. However, such provisions are difficult to negotiate.¹²⁴ They serve legitimacy better than application of general choice of law rules or comity because states agree to them *ex ante*.¹²⁵ They are more efficient than comity in general because they are defined rules that lead to predictable results, allowing parties to make choices about how to act. Explicit *ex ante* rules recognize that just as states' regulatory policies reflect different value judgments,¹²⁶ so too states' international commitments reflect different value judgments. Specific *ex ante* rules will not be optimally efficient because, as a model, specific *ex ante*

122. One way to accommodate the view and values of other regimes is simply to give them a seat at the table. Kennedy, *Why Multilateralism Matters*, *supra* note 38, at 53. The WTO has not always been anxious to do so and has been criticized as being non-transparent. More recently it has made some attempts at opening up. As Kevin Kennedy notes:

Recognizing the important contribution that NGOs can make in increasing public awareness regarding its activities, the WTO agreed to improve transparency and to develop better lines of communication with NGOs in several respects. First, the WTO agreed to de-restrict documents more promptly than in the past and to make them available on the WTO's online computer network. Second, direct contacts with NGOs by the WTO Secretariat through symposia are also encouraged. Beginning in May 1997, the WTO Secretariat has organized a series of symposia with NGOs on trade, environment, and sustainable development. Another high-level symposium on trade and environment was organized by the Secretariat in March 1999. Third, observer status at CTE meetings has been extended to the Secretariats of CITES, the Montreal Protocol, the Basel Convention, the Framework Convention on Biological Diversity, and other international environmental organizations.

Id. at 53-54 (internal citations omitted).

123. UNIDROIT—International Institute for the Unification of Private Law, Principles of Commercial Contracts at vii (Rome 1994); UNCITRAL Model Law on International Commercial Arbitration, June 21, 1985, U.N. Doc. A/40/17, Annex 1 (1985), reprinted in 24 I.L.M. 1302 (1985). These framework-establishing organizations establish such principles, particularly for cross-border transactions, that states may choose to adopt in domestic legislation. Alternatively, these frameworks may establish multilateral conventions that states may choose to join. For example, United Nations Convention on the Assignment of Receivables in International Trade, opened for signature Dec. 12, 2001, G.A. Res. 56/81, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/81 (2002), available at <http://www.uncitral.org/stable/res5681-e.pdf>; United Nations Convention on the Assignment of Receivables in International Trade, available at <http://www.uncitral.org/english/texts/payments/ctc-assignment-convention-e.pdf> [hereinafter United Nations Convention on the Assignment of Receivables in International Trade; or the Convention]; and the Model Inter American Law on Secured Transactions and Commentaries, CIPIID-VI/Res. 6/02 (approved Feb. 8, 2002), available at http://www.oas.org/dil/CIDIP-VI-securedtransactions_Eng.htm, are all framework organizations that allow private parties to establish ground rules for international transactions.

124. Antonio F. Perez, *W.T.O and U.N. Law: Institutional Comity in National Security*, 23 YALE J. INT'L L. 301, 361-62 (1998) (noting that negotiation of conflicts may be problematic).

125. *Cf. id.* at 344, 360 (noting preliminary objections to applying institutional comity to public international law conflicts by means of general conflicts principles).

126. *Cf.* Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: the Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 289 (1982) (discussing traditional conflicts rules).

rules will always suffer from the deficiency that they do not provide an answer for the unpredicted conflict. Unpredicted conflicts would not be so worrisome if not for what Kal Raustiala has termed the “generativity” of some regimes.¹²⁷ Where multilateral regimes regulate states’ public acts, those regimes sometimes evolve to generate norms to which the states may not have agreed at the time they joined the regime.¹²⁸ Where a regime, such as the WTO, generates new norms, the *ex ante* conflicts rules may produce unexpected results.

Where there are no specific conflict rules, general conflict principles from international law achieve accommodation.¹²⁹ For example, *lex specialis* provides that the specific rule should apply over the general rule, and *lex posterior* indicates that, in case of conflict, the later enacted rule should govern.¹³⁰ These general rules presuppose that all of the parties are signatories to the conflicting regimes.

These general rules are helpful to promote efficiency through stability or certainty, but they may do less for legitimacy values. Using these rules, states will be able to predict which rules will govern a given set of circumstances, and will be able to adjust their behavior efficiently. However, these rules may appear to be arbitrary line-drawing because they do not reflect a weighing of each regime’s values.¹³¹ Still, if states wish to weigh the values of each regime, they could do so and could modify the application of such rules through a savings clause.¹³²

The concept of *jus cogens*,¹³³ that some international norms do not permit derogation, can be considered a conflict rule that serves accommodation. Rules that rise to the level of *jus cogens* are preemptory rules from which parties may not derogate.¹³⁴ Robert Howse and Makau Mutua note that States cannot, by

127. Raustiala, *supra* note 26, at 410 (explaining generativity as the “ability of international institutions to produce new substantive rules that modify or extend a given legal agreement”).

128. *Id.* at 412.

129. See Pauwelyn, *How to Win*, *supra* note 78, at 1005 (noting that “to justify an otherwise WTO inconsistent measure, the other rule must prevail over the contradictory WTO rule pursuant to conflicts rules of international law”).

130. *Lex specialis derogat legi generali* (specific rule prevails over general rule) and *lex posterior derogat legi prior* (last in time rule). See Vienna Convention on the Law of Treaties, May 23, 1969 [hereinafter Vienna Convention], 8 I.L.M. 679, 691, art. 30 (1969), 1155 U.N.T.S. 331, 339-40 (supporting the principle of *lex posterior*). *Lex specialis* is supported by doctrine. See IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 96 (1984).

131. However, states can negotiate savings clauses. See *infra* notes 143-145 and accompanying text.

132. Sabrina Safrin, *Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements*, 96 AM. J. INT’L L. 606, 619 (2002) (“A savings clause is not an operative provision. It does not by itself impose an affirmative obligation upon parties. Rather, it states the relationship between the agreement and earlier agreements, specifying that the agreement does not change the earlier agreements; therefore, a party’s rights and obligations under those earlier agreements persist.”).

133. Article 53 of the Vienna Convention provides that a preemptory norm is one accepted “by the International Community of States as a whole as a norm from which no derogation is permitted.” Vienna Convention, *supra* note 130, art. 53.

134. See *id.*

treaty, contract out of *jus cogens* obligations.¹³⁵ Thus, where a treaty obligation conflicts with a rule or norm that has *jus cogens* status, *jus cogens* would operate as a conflict rule to dictate that the state disregard the treaty obligation.¹³⁶

In addition to specifically negotiated conflict rules and mandatory obligations pursuant to the concept of *jus cogens*, regimes may accommodate other regimes by incorporating a choice of law analysis into their jurisprudence. Choice of law analysis may rely upon various formulations, *inter alia*: governmental interest analysis, the most significant relationship test, the choice influencing considerations, the center of gravity approach, and comparative analysis.¹³⁷ Each of these tests attempts to determine what law should apply. Once again, this analysis differs in the institutional context from the domestic or state context, because while it may seem appropriate for a French court to apply English law, it seems odd to think of a trade forum applying an environmental agreement, or a national security forum applying WTO law because choice of law analysis does not translate easily into the regime context.¹³⁸

Choice of law principles do not translate easily into the regime context because, as Antonio Perez notes, some choice of law principles are based on territorial notions of the sovereign, rather than substantive areas of expertise.¹³⁹ However, choice of law models can be built on non-territorial foundations.¹⁴⁰ Applying choice of law principles among institutions requires that we recon-

135. Howse & Mutua, *supra* note 58, at 6-8. These norms would include norms against slavery, genocide, and piracy. *Id.* at 7.

136. *Cf. id.* at 7 (noting that universally recognized human rights must take precedence over treaty law).

137. *See generally* Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 890-94 (2002) (outlining various forms of interest analysis); Sprague, *supra* note 105, at 1452-57 (discussing choice of law approaches). Professor Trachtman has argued for a law and economics approach to conflicts that could be adopted here as well. Trachtman, *Conflict of Laws*, *supra* note 105, at 987 (proposing that "decisionmakers faced with conflict of laws issues should allocate prescriptive jurisdiction over a subject matter to the government(s) whose constituents are affected by the subject matter, pro rata in proportion to the relative magnitude of such effects, as accurately as is merited given the transaction costs in allocation of prescriptive jurisdiction").

138. For example, the WTO Agreements provide that the DSU should only resolve WTO disputes. *See* DSU, *supra* note 13, art. 1.1. However, a separate question is what law can be applied in governing those disputes, and the argument can and has been made that DSU Article 7 allows the WTO to consider the law of other regimes when it requires the Panels to look at the dispute "in light of the relevant provisions" and "to address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." Pauwelyn, *How to Win*, *supra* note 78, at 1000 (citing DSU Article 7). Professor Pauwelyn notes two possibilities: "[o]ne either considers this reference to WTO rules as an exhaustive list of all rules that WTO Panels can possibly apply, or one holds the view that confirming the relevance of some rules . . . does not preclude that WTO Panels may apply also other, non-WTO rules in particular circumstances." Pauwelyn, *How to Win*, *supra* note 78, at 1000-01 (internal citations omitted). Pauwelyn argues that the latter view should apply. *Id.*

139. Perez, *supra* note 124, at 358 (noting that "because international organizations are not expressions of territorial sovereignty, choice of law principles that are ordinarily based upon competence over territory are inapposite").

140. Guzman, *Choice of Law*, *supra* note 137, at 885-86 (adopting an economic perspective).

ceive the territoriality model as a subject matter model.¹⁴¹ Instead of assuming the policies that support a sovereign's complete control and dominion over its territory, we would adopt those policies that support an organization's control and dominion of its designated area of expertise.¹⁴²

C. Preemption

Accommodation can also occur through preemption. We can view one international treaty or regime as preempting another. The preemption model already functions in international law through the Vienna Convention on the Law of Treaties, which guides interpretation of successive treaties concerning the same subject matter. Under Article 30.2, "when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail."¹⁴³ Some agreements deal with the possibility of preemption under Article 30 by incorporating a savings clause that allows the pre-existing agreement to take precedent in the case of a conflict. Without a savings clause, the provisions of Articles 30.3 and 30.4 govern, depending upon whether all the parties are signatories to both treaties.¹⁴⁴ Under subsection 3, "when all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty."¹⁴⁵

A preemption model of accommodation functions smoothly when all of the parties to one agreement are parties to the other agreements,¹⁴⁶ and where a clear savings clause identifies which agreement should prevail or there is no sav-

141. Cf. Perez, *supra* note 124, at 363 (suggesting that institutions can be viewed "not [as] territorial sovereignties in the classic sense, but rather institutional sovereignties encompassing competing epistemic communities").

142. Others have suggested, correctly I think, that it is time to re-conceive our notions of the state and in particular the foundations upon which we base the trading regime. See Ari Afilalo & Dennis Patterson, *Commerce in the Age of Terror, Restructuring the WTO after the Long War* (on file with author).

143. Vienna Convention, *supra* note 130, art. 30(2). A later treaty may indicate that it does not preempt the earlier treaty. *Id.* art. 30(2). Where there is no savings clause, the provisions of Articles 30(3) and 30(4) govern depending on whether all the parties are signatories to both treaties. Under subsection 3, "when all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty." Vienna Convention, *supra* note 130, art. 30(3). Of course, the more difficult case will be when the parties to the later treaty do not include those of the earlier treaty. In such a case, under subsection 4, "(a) as between States parties to both treaties the same rule applies as in paragraph 3" and "(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations." *Id.*

144. Vienna Convention, *supra* note 130, arts. 30(3), 30(4).

145. Vienna Convention, *supra* note 130, art. 30(3).

146. *But see* Alvarez, *supra* note 54, at 9 (noting, for example, that "Parties to those ILO Conventions could plausibly assert that they committed themselves . . . for purposes of the (weaker) forms of ILO dispute settlement").

ings clause at all.¹⁴⁷ Under such circumstances, efficiency gains are possible because Article 30 provides predictability and certainty as to which treaty's rules will prevail. However, as we will see when we discuss the Cartagena Protocol, sometimes drafters adopt compromising language in lieu of a savings clause and in such cases the Vienna Convention's Article 30 is less helpful.¹⁴⁸ In addition, where the parties to one agreement are not parties to the other agreement, they cannot be bound by the agreement to which they have not consented under the Vienna Convention.¹⁴⁹

D. Deference

International regimes can defer to the decisions, understandings, or rules of another regime. One tribunal could defer to another because another tribunal has already heard and decided part or all of the issue.¹⁵⁰ A tribunal might adopt the findings (or abstain and await the findings) of another, more expert tribunal.¹⁵¹ Alternatively, one regime can implicitly defer to another by adopting the language and/or standards of that regime.

The WTO already uses deference as a means of linkage. The WTO uses a deference model for some International Monetary Fund (IMF) decisions.¹⁵² WTO Members must accept IMF decisions with respect to the IMF's Articles of Agreement or the terms of a special exchange agreement between the Members.¹⁵³ The SPS defers to certain international standards explicitly.¹⁵⁴ Some WTO language could also be characterized as implicit deference because it adopts the language or standards of another regime. For example, WTO language parroting the language of "sustainable development" implicitly defers to

147. Possibly, one could argue that a preemption model could extend beyond that articulated in the Vienna Convention so that even where one country has not assented to both agreements, a later agreement or a more specific agreement that is assented to by a large number of states should at least be considered by another regime. Such a suggestion, though, would probably meet substantial resistance.

148. See *infra* note 312 and accompanying text.

149. Vienna Convention, *supra* note 132, art. 30(4).

150. See, e.g., Pauwelyn, *How to Win*, *supra* note 78, at 1017-19. Pauwelyn discusses whether the principle of *res judicata* or issue preclusion could be used.

151. Cf. Howse, *supra* note 79, at 1341-42 ("I believe that judicial restraint . . . should not preempt the fundamental right to dispute settlement because other organs of the WTO could monitor or review legal compliance. At the same time, where such political and diplomatic organs within the WTO or other international institutions are implicated in an area of WTO law (for example UNCTAD in the case of GSP) it is only appropriate that the views of those organisms be taken into account in dispute settlement, and especially that expert competence be respected.").

152. WTO Agreement, *supra* note 1, Annex 1A, General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-63, 55 U.N.T.S. 266, art. XV:6 [hereinafter GATT].

153. Leebron, *Linkages*, *supra* note 2, at 20 (discussing IMF linkage). Leebron refers to the WTO's linkage with the United Nations as a form of deference. He points to the language that "nothing in this Agreement shall be construed . . . to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security" as a deferential form of linkage. *Id.*

154. See SPS Agreement, *supra* note 6, Annex A, para. 3.

environmental norms.¹⁵⁵ Further, the AB has in some sense deferred to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) with respect to whether sea turtles are an exhaustible natural resource for purposes of an Article XX analysis.¹⁵⁶ Various DSU provisions allow WTO panels to seek the advice of experts,¹⁵⁷ and one set of commentators has suggested that “environmental experts could be allowed to sit on GATT Panels dealing with trade and environmental disputes.”¹⁵⁸

Just as the WTO may use deference as a linkage mechanism, other regimes may respond by deferring to and thus accommodating WTO language and standards. Regimes may mimic WTO language and standards,¹⁵⁹ or a regime may also provide a deference mechanism to be used at a later time, such as in dispute resolution.¹⁶⁰ Thus, a regime could allow a tribunal to consider or consult the expertise of another regime within the dispute settlement mechanism. A deference model, if properly confined, seems both legitimate and efficient. Deference in the face of prior adjudicative proceedings or superior expertise promotes efficiency. It also promotes legitimacy in the sense that the “right” organization makes the decision.

155. See WTO Agreement, *supra* note 1, Preamble:

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

Id. See also Singapore Ministerial Declaration, *supra* note 33, ¶ 2 (with respect to labor rights, noting that “[w]e renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.”).

156. See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 90, ¶ 132.

157. DSU Agreement, *supra* note 13, art. 13.2 (“Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter.”); SPS Agreement, *supra* note 6, art. 11.2 (stating that “a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute”).

158. Gretchen L. Gaston & Randall S. Abate, *The Biosafety Protocol and the World Trade Organization: Can the Two Coexist?*, 12 PACE INT’L L. REV. 107, 139 (2000).

159. See, e.g., *infra* notes 238-246 and accompanying text; Robert Howse & Joshua Meltzer, *The Significance of the Protocol for WTO Dispute Settlement*, in THE CARTAGENA PROTOCOL ON BIOSAFETY: RECONCILING TRADE IN BIOTECHNOLOGY WITH ENVIRONMENT & DEVELOPMENT 485-91 (Christoph Bail, Robert Falkner & Helen Marquard eds., 2002) (noting ways in which a WTO dispute settlement panel might refer to the Cartagena Protocol).

160. See, e.g., Robert Howse & Joshua Meltzer, *The Significance of the Protocol for WTO Dispute Settlement*, 485-91, in THE CARTAGENA PROTOCOL ON BIOSAFETY: RECONCILING TRADE IN BIOTECHNOLOGY WITH ENVIRONMENT & DEVELOPMENT (Christoph Bail, Robert Faulkner, & Helen Marquard eds., 2002) (noting ways in which a WTO dispute settlement panel might refer to the Cartagena Protocol).

IV.
 ACCOMMODATION OPPORTUNITIES

Analyzing how WTO rules and norms may conflict with other regimes' norms implicates how accommodation does or might work more generally. Part IV(A) identifies potential conflicts between the WTO and national security values, environmental norms, human rights, and developmental strategies. Part IV(B) explores some specific conflicts between the WTO's SPS Agreement and the Cartagena Protocol.

A. *Areas of Conflict*

The WTO operates within a larger international framework¹⁶¹ and its rules may conflict with other parts of that framework.¹⁶² This section identifies some of the issue areas that may conflict. Even if the WTO sought to avoid conflict, natural regime linkage would make conflict inevitable because trade and trade regulation affect other issue areas that may serve different goals.¹⁶³ Thus, the rule of non-discrimination potentially conflicts with national security values, environmental norms, human rights, and development strategies.¹⁶⁴ Additional conflicts may arise where the WTO harmonizes areas, such as in the fields of intellectual property protection or technical regulations.¹⁶⁵

Although the WTO principle of non-discrimination appears to be a neutral principle, it still conflicts with values that may cause a state to discriminate. A WTO Member may isolate another country to prompt regime change in a way that affects the trading rights of other Members,¹⁶⁶ or a Member may simply wish to restrict the trade in certain goods.¹⁶⁷ For example, it would not be difficult to imagine a Member restricting trade with other Members in order to combat terrorism.¹⁶⁸ Thus, trade in certain technologies could be prohibited or special rules of administration could be applied to goods from, or traveling through,

161. Bacchus, *supra* note 38, at 540 (stating that experience has shown that "the work of the WTO cannot be viewed separately from other international issues"); Steinberg, *supra* note 35, at 248 (arguing that the AB interpretations are constrained by "international legal discourse and politics").

162. See, e.g., Terence P. Stewart & David S. Johanson, *A Nexus of Trade and the Environment: The Relationship Between the Cartagena Protocol on Biosafety and the SPS Agreement of the World Trade Organization*, 14 *COLO. J. INT'L ENVTL. L. & POL'Y* 1, 37-51 (2003) (discussing the differences between the SPS and the Protocol).

163. *Roundtable*, *supra* note 42, at 1316 (noting that there are conflicts that the WTO could not avoid even if it tried).

164. Ari Afilalo & Sheila Foster, *The World Trade Organization's Anti-Discrimination Jurisprudence: Free Trade, National Sovereignty, and Environmental Health in the Balance*, 15 *GEO. INT'L ENVTL. L. REV.* 633, 634 (2003); Tiefenbrun, *supra* note 39, at 274-76; Perez, *supra* note 124, at 344, 356.

165. See, e.g., *supra* note 155.

166. See, e.g., Perez, *supra* note 124, at 302-03 (discussing the Helms-Burton Act).

167. See, e.g., *id.* at 327 (discussing the recent dispute between the U.S. and Canada under NAFTA, regarding strategic trade in uranium and uranium enrichment services).

168. Legitimate domestic goals may also be subject to protectionist abuses. Perez, *supra* note 124, at 327-30 (discussing possible pretextual uses).

particular countries.

First, in the field of national security, Antonio Perez suggests that comity can resolve conflicts between the WTO and the UN.¹⁶⁹ After describing the tension between competing models of the WTO, Professor Perez proposes that international comity may mediate conceptual tensions and facilitate the use of general international law “to cure substantive gaps in the WTO legal system.”¹⁷⁰ This vision of comity calls upon the WTO to affirmatively identify and weigh the competing interests of other regimes.¹⁷¹

The WTO’s national security exception facilitates such a call for comity.¹⁷²

Nothing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations; or (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.¹⁷³

Thus, WTO Members may consider national security concerns—either their own or those of the United Nations—by relying upon the WTO’s national security exception. But as Professor Perez points out, interpreting this exception may raise a conflict between the United Nations and the WTO.¹⁷⁴ The competing interpretive views diverge upon whether this exception is self-judging, whether the invoking state may unilaterally declare the exception, or whether the WTO may assess its validity.¹⁷⁵ Professor Perez calls for an intermediate position, one that requires comity through the adoption of choice of law principles between the WTO and the UN.¹⁷⁶

The recently approved “Kimberley Scheme” regulating the trade in “blood

169. *Id.* at 302. For a discussion of comity between the UN and the WTO, see *id.* at 367-69. Professor Perez raises the possibility that one can conceive of international organizations as “separate sovereignties, not territorial sovereignties in the classic sense, but rather institutional sovereignties encompassing competing epistemic communities.” *Id.* at 363.

170. *Id.* at 358. Professor Perez invokes interest analysis. *Id.* at 358-59.

171. Professor Perez justifies his approach from an interpretive perspective. *Id.* at 360-61.

172. General Agreement on Tariffs and Trade, art. XXI, Oct. 30, 1947, 61 Stat. A-63, 55 U.N.T.S. 266 [hereinafter GATT].

173. *Id.*

174. Perez, *supra* note 124, at 302 (noting that the security exception in the WTO “potentially encroaches on the [United Nations] regime for the management of global security issues,” and that “how the provision is interpreted tells us a great deal about how the existing supranational institutional structure will address conflicts between trade and security values”).

175. *Id.* at 305.

176. *Id.* at 376-77. Competing visions of the WTO complicate this conflict. *Id.* Perez points out that allowing the conflict to co-exist might help force a negotiated settlement, although there are some problems with rent seekers and the likelihood of a negotiated settlement. *Id.* at 361-62.

diamonds,”¹⁷⁷ avoided a potential conflict between national security values and trade rules. Under the U.N.-sponsored Kimberley Scheme, states agreed to certify trade in diamonds and ban all trade in blood diamonds.¹⁷⁸ Arguably, the U.N. scheme would be considered an “action in pursuance of . . . obligations under the United Nations Charter for the maintenance of international peace and security,”¹⁷⁹ and thus could be allowed as an exception to WTO rules.¹⁸⁰ Nevertheless, WTO Members who were not signatories waived any WTO rights abridged by the scheme.¹⁸¹ In this instance, it seems that WTO Members linked the WTO with the Kimberley Scheme by approving the waiver; however, the Kimberley Scheme also accommodated the WTO by seeking a waiver.

Second, environmental norms may conflict with WTO norms. Efforts to promote sustainable development might benefit from restrictions on the transboundary movement of products that implicate the WTO. For example, GATT Article XI restricts outright bans of products.¹⁸² The Most Favored Nation (MFN) Provision of GATT Article I¹⁸³ and the National Treatment Provision of GATT Article III require non-discriminatory treatment of tariffs, regulations, and taxes.¹⁸⁴ In addition, the Agreement on Technical Barriers to Trade (TBT)¹⁸⁵ regulates national standards, and the SPS governs the implementation of sanitary and phytosanitary measures.¹⁸⁶ Thus, any environmental measure taken pursuant to an environmental agreement or to promote a domestic environmental norm can be challenged if it has any arguable effect on trade.¹⁸⁷

177. Diamonds used to fund internal strife and terrorism in Africa.

178. Kimberly Process Certification Scheme Background, <http://www.kimberleyprocess.com> (follow “Background” hyperlink). See also Joost Pauwelyn, *WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for “Conflict Diamonds”*, 24 MICH. J. INT’L L. 1177, 1178 (2003) [hereinafter Pauwelyn, *WTO Compassion or Superiority Complex*] (noting that the waiver was probably not necessary).

179. GATT, *supra* note 171, art. XXI(c).

180. Pauwelyn, *WTO Compassion or Superiority Complex*, *supra* note 178, at 1184-85. See also, e.g., Howse & Mutua, *supra* note 58, at 10 (discussing Article 103 of the U.N. Charter providing that the Charter prevails over Members’ conflicting obligations).

181. WTO General Council, Proposed Agenda, WT/GC/W/498 (May 13, 2003), Item VI; WTO Council for Trade in Goods, Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds: Communication, G/C/W/432/Rev.1 (Feb. 24, 2003). For a discussion of whether this waiver was either necessary or wise, see Pauwelyn, *WTO Compassion or Superiority Complex*, *supra* note 178, at 1198-1202 (concluding that it was not). Arguably the waiver itself may represent an accommodation of sorts because it is a “recognition of the role of non-WTO instruments before a WTO panel.” See Pauwelyn, *WTO Compassion or Superiority Complex*, *supra* note 178, at 1194.

182. GATT, *supra* note 171, art. XI.

183. *Id.* art. I.

184. *Id.* art. III.

185. See Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 117 (1994) [hereinafter TBT].

186. See SPS Agreement, *supra* note 6.

187. But see GATT, *supra* note 172, art. XX (“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . necessary to protect human, animal or plant life or health.”). See

Third, human rights values can also conflict with WTO norms. Some commentators argue that the WTO creates a race to the bottom for both labor and human rights values.¹⁸⁸ Thus, countries may seek to avoid labor norms established by the International Labour Organization (ILO) by invoking the trade regime's rules.¹⁸⁹ Alternatively, countries may wish to impose trade sanctions in order to promote human rights values.¹⁹⁰

Additional conflicts may manifest themselves where countries attempt to promote non-trade values within the WTO framework. For example, non-trade values emerged in legislation enacted pursuant to the Generalized System of Preference (GSP).¹⁹¹ The GSP allows WTO Members to favor certain developing countries without violating the GATT Article I MFN requirement. In adopting GSP legislation, countries have "conditioned" such preferential treatment

also TBT, *supra* note 185, art. 2.2 ("Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment."); SPS Agreement, *supra* note 6, art. 2.1 ("Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.").

188. See Reich, *supra* note 19, at 350-51 n.96 (noting the proponents of the race to the bottom argument).

189. See, e.g., Pauwelyn, *How to Win*, *supra* note 78, at 1022 (discussing the ILO recommendation against Myanmar and noting that the "easiest situation for Panels to thus apply non-WTO rules would be where a measure is inconsistent with WTO rules, but specifically imposed or permitted by a decision under the dispute settlement mechanism of another treaty").

190. See, e.g., Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61 §§ 1-9, 117 Stat. 864 (2003) (codified at 50 U.S.C. § 1701 (2000)).

191. See Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 191 (1980).

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.

2. The provisions of paragraph 1 apply to the following:

- a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences;
- b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;
- c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another;
- d) Special treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

Id. (internal citations omitted). Members of the WTO can help developing countries by improving market access, helping with product diversification, cutting tariffs, granting trade-related technical assistance, and investing in least-developed nations. See World Trade Organization, High-Level Meeting on Integrated Initiatives for Least-Developed Countries' Trade Development, WT/LDC/HL/M/1 (Nov. 26, 1997), available at http://www.wto.org/english/tratop_e/devel_e/hlm_minutes.htm.

upon compliance with non-trade values.¹⁹² For example, the EC implemented a GSP scheme that India challenged as violating WTO rules because it granted greater benefits to Pakistan as a country taking measures to combat illicit drug production.¹⁹³

The GSP question raised in the EC-India dispute also raises conflict, linkage, and accommodation possibilities relating to development strategies. The GSP, by definition, discriminates among WTO Members in order to benefit developing countries. Conditioning GSP preferences on labor, environmental, or national security norms ties an exception to the non-discrimination norm to non-trade values, creating a potential conflict between the more general norm of non-discrimination and other non-trade values.¹⁹⁴

The potential conflict between trade and non-trade values includes those situations where the WTO has reached beyond the norm of non-discrimination to achieve some level of proactive harmonization. Both Kal Raustiala and Arie Reich have articulated several areas where the WTO has reached beyond setting norms of non-discrimination.¹⁹⁵ For example, the TRIPs Agreement sets minimum standards for intellectual property,¹⁹⁶ and the TBT and the SPS regulate the use of science to evaluate technical or sanitary standards.¹⁹⁷ According to Raustiala, these are “policy-constraining and policy determining rules.”¹⁹⁸ Raustiala notes the particular problem that “the incorporation of otherwise non-binding international standards, such as the Codex Alimentarius, that provide presumptions of compliance or regulatory safe harbors with WTO obligations, produces generativity when those international standards change and evolve *ex post*.”¹⁹⁹ Thus, these scholars demonstrate that the WTO does not simply apply a static rule of non-discrimination; it seeks and achieves harmonization that theoretically facilitates liberalized trade. In doing so, it reaches into areas where its rules and values may conflict with those of other regimes.

Part B examines a specific treaty regime, the Cartagena Protocol, to illustrate a specific instance of how a regime’s rules and norms may conflict with WTO rules and norms, and thereafter establishes a framework for understanding

192. See, e.g., The Trade Act of 1974, 19 U.S.C. § 2462(c)(7) (2004).

193. Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preference to Developing Countries*, WT/DS246/AB/R (Apr. 7, 2004). Ultimately, the WTO sustained the EC scheme. *Id.* ¶¶ 165, 167, 173, 174.

194. Pauwelyn, *WTO Compassion or Superiority*, *supra* note 178, at 1188 (noting the argument that GSP conditionalities may require a waiver).

195. See Raustiala, *supra* note 26, at 404-07; Reich, *supra* note 19, at 329 (explaining GATT’s “gradual assumption of the harmonization role”).

196. Raustiala, *supra* note 26, at 405. See also Pauwelyn, *Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO*, *supra* note 73, at 580 (noting that the non-discriminatory policies can now be challenged under the GATT). But see Robert Howse & Petros C. Mavroidis, *Europe’s Evolving Regulatory Strategy for GMOs—The Issue of Consistency with WTO Law: Of Kine and Brine*, 24 *FORDHAM INT’L L.J.* 317, 318 (2000) (noting that the WTO “with some notable exceptions, like [TRIPs], is not about regulatory harmonization”).

197. Raustiala, *supra* note 26, at 405.

198. *Id.* at 406.

199. *Id.* at 412.

and evaluating accommodation.

B. Conflicts between the WTO and the Cartagena Protocol

The WTO and the Cartagena Protocol pursue different goals. While the WTO mandates non-discrimination in international trade between Member states, the Protocol regulates the transboundary movement of living modified organisms (LMOs) produced by modern biotechnology.²⁰⁰ In particular, the Protocol concerns itself with the transboundary movement of LMOs and any adverse effect such movement has on the environment and “the conservation and sustainable use of biological diversity.”²⁰¹ To the extent that any adverse effects on the environment are avoided under the Protocol through trade measures, the Protocol implicates WTO norms and rules.

The Protocol provides a framework for the regulatory harmonization of measures affecting the transboundary movement of LMOs.²⁰² The following is a brief description of the Protocol’s provisions, though others have more fully outlined its provisions.²⁰³ Under the Protocol, countries must obtain permission prior to their first intentional importation of any LMO not meant for food, feed, or processing (FFP)²⁰⁴ and adopt notification procedures pursuant to the “Advanced Informed Agreement” (AIA).²⁰⁵ The AIA requires an exporting party to notify, “in writing, the competent national authority of the Party of import prior to the intentional transboundary movement of a living modified organism.”²⁰⁶

200. An LMO is “any living organism that possesses a novel combination of genetic material obtained though the use of modern biotechnology.” Cartagena Protocol, *supra* note 7, art. 3(g). The agreement does not apply to pharmaceuticals. *Id.* art. 5. However, as one commentator has noted, “Article 5 could be reasonably understood as excluding application of the Protocol only when other relevant international agreements or organizations cover the specific pharmaceutical.” Rivera-Torres, *supra* note 43, at 276.

201. See Cartagena Protocol, *supra* note 7, Preamble, art. 1.

202. Article 3(h) clarifies the scope further by adding that “‘Living organism’ means any biological entity capable of transferring or replicating genetic material, including sterile organisms, viruses and viroids.” *Id.* art. 3(h). While there are advantages to species developed with the aid of biotechnology, there are concerns that genetic modification can cause future health and environmental problems, such as unusually strong pesticides or disruption of the ecosystem. For a discussion of biotechnology and its benefits and risks, see Gregory N. Mandel, *Gaps, Inexperience, Inconsistencies and Overlaps: Crisis in the Regulation of Genetically Modified Plants and Animals*, 45 WM. & MARY L. REV. 2167 (2004); Kirsten N. Jabara, *The Biosafety Protocol*, 8 U. BALT. J. ENVTL. L. 121, 132-35 (2001). See also Union of Concerned Scientists, *Risks of Genetic Engineering*, <http://www.ucsusa.org/agriculture/gen.risks.html>.

203. See generally Patrick J. Vallely, *Tension between the Cartagena Protocol and the WTO: The Significance of Recent WTO Developments in an Ongoing Debate*, 5 CHI. J. INT’L L. 369, 371-74 (2004); Rivera-Torres, *supra* note 43, at 268-88; Jabara, *supra* note 202, at 125; Steve Charnovitz, *The Supervision of Health and Biosafety Regulation by World Trade Rules*, 13 TUL. ENVTL. L.J. 271, 298-301 (2000); Gaston & Abate, *supra* note 158; Asif H. Qureshi, *The Cartagena Protocol on Biosafety and the WTO – Co-existence or Incoherence?*, 49 INT’L & COMP. L.Q. 835 (2000).

204. Cartagena Protocol, *supra* note 7, art. 7.

205. *Id.* art. 8.

206. *Id.* art. 8.1. The scope of the AIA is rather limited in that it only “applies to LMOs that will be intentionally introduced into the environment.” Stewart & Johanson, *supra* note 161, at 7 (noting the small percentage of biotechnology subject to the AIA). The AIA is limited in that it applies only to the “first intentional transboundary movement of living modified organisms for inten-

The notification must include certain minimum information set forth in Annex I of the Protocol, and the importing country must acknowledge the notification and indicate if and how the exporter shall proceed.²⁰⁷ The importing party, stating the reasons for its decision, may allow the import with or without conditions, prohibit the import, or request additional information.²⁰⁸ Thus, under the Protocol, a country may bar LMO imports such as seeds, microbes, animals, and crops if a country feels that the importation of those products would harm or threaten its environment.²⁰⁹

While an importing country must base its decision upon a scientifically sound risk assessment,²¹⁰ it may apply the precautionary principle when making the risk assessment:

Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of the living modified organism in question as referred to in paragraph 3 above, in order to avoid or minimize such potential adverse effects.²¹¹

The procedures for FFP LMOs (those destined for food, feed, or processing) are slightly different and less burdensome than those for non-FFP LMOs. They are not subject to the AIA; nevertheless, under Article 11, a Party may deny domestic development or importation and sale of FFP LMOs regardless of the “lack of scientific certainty due to insufficient relevant scientific information” underlying its decision.²¹² Unfortunately, “Article 11 does not offer much in terms of the criteria on which a country must base its decision regarding domestic use.”²¹³ Essentially, for FFP LMOs, the burden shifts to each potential

tional introduction into the environment of the Party of import.” Cartagena Protocol, *supra* note 7, art. 7.1.

207. Cartagena Protocol, *supra* note 7, arts. 8, 9, 10.

208. *Id.* arts. 10.3, 10.4. If the Party of import refuses importation, it must follow the procedures set forth in Article 10. *Id.* arts. 9, 10.

209. *Id.* art. 10.

210. Under Article 10, the importing party must follow the risk assessment procedures set forth in Article 15: “Risk assessments undertaken pursuant to this Protocol shall be carried out in a scientifically sound manner, in accordance with Annex III and taking into account recognized risk assessment techniques.” *Id.* arts. 10.1, 15.1.

211. *Id.* art. 10.6. In addition, the parties may take into consideration “socio-economic considerations arising from the impact of living modified organisms on the conservation and sustainable use of biological diversity, especially with regard to the value of biological diversity to indigenous and local communities.” *Id.* art. 26.

212. *Id.* arts. 11.1, 11.4, 11.8. See Qureshi, *supra* note 203, at 840.

213. Rivera-Torres, *supra* note 43, at 278. Rivera-Torres argues that Article 2 and Article 16 are arguably applicable. *Id.* Article 2.2 provides: “The Parties shall ensure that the development, handling, transport, use, transfer and release of any living modified organisms are undertaken in a manner that prevents or reduces the risks to biological diversity, taking also into account risks to human health.” Cartagena Protocol, *supra* note 7, art. 2.2. Article 16 deals with risk management and provides that the parties shall “establish and maintain appropriate mechanisms, measures and strategies to regulate, manage and control risks identified.” *Id.* art. 16.1. Further measures should only be imposed to the extent necessary to protect sustainable use of biodiversity. *Id.* art. 16.2.

importing country to report to the Biosafety Clearing House its decision regarding domestic use of FFP GMOs.²¹⁴ A party that wishes to begin or prohibit domestic use under Article 11 must inform the Biosafety Clearing House of its decision and supply the information required by Annex II of the Protocol.²¹⁵

Although the Protocol provides a regulatory framework for LMOs for environmental (non-trade) purposes, there are several ways in which countries' implementation of the Protocol might implicate trade. As others note, an importing country could require that exporters conform to notification and approval provisions prior to a transboundary movement, or simply prohibit the entrance of certain LMOs.²¹⁶ Alternatively, countries could "establish measures to comply with Article 18 on identification of imported LMOs."²¹⁷ Such actions would arguably restrict trade and would need to be assessed under the relevant WTO disciplines.²¹⁸

Protocol measures may implicate the GATT, the TBT,²¹⁹ and the SPS. The consensus among commentators appears to be that the SPS is the most relevant.²²⁰ However, completeness necessitates mentioning potential conflicts under the GATT and the TBT before continuing on with a more detailed analysis under the SPS.²²¹ Under the GATT, a Protocol measure regulating the importa-

214. Cartagena Protocol, *supra* note 7, art. 11. See also Qureshi, *supra* note 203, at 841.

215. Article 11.4 provides: "A Party may take a decision on the import of living modified organisms intended for direct use as food or feed, or for processing, under its domestic regulatory framework that is consistent with the objective of this Protocol." Cartagena Protocol, *supra* note 7, art. 11.4. A decision to allow the import of a product that is consistent with the Protocol necessarily includes the precautionary principle. *Id.* art. 11.8. As one commentator has noted, "the only distinguishing aspect of this procedure from those required for other LMOs under the AIA is that it 'lays first responsibility on potential importers to develop and announce [its] regulations proactively.'" Rivera-Torres, *supra* note 43, at 279 (citing Aaron Cosbey & Stas Burgiel, *International Institute for Sustainable Development, The Cartagena Protocol on Biosafety: An Analysis of Results: An IISD Briefing Note 8* (2000)).

216. Cartagena Protocol, *supra* note 7, art. 10. Rivera-Torres, *supra* note 43, at 310 (discussing "the range of measures that could require analysis under the WTO disciplines").

217. Rivera-Torres, *supra* note 43, at 310.

218. *Id.*

219. TBT, *supra* note 185, at 138.

220. Rivera-Torres, *supra* note 43; Charles W. Smitherman, III, Comment, *World Trade Organization Adjudication of the European Union-United States Dispute Over the Moratorium on the Introduction of New Genetically Modified Foods to the European Common Market: A Hypothetical Opinion of the Dispute Panel*, 30 GA. J. INT'L & COMP. L. 475, 492 (2002); Stewart & Johanson, *supra* note 161, at 25; Howse & Mavroidis, *supra* note 196, at 321.

221. In the current dispute between the U.S. and the EU, the U.S. argues that the challenged measures fall within the scope of the SPS. First Submission of the United States, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, 292, 293 (Apr. 21, 2004), ¶ 71 [hereinafter First Submission of the United States]. The EC argues that at least a part of the measures do not. First Written Submission of the European Communities, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, 292, 293 (May 17, 2004), ¶¶ 513-14 [hereinafter First Written Submission of the EC]. The EC accepts that "the alleged delays (or failure to act within a specific timeframe) in the approval process can be reviewed under the SPS agreement as an issue of application of a sanitary or phytosanitary measure," but the complainants "allege the violation of obligations relating not to the application of an SPS measure but to the development of such a measure, or even its very existence." Thus, SPS does not apply. *Id.*

tion of an LMO or FFP LMO may run afoul of GATT Article XI (if it takes the form of an import ban), GATT Article I (if it is country-specific), and GATT Article III (if it favors domestic like products). Where the SPS does not apply,²²² the TBT governs whether a Protocol measure fails to comply with the harmonization of technical standards.²²³

Finally, a Protocol measure might (and probably would) implicate the SPS, which regulates measures to protect the health and life of humans, animals, or plants.²²⁴ Under SPS Article 2, Members have a right to take sanitary or phytosanitary measures so long as they are not inconsistent with the SPS Agreement. Those measures can only be applied to the extent necessary and must be based on scientific principles with sufficient scientific evidence (unless permitted on a provisional basis under certain limited circumstances).²²⁵ Finally, no measure can arbitrarily or unjustifiably discriminate between Members and shall not be applied in a “manner which would constitute a disguised restriction on international trade.”²²⁶

As previously discussed, measures enacted under the Protocol may be consistent with SPS. Yet, conflicts may arise, depending upon the specific national legislation,²²⁷ because countries’ domestic regulatory structures differ.²²⁸ In the United States, some commentators blame regulatory capture, in part, for domestic regulation that fails to protect health and the environment.²²⁹ There have already been gaps in the regulatory systems that have caused scares, most notably concerning star link corn, Bt crops, and the monarch butterfly.²³⁰ In con-

222. By definition, the TBT does not apply to SPS measures as defined in Annex A of the SPS. Annex A of the SPS defines “SPS” measures fairly broadly. Howse & Mavroidis, *supra* note 196, at 321.

223. For example, a labeling standard for genetically modified organisms might fall under the TBT. Agreement on Technical Barriers to Trade, Annex 1, cl. 1, www.wto.org/english/docs_e/legal_e/17-tbt.pdf; Serina Vandegrift & Christine Gould, *Issues Surrounding the International Regulation of Adventitious Presence and Biotechnology*, 44 JURIMETRICS J. 81, 92 (2003); For a discussion of the TBT see Daniel Kalderimis, *Problems of WTO Harmonization and the Virtues of Shields Over Swords*, 13 MINN. J. GLOBAL TRADE 305, 326-27 (2004).

224. SPS Agreement, *supra* note 6, Preamble.

225. *Id.* arts. 2.2, 5.7.

226. *Id.* art. 2.3.

227. Safrin, *supra* note 132, at 611 (noting the concern that “some countries might implement the Protocol in a manner that violated their WTO obligations”).

228. See also Roundtable, *supra* note 41, at 1310; Elizabeth Becker, *U.S. Threatens to Act Against Europeans over Modified Foods*, N.Y. TIMES, Jan. 10, 2003, at A4. In the United States, a plethora of agencies and laws regulate traditional genetic modification techniques. See Office of Science and Technology Policy, Coordinated Framework for Regulation of Biotechnology; Establishment of the Biotechnology Science Coordinating Committee, 50 FR 47174 (Nov. 14, 1985). For example, the FDA drafted Voluntary Labeling Guidelines. U.S. Food and Drug Administration, Center for Food Safety and Applied Nutrition, Draft Guidance for Industry—Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering (Jan. 2001), www.cfsan.fda.gov/dms/biolabgu.html (not only are these guidelines voluntary, but the nature of food processing in the US makes it extremely difficult to sanction labels that are not misleading and are still informative). See also Smitherman, *supra* note 220, at 483-86.

229. See, e.g., Gregory N. Mandel, *Confidence-Building Measures for Genetically Modified Products: Stakeholder Teamwork on Regulatory Proposals*, 44 JURIMETRICS J. 41, 44 (2003).

230. *Id.* at 52-54.

trast, the EC has taken a very cautious stance concerning the use of biotechnology.²³¹ In 1998, it implemented a *de facto* ban on any new genetically modified product.²³² The potential for conflict materialized into an actual conflict when the United States filed a complaint in the WTO claiming that the EC suspended its own approval procedures for agricultural products produced with biotechnology, resulting in a *de facto* moratorium on such products.²³³ The EC ended its moratorium in May of 2004 when it approved the first GMO crop in over five years.²³⁴

* * *

The Conference of Parties (COP) to the Convention on Biological Diversity began negotiating the Protocol in 1994, and the Protocol entered into force in 2000. If we suppose that states operating within other regimes negotiate within the shadow of WTO primacy and linkage, it may be useful to assess whether and how the Protocol negotiators behave in light of the SPS Agreement.²³⁵ One commentator has pointed out:

Prior to re-starting the ExCOP, an event of considerable international importance took place at the World Trade Organisation (WTO) Ministerial meeting in Seattle. The agenda of that meeting included a proposal to establish a group on biotechnology under the Committee for Trade and Environment (CTE) and to recommend legal developments within the WTO agreements, which in other words, meant that any discussion about biotechnology would be subordinate to WTO rules. To great surprise, that Ministerial meeting collapsed due to massive protests and the demand for transparency in multilateral negotiations. Consequently, the atmosphere in Montreal in January 2000 was very different from that of Cart-

231. Vandegrift & Gould, *supra* note 223, at 89 (noting the disparate views of the EC and the U.S.).

232. See generally Smitherman, *supra* note 220, at 475 (discussing the *de facto* ban and the comprehensive EC framework). This ban effectively ended in May 2004. Joe Kirwin, *Old, New EU states Block Authorization to Cultivate Gene-Engineered Corn NK603*, 21 INT'L TRADE REP. (BNA) 1234 (2004).

233. First Submission of the United States, *supra* note 221, ¶¶ 2, 3, 34. The United States also claimed that in addition to the *de facto* moratorium six EC countries adopted marketing or import bans on previously approved biotech products. See *id.* ¶¶ 5, 57.

234. Joe Kirwin, *EU Members Reject GM Rapeseed Crop In Vote GMO Critics Hail as Key Victory*, 21 INT'L TRADE REP. (BNA) 1063, 1063-64 (2004).

235. For purposes of time and space constraints, I will outline some potential conflicts between the Protocol and the SPS agreement and leave potential conflict between the Protocol and GATT and the TBT for another day. A separate question raised in the US-EC dispute over genetically modified organisms is whether the SPS is the correct WTO agreement under which to evaluate genetically modified organisms. One argument made by the EC is that "the *SPS Agreement* was not drafted with products having the particular characteristics of GMOs in mind. The *SPS Agreement* does not refer to genetically modified organisms or any similar products, although it refers to and defines in detail the kinds of risk and products to which it is to apply." First Submission of the EC, *supra* note 221, ¶ 384. The EC argued that the risks in GMOs go far beyond the risks that are addressed by the SPS. See *id.* ¶ 386. Another question of jurisdiction is raised by the EC response. It argues that "if a WTO Member acts for two different objectives, one of which falls within the scope of the *SPS Agreement*, and the other of which does not, there are in effect two different measures for WTO purposes." *Id.* ¶ 413. This may mean that Article 2.2 of the TBT could apply or, if not, that Article XX would apply. See *id.* ¶ 441. See also Stewart & Johanson, *supra* note 161, at 8-9 (noting the disagreement between the US and the EC).

agenda in February 1999.²³⁶

The negotiators could not have been unaware of states' WTO obligations, nor the prospect of WTO linkage or regulation in this field, and the possible regime competition that might develop between these regimes. Part V examines whether and how this knowledge influenced the negotiations and any resulting accommodation.

V.

LINKAGE AND ACCOMMODATION BY THE WTO AND THE CARTAGENA PROTOCOL

Comparing the WTO's SPS Agreement to the Cartagena Protocol can help us evaluate instances of accommodation and the WTO's causal significance.²³⁷ Some potential areas of conflict, linkage, and accommodation between the two regimes include risk assessment for the imposition of measures permitted under each regime, the degree of scientific evidence required, the underlying objectives, the burden of proof, and dispute resolution. Here I will consider three areas of possible conflict, linkage, and accommodation: risk assessment for measures authorized under each regime, the use of scientific evidence, and underlying objectives of each regime. For each area, I will explore whether and how linkage and accommodation occur and suggest ways that linkage and accommodation might mask important normative differences. Specifically, I suggest that Protocol negotiators and WTO decision-makers have opted for deference models of accommodation and linkage (both explicit and implicit) and have eschewed opportunities to confront normative differences through preemption and choice of law or choice of forum accommodation models. Negotiators may find it easier to accommodate or link through deference models because they can avoid confronting serious and sometimes insurmountable value differences. Unfortunately, concealing the differences among regimes may be detrimental to the interests embodied in the less powerful regime and indeed may force the less powerful regime to appease the more powerful regime's interests.

236. Juan Mayr, *Doing the Impossible: The Final Negotiations of the Cartagena Protocol, in* CARTAGENA PROTOCOL ON BIOSAFETY: FROM NEGOTIATION TO IMPLEMENTATION 11-12, available at <http://www.biodiv.org/doc/publications/bs-brochure-02-en.pdf>. See also Robert Falkner, *Negotiating the Biosafety Protocol, in* THE CARTAGENA PROTOCOL ON BIOSAFETY: RECONCILING TRADE IN BIOTECHNOLOGY WITH ENVIRONMENT & DEVELOPMENT 5-7 (Christoph Bail, Robert Falkner & Helen Marquard eds., 2002) (discussing the influence of international trade developments).

237. One commentator has remarked on the causal relationship between the WTO and the Protocol, stating: "[t]hroughout this history biosafety-related issues were discussed in a number of international fora at the same time and in many instances parallel exercises made a complicated issue even more complicated. At least one of the forums, namely the third WTO Ministerial Conference held in Seattle in 1999, could be seen as having been initiated in order to disrupt the CPB negotiation process." Veit Koester, *The History Behind the Protocol on Biosafety and the History of the Cartagena Biosafety Protocol Negotiation Process, in* CARTAGENA PROTOCOL ON BIOSAFETY: FROM NEGOTIATION TO IMPLEMENTATION, *supra* note 236, at 6.

A. Risk Assessment for Measures Taken

The Protocol accommodates the SPS's risk assessment standard. Both the SPS and the Protocol assess the validity of measures taken in support of each treaty by requiring parties to conduct a risk assessment. Both agreements strive to allow only measures that are "necessary." Under the SPS, the measure taken must be the least trade-restrictive measure to achieve the desired goal.²³⁸ More specifically, Article 5.6 requires that Members tailor measures to meet the desired objectives without overly burdening trade.²³⁹ The Protocol drafters adopted similar language, providing that a measure should be imposed to the extent necessary to prevent harm.²⁴⁰ Thus, the Protocol accommodates the SPS least trade-restrictive requirement by means of implicit deference. The drafters avoided adopting a precautionary approach specifically for risk management, even though a precautionary approach was adopted in other parts of the Protocol.²⁴¹

Despite the Protocol's accommodation of the SPS standard, determining necessity under either agreement might lead to a conflict between the two agreements and require some sort of further linkage or accommodation. A necessity determination entails a fact-sensitive analysis of goals, means, and policies;²⁴² it requires that a nexus be shown between the measure adopted and the goal stated. We have seen the WTO panels and the AB struggle to establish an appropriate nexus when examining a variety of measures under the GATT Article XX exceptions.²⁴³ In doing so, it has made room for linkage.²⁴⁴ For example, in the Shrimp-Turtle decision, the AB defined the term "exhaustible natural resources" in Article XX (g) "in light of contemporary concerns of the community of nations about the protection and conservation of the environment."²⁴⁵ Specifically, it acknowledged the inclusion of sea turtles on Appendix I of the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES), and it observed that the United States had failed to raise the issue with the appropriate CITES Committee.²⁴⁶ Thus, linkage on the WTO's

238. See SPS Agreement, *supra* note 6, arts. 5.4, 5.6. Under Article 5.4, "Members should . . . take into account the objective of minimizing negative trade effects." *Id.* art. 5.4.

239. "Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility." *Id.* art. 5.6.

240. Cartagena Protocol, *supra* note 7, art. 16.2.

241. The Cartagena Protocol on Biosafety: A Record of the Negotiations 54, <http://www.biodiv.org/doc/publications/bs-brochure-03-en.pdf> [hereinafter Record of Negotiations].

242. Howse, *supra* note 79, at 1371-72 (discussing necessity determinations under Article XX of the GATT).

243. John J. Emslie, *Labeling Programs as a Reasonably Available Least Restrictive Trade Measure Under Article XX's Nexus Requirement*, 30 BROOK. J. INT'L L. 485 (2005).

244. See Gaston & Abate, *supra* note 158, at 117 (examining the "shift in the WTO Dispute Settlement Body from its alleged anti-environment position towards one that is more environmentally conscious").

245. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 90, ¶ 129.

246. *Id.* ¶¶ 72, 171, n.174.

part may occur through an explicit deference model administered by the AB.

The Protocol drafters rejected other opportunities to accommodate the SPS assessment measures. For example, the Protocol drafters failed to address what should happen if measures taken under the Protocol conflict with WTO rules. The COP to the Protocol considered, but ultimately deleted, a provision that would have established a choice of law rule for potential conflicts, including those relating to measures taken under the Protocol:

This provided that, in the event of any inconsistency between the Protocol and the Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), the Protocol would “prevail to the extent of the inconsistency” and that Parties could “waive to this extent their right to bring a complaint against any other Party under [those] agreements.”²⁴⁷

The deletion of this language suggests that the negotiators chose not to alienate potential Members who would not be willing to subordinate their WTO rights.

Likewise, the Protocol’s Preamble eschewed a choice of law or forum approach. The Preamble states: “this Protocol shall not be interpreted as implying a change in the rights and obligations of a party under any existing international agreements.”²⁴⁸ Yet it goes on to add that “the above recital is not intended to subordinate this Protocol to other international agreements.”²⁴⁹ The preambular back-peddling acknowledges the potential for conflict and the desire to avoid it, but not the will to directly confront it in a choice of law model.

Further, when adopting Article 15, which relates to the necessary risk assessment, the drafters rejected a proposal that might have brought it into conflict with WTO rules of non-discrimination:

[M]ost developing countries supported the view that the assessment should be based not only on scientific data but also on data concerning possible impacts on the conservation and sustainable use of biological diversity, socioeconomic factors and the risks to agriculture and human health. Such assessments would, as a consequence, need to be multidisciplinary.²⁵⁰

Thus, the negotiators chose to avoid an approach that might have allowed countries to integrate socio-economic considerations and risks to agriculture in performing risk assessment. Although socio-economic considerations were permitted in Article 26 of the Protocol, at least one commentator views that article as weak and a result of developed countries’ attempts to secure “their structural advantages in trade and development.”²⁵¹

Protocol negotiators retained significant normative distinctions in other

247. Record of Negotiations, *supra* note 241, at 110.

248. Cartagena Protocol, *supra* note 7, Preamble.

249. *Id.* See also Frechette, *supra* note 203, at 257 (discussing whether the Protocol modifies WTO rights and obligations).

250. Record of Negotiations, *supra* note 241, at 51 (internal citations omitted).

251. Tewolde Berhan Gebre Egziabher, *Balancing Biosafety, Trade and Economic Development Interests in the Implementation of the Cartagena Protocol: A Developing Country Perspective*, in CARTAGENA PROTOCOL ON BIOSAFETY: FROM NEGOTIATION TO IMPLEMENTATION, *supra* note 236, at 33.

ways. A separate article on non-discrimination was deleted from the final draft, indicating that the Protocol negotiators were not prepared to explicitly adopt WTO standards:

Thirteen elements were included in the draft text encompassing views ranging from acknowledging the exercise of sovereign rights by Parties in respect of non-discrimination to ensuring the Protocol's consistency with trade-related international treaties, and in particular, those under the WTO.²⁵²

Likewise with respect to Article 18, concerning packaging and labeling, some Members preferred that the parties not adopt a provision concerning packaging and labeling in order "to avoid possible conflict with the WTO."²⁵³ Nevertheless, the drafters included Article 18 requiring the parties to adopt measures to provide for the safe packaging and documentation of LMOs.²⁵⁴

Finally, measures taken under the Protocol, including the possibility of prohibiting an import, must arise under the decision procedure set forth in Article 10. Article 10 specifically includes the precautionary principle indicating that "[l]ack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism . . . shall not prevent a party from taking a decision."²⁵⁵ The insertion of this provision caused lengthy debates among the negotiators, with one group specifically calling for its deletion.²⁵⁶ Nevertheless, precautionary language relating to the second area of potential conflict between the Protocol and the WTO, namely, the amount of scientific evidence required, remained in the Protocol.

While it is difficult to draw conclusions, we can see the contours of a deference model between the Protocol and the SPS Agreement, at least with respect to measures to be taken under the agreements and the risk assessment performed in connection with those measures. The WTO has left room for explicit deference to the other international regimes in the SPS Annex and in the AB.²⁵⁷ The Protocol has avoided direct conflicts with the WTO by adopting treaty language that leaves room for consistent interpretations between the two regimes. However, a choice of forum or choice of law model was clearly not chosen. Sufficient consensus on how the two agreements should coexist simply could not be reached and, as a result, clear instructions could not be issued.

Indeed, the choice of accommodation models with respect to risk assessment and measures taken seems to reflect a desire or need to avoid negotiations that would force a resolution of the principle issue, that is, if a measure were necessary from an environmental perspective but not from a trade perspective.

252. Record of Negotiations, *supra* note 241, at 114.

253. *Id.* at 59.

254. See Cartagena Protocol, *supra* note 7, art. 18.1 (requiring that parties take measures to ensure LMOs "are handled, packaged and transported under conditions of safety, taking into consideration relevant international rules and standards").

255. *Id.* art. 10.6.

256. Record of Negotiations, *supra* note 241, at 36-37.

257. SPS Agreement, *supra* note 6, Annex A, ¶ 3.

The implicit deference model employed by the drafters may avoid the question in most instances. But it does nothing to resolve the underlying issue of the relationship between the goals and policies of the two regimes. A cynical view would suggest that the WTO's linkage by AB deference compounds the problem by providing an escape hatch for the trade regime to forgo any claim to regime supremacy if the DSB perceives it will be in the regime's interest to do so. A less cynical view might suggest that the two regimes exercise comity to delicately balance observance of a wide variety of international norms. As discussed above, institutions operate consistently with comity principles by espousing respect in some general way or through various specific mechanisms such as deference or preemption.²⁵⁸ We may desire some exercise of comity because it can lead to efficiencies and positive externalities, but it is not without its costs. These costs include lost efficiencies when accommodation is *ad hoc* or non-transparent, and more normative costs that result from forgoing important policy and value debates.

B. *Scientific Evidence*

The two regimes differ with respect to the amount of scientific evidence they require to impose trade measures.²⁵⁹ SPS Article 3 requires that Members base their measures on international standards or provide an independent scientific justification under SPS Article 5.²⁶⁰ Where measures conform to international standards, they are presumed consistent with the SPS and the GATT.²⁶¹ The international standards recognized by the SPS are those set by Codex Alimentarius Commission (for food safety), the International Office of Epizootics (for animal health), and the International Plant Protection Convention (plant health).²⁶² The SPS Committee may identify other relevant organizations for setting standards if the measure involves matters not covered by these organizations, so long as such an organization is open for membership to all Members.²⁶³ For example, the SPS Committee could choose to identify the Protocol as a relevant standard for the protection of biodiversity, although it has not yet done so.²⁶⁴

Under the SPS, even if measures are not based on and conforming to desig-

258. See *supra* notes 104-107 and accompanying text.

259. Valley, *supra* note 203, at 370 (describing the difference in the requirements for scientific evidence as the most significant conflict between the agreements).

260. SPS Agreement, *supra* note 6, art. 3.1.

261. *Id.* art. 3.2.

262. *Id.* Annex A, ¶ 3.

263. *Id.* (providing that "for matters not covered by the above organizations, appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all Members, as identified by the Committee" may be used).

264. *But see* SPS Agreement Training Module, www.wto.org/English/tratop_e/sps_e/sps_agreement_cbt_e/c8s1p1_e.htm ("If a dispute is brought to the WTO, the panel can only judge compliance with WTO Agreements. In doing so the Cartagena Protocol would presumably be taken into account as a relevant international treaty. The relationship of the protocol with the SPS Agreement and other international agreements is not clear.").

nated international standards, Members can still justify their measures if they result in a higher level of protection, if there is a scientific justification in accordance with Article 5 of the SPS,²⁶⁵ and so long as the measure “is based on scientific principles and is not maintained without sufficient scientific evidence.”²⁶⁶

The SPS allows for an exception to this requirement pursuant to the precautionary principle’s incarnation in Article 5.7:

In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.²⁶⁷

Thus, under the SPS, Members faced with insufficient scientific evidence may adopt SPS measures. However, those measures can only be provisional, and the Members must seek additional information and review the measure within a reasonable period of time.²⁶⁸

The Protocol’s scientific evidence requirement differs slightly from the SPS. Parties must base their measures on scientific evidence; however, under the Protocol, a “lack of scientific certainty due to insufficient relevant scientific information . . . taking also into account risks to human health, shall not prevent that Party from taking a decision . . . in order to avoid or minimize such potential adverse effects.”²⁶⁹ Commentators Stewart and Johanson have succinctly compared the two approaches in light of prior draft language in the Protocol:

Article 10.6 of the Protocol and Article 5.7 of the SPS Agreement permit countries to use the precautionary principle to make import decisions in cases in which scientific evidence is insufficient as to whether the product in question may pose a risk. In contrast, Article 8.7 of the draft Protocol would have permitted countries to prohibit imports of LMOs due to “lack of full scientific certainty or scientific consensus regarding the potential adverse effects” of LMOs. It appears that it would be more feasible for countries to obtain “sufficient” information concerning the possible risks of an LMO, as required by the final language in Article 10.6, as opposed to proving “full scientific certainty” per draft Article 8.7. . . . [U]nlike Article 5.7 of the SPS Agreement, Article 10.6 of the Protocol does not state that under its terms precautionary measures are provisional.²⁷⁰

While the standards seem facially consistent, tribunals may interpret them differently.²⁷¹ The Protocol’s standard emphasizes precaution more than the SPS,

265. SPS Agreement, *supra* note 6, art. 3.3.

266. *Id.* art. 2.2.

267. *Id.* art. 5.7.

268. *Id.*

269. Cartagena Protocol, *supra* note 7, art. 10.6.

270. Stewart & Johanson, *supra* note 161, at 24 (internal citations omitted).

271. As Kevin Kennedy discusses, “the WTO’s own ‘precautionary principle’ seems to be, ‘If in doubt, trade wins out.’ The burden of proof certainly favors the exporting WTO member and, consequently, trade.” Kennedy, *Resolving International Sanitary and Phytosanitary Disputes*, *supra* note 44, at 99. Kennedy adds that, in addition, “[r]eliance on the precautionary principle is mis-

and the Protocol does not require measures to be provisional.²⁷²

The precautionary principle's scope in the SPS and the Protocol arose in the recent dispute between the US and the EC concerning the EC's moratorium on genetically modified products.²⁷³ In its first written submission, the EC stated:

It is notable that after several years of negotiations the Contracting Parties . . . agreed by consensus that the precautionary principle should be expressly incorporated into the operative provisions of the Protocol dealing with the import procedures This gives the precautionary approach a significant role in the decision to restrict or prohibit import of LMOs in the face of scientific uncertainty. The provisions are not formulated as obligations but as rights to take precautionary action.²⁷⁴

The EC argued that the WTO agreements should be interpreted consistently with the Protocol.²⁷⁵ In negotiating the Protocol, the Miami group argued that the precautionary principle as represented in Article 10 could be deleted as superfluous and inconsistent with the precautionary principle stated in the Rio Declaration.²⁷⁶

The SPS and the Protocol's approaches to scientific evidence both illustrate linkage and accommodation. The SPS's incorporation of international standards links those regimes listed in Annex A of the SPS to it.²⁷⁷ The SPS not only accepts this standardized law as *per se* in conformance with WTO rules, but it encourages measures to be based on international standards.²⁷⁸ Arguably, such

placed. Although the precautionary principle is reflected in Articles 5.7 and 3.3 of the SPS agreement, it only can be invoked when scientific evidence is 'insufficient.'" *Id.* at 100. Howse & Mavroidis point out: "We are still in the dark, however, as to the interpretation of the term 'available pertinent information' as it appears in the first sentence of Article 5.7 of the SPS. This term is perhaps the cornerstone of the whole Article: Since it is by definition less authoritative than scientific evidence, we need to know how much less is necessary for the 'precautionary' principle to be invoked in the first place." Howse & Mavroidis, *supra* note 196, at 343.

272. Stewart & Johanson, *supra* note 161, at 33 (noting that the agreements place different emphasis on the precautionary principle).

273. Request for the Establishment of a Panel by the United States, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/23 (Aug. 8, 2003).

274. See First Written Submission of the EC, *supra* note 221, ¶ 107.

275. See *id.* ¶ 112. The EC also made the argument that it is plausible that the GMO Product and non-GMO Product are not like products. *Id.*

276. Record of Negotiations, *supra* note 241, at 38. See also *Draft U.S. Position on Risk Analysis Biased Toward Trade, Consumer Group Comments*, 17 INT'L TRADE REP. (BNA) 1041 (Jul. 6, 2000). See also Richard Douglas Ballhorn, *Balancing Biosafety, Trade and Economic Development Interests in the Implementation of the Cartagena Protocol: A Developed Country Perspective*, in *CARTAGENA PROTOCOL ON BIOSAFETY: FROM NEGOTIATION TO IMPLEMENTATION*, *supra* note 236, at 36 ("One of the basic objectives of Canada and other Miami Group members was to ensure that the trade-related provisions of the Protocol were consistent with WTO Agreements relevant to trade in LMOs, and that rights and obligations under WTO and other relevant international agreements were not changed as a result of the Protocol.").

277. See SPS Agreement, *supra* note 6, Annex A, ¶ 3.

278. Indeed, in analyzing the *Beef Hormones* decisions, Howse & Mavroidis argue that "it is clear that national SPS measures based on international standards can pass the test of WTO legality, even if they reflect only elements of the international standard." Howse & Mavroidis, *supra* note 196, at 332.

encouragement represents a desire to defer to a more expert institution. Still, only a limited number of standards are recognized. Under Annex A of the SPS, the SPS Committee recognizes the Codex Alimentarius Commission, the International Office of Epizootics, and the International Plant Protection Convention as international standards that, if complied with, provide a presumption of SPS legality.²⁷⁹ As indicated above, the SPS could designate the Protocol as an international standard falling within its choice of law rules.²⁸⁰ Alternatively, the AB could, as a means of linkage, defer to the decisions of another panel in making a determination as to whether the precautionary principle under Article 5.7 has been satisfied or whether an exception under Article XX is necessary.²⁸¹

Protocol negotiators accommodated the SPS in adopting the Protocol's position on the use of scientific evidence. Although unwilling to simply adopt the WTO's articulation of the precautionary approach, Protocol negotiators rejected a standard that would have allowed Members to act in a precautionary manner where there was less than full scientific certainty.²⁸² The negotiators accommodated the SPS by adopting an intermediate position. Arguably the Protocol's articulation of the precautionary principle emphasizes caution more than the WTO's articulation.²⁸³ Nevertheless, the close similarity of the language suggests that the Protocol implicitly defers to the SPS standard. Again, clearly there has not been accommodation in the form of choice of law or forum, or pre-emption, and I would argue that the response fails to rise to the level of explicit deference. Yet there is some notion of comity at work because the Protocol negotiators seemed to take account of the SPS standard even though in the SPS's absence, a more environmentally friendly standard could have been adopted.²⁸⁴ One could categorize this accommodation as comity in the general sense or comity applied through implicit deference,²⁸⁵ that is, parroting the language of another regime to defer to that regime's articulation of the relevant standard and therefore deferring to its norms.

Although accommodation may be desirable, we can see in this instance how the Protocol's accommodation of the SPS's precautionary approach limits our ability to make informed and thoughtful decisions about the trade and environment default rules that we as a society desire. By adopting a standard that allows countries to implement environmental measures in the face of insufficient scientific evidence rather than in the absence of "full scientific certainty,"²⁸⁶ the Protocol limits the Members' measure-taking authority. In doing so, it by defi-

279. SPS Agreement, *supra* note 6, Annex A, ¶ 3.

280. *Id.* Annex A, ¶ 3(d).

281. *See, e.g.*, Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 90, ¶ 132 (finding that sea turtles are an exhaustible natural resource by reference to environmental agreements).

282. *See supra* note 270 and accompanying text.

283. *Compare* SPS Agreement, *supra* note 6, art. 5.7, with Cartagena Protocol, *supra* note 7, art. 10.6.

284. *See supra* note 108 and accompanying text.

285. *See, e.g.*, *supra* note 155.

286. *See supra* note 270 and accompanying text.

nition reduces the likelihood that a precautionary measure will violate the SPS.

Initially, the absence of inter-international regime conflict seems desirable. However, the difference in emphasis between the two precautionary principles has meaning. The different principles reflect different default positions. In the trade regime, parties' preferences establish that when in doubt trade wins out,²⁸⁷ likewise, in the Protocol, parties believe that when in doubt biological diversity wins out. Accommodation may mask this slight normative difference in approaches. Although one may argue that accommodation has no consequence, because in the rare situation where this slight difference in standards or approaches would change the outcome of a dispute, the difference in the normative positions will come to the forefront and receive a full airing such that we as a society can make a choice as to the better position.

I believe that the foregoing argument fails to account for the value and impact of decisions made every day that do not lead to conflict. Parties, including states, businesses and individuals, act, plan and react based on their understanding of default rules. These plans or actions may or may not lead to conflict. But these actions do lead to norms.²⁸⁸

For example, if traffic tickets are never issued for driving below 65 mph, despite a posted speed limit of 55 mph, then drivers will behave accordingly and a norm of driving 55-65 mph will develop. Applying this concept to a trade and environmental hypothetical, suppose that Agric Co. in Country A manufactures genetically modified seeds. The seeds are engineered to be pest-resistant. Agric Co. sells its seeds throughout the world. The scientific evidence reveals that although the seeds are resistant to pests, long-term use of the seeds might possibly result in the development of pesticide-resistant pests. The science on whether such pesticide-resistant pests would evolve is less than clear.

Under both the Protocol and the SPS, Country B would be able to ban the importation of Agric Co.'s seeds to protect its environment only if there was insufficient scientific evidence, though under the SPS, the ban could only be provisional. But it is unclear what the phrase "insufficient scientific evidence" means. A trade body may interpret the standard in a less precautionary manner than would an environmental body. A trade tribunal would start from the premise that in general, there should be free movement of goods, and therefore a party seeking to impede the free movement of goods bears the burden of showing that it is entitled to do so.²⁸⁹ Since the WTO has a means of resolving any

287. Kennedy, *Resolving International Sanitary and Phytosanitary Disputes*, *supra* note 44, at 99.

288. See Koh, *supra* note 25, at 642-54 (describing norm internalization); Martin & Simmons, *supra* note 40, at 730 (noting that institutions can change behaviors by substituting for domestic practices); Robert O. Keohane, *When Does International Law Come Home?*, 35 HOUS. L. REV. 699, 709-13 (1998) (commenting on Professor Koh's theory of norm internalization).

289. See Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products*, ¶ 98, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) ("The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the *SPS Agreement* on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie case* is made, the burden of proof

potential disputes that arise concerning the meaning of “insufficient scientific evidence,” it would not be surprising if a trade-friendly interpretation of “insufficient scientific evidence” arises.

Thus, if the scientific community was reasonably certain that Agric Co.’s seeds were probably not going to lead to the evolution of pesticide-resistant pests, then Country B would not be able to ban the importation of the seeds without risking a WTO complaint. This outcome would be fine as long as Country B did not feel particularly strongly about the remote possibility the pesticide-resistant pests would evolve.

As time goes by, Agric Co. will export its seeds to more countries. Farmers will become dependent on them. Even farmers who might have preferred not to use Agric Co.’s seeds initially may have no other choice but to use them if they cannot compete without using them. Once they start using them, they will become invested in Agric Co.’s (and Country A’s) ability to keep sending the seeds. Investors will invest in Agric Co. knowing that the movement of Agric Co.’s seeds is virtually assured by WTO rules. States, farmers, and businesses will act and rely upon a trade-friendly interpretation of the phrase “insufficient scientific evidence.”²⁹⁰

Suppose that after a period of time, Agric Co. seeks to sell the seeds into Country C. Country C is heavily dependent on agriculture and in the past has had infestation problems. Country C cannot take the chance of pesticide-resistant pests evolving and would like to see a more environmentally friendly interpretation of “insufficient scientific evidence,” so that it may be allowed to adopt its measure out of an abundance of caution. It may try to press its understanding of “insufficient scientific evidence” in the environmental forum, but it may find that over time, the meaning of “insufficient scientific evidence” has been so consistently interpreted in a trade-friendly manner that the opportunity to argue for another interpretation has passed. Country C might have preferred an understanding of “insufficient scientific evidence” that was more akin to “lack of full scientific uncertainty,” but by mimicking the trade-like language, the negotiators brushed over the important normative difference between the two standards, perhaps eliminating the possibility of later arguing for the environmentally friendly standard.

The foregoing example illustrates that the choice of accommodation model matters. Both the preemption and choice of law or forum models would have forced the normative confrontation. These models are difficult to use because they require negotiation, but the process of negotiation at least allows for the venting of important policies. Explicit deference takes advantage of other regimes’ expertise. Its explicit nature also necessarily addresses the normative differences between regimes. However, if explicit deference operates in a dis-

moves to the defending party, which must in turn counter or refute the claimed inconsistency.”).

290. For an argument that parties shift their preferences over time, see generally Claire R. Kelly, *The Value Vacuum, Self-Enforcing Regimes and the Dilution of the Normative Feedback Loop*, 22 MICH. J. INT’L L. 673, 710-14 (2001).

pute resolution setting, it risks being applied in an arbitrary or non-transparent manner. Comity as an accommodation model is troublesome because it is opaque and can be applied arbitrarily as well. In addition, it may not resolve the normative differences. It does not, however, hide those differences to the degree that implicit deference does. Implicit deference, as illustrated above, is a particularly troubling accommodation model because it masks those normative differences and allows norms to evolve in a skewed fashion.

C. *Underlying Objectives*

International organizations have conflicting goals that affect other actors and organizations. Most commentators have constrained their analysis to whether the SPS and the Protocol regimes' specific rules necessarily conflict.²⁹¹ These commentators sensibly start with this analysis because it raises the most pressing issues first. However, as discussed in Part IV(A) and (B), the importance of raising these issues does not diminish the need to consider the values generated by each regime. Reinforcement of regime values through regime rules (even when not directly at the expense of other regime rules) affects the propagation of other regimes' values.²⁹² Thus, measuring the effects of accommodation necessarily involves an assessment of the different values of each regime. However, it is also possible to assess whether regimes attempt to link or accommodate objectives more generally.

Initially, envisioning linkage and accommodation between the two regimes' objectives may be difficult because the WTO generally promotes the values of non-discrimination, while the Protocol promotes the protection of biodiversity.²⁹³ While the WTO in its preamble refers to sustainable development,²⁹⁴ the Protocol refers to preventing or reducing "potential adverse effects on biological diversity, taking also into account risks to human health."²⁹⁵

291. See, e.g., Smitherman, *supra* note 220.

292. Kelly, *The Value Vacuum*, *supra* note 290, at 710-14.

293. See Cartagena Protocol, *supra* note 7, art. 1 (noting that "the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements").

294. See WTO Agreement, *supra* note 1, Preamble:

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

Id.

295. Cartagena Protocol, *supra* note 7, art. 1. Commentators have noted that the Protocol was originally envisioned as targeting harm to the environment. See Stewart & Johanson, *supra* note 161, at 8 (commenting on the Convention on Biological Diversity).

Where the SPS protects Members adopting or enforcing measures to protect human, animal, or plant life or health, subject to the caveat that they not constitute arbitrary or unjustifiable discrimination,²⁹⁶ the Protocol ensures an adequate level of protection from modern biotechnology.²⁹⁷ The WTO agreements concern themselves with the negative effects on trade,²⁹⁸ while the Protocol sets forth “affirmative obligations to regulate the transboundary movement of [LMOs].”²⁹⁹ Even where a Member to the Protocol trades with a non-Member to the Protocol, the Member must do so consistently “with the objective of this Protocol,” while encouraging non-Parties to adhere to the Protocol.³⁰⁰ Thus, non-Parties that export LMOs to parties would have to comply with the Protocol.³⁰¹

Despite the potential conflicts in objectives between the WTO and the Protocol, we can see traces of linkage and accommodation with respect to each regime’s objectives. Statements by the Committee on Trade and the Environment suggest that in disputes concerning the use of trade measures in connection with an environmental agreement to which both WTO Members are signatories, the resolution in the first instance should be in the environmental forum.³⁰² Also, the WTO Preamble acknowledges environmental concerns recognizing the need for sustainable development.³⁰³ It states:

[T]hat [the Member States’] relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with

296. SPS Agreement, *supra* note 6, Preamble.

297. Cartagena Protocol, *supra* note 7, art. 2. See also First Written Submission of the EC, *supra* note 221, ¶ 97. Under the Protocol, parties are allowed to enact stricter measures than those required by the Protocol. See *id.* ¶ 99.

298. See Kennedy, *Resolving International Sanitary and Phytosanitary Disputes*, *supra* note 44, at 99 (“the WTO is first and foremost the premier international organization for the enforcement of rules designed to promote open trade, and only incidentally an institution that enforces SPS standards”). See also Vallely, *supra* note 203, at 372.

299. Rivera-Torres, *supra* note 43, at 264, 302.

300. Cartagena Protocol, *supra* note 7, art. 24. See generally Gaston & Abate, *supra* note 158, at 122 (explaining that this possible interpretation resulted in certain states demanding that a savings clause (a clause that allows the pre-existing WTO Agreement to take precedent in the case of a conflict) be included in the treaty). Thus, the Protocol includes in its Preamble the following: “[T]his Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements.” Then, in the very following line, it adds: “Understanding that the above recital is not intended to subordinate this Protocol to other international agreements.” Cartagena Protocol, *supra* note 7, Preamble.

301. Dennis Stephens, *The Biosafety Protocol: Documentation and International Trade*, in CARTAGENA PROTOCOL ON BIOSAFETY: FROM NEGOTIATION TO IMPLEMENTATION, *supra* note 236, at 31. But see Gaston & Abate, *supra* note 158, at 122 (noting the Protocol’s vague language with respect to non-parties).

302. Committee on Trade and Environment, *Report (1996) of the Committee on Trade and Environment*, WT/CTE/1 (Nov. 12, 1996).

303. The WTO Agreement, *supra* note 1, Preamble.

their respective needs and concerns at different levels of economic development.³⁰⁴

The Ministerial Declaration of Trade and the Environment echoed the sentiments contained in the Preamble: “[T]here should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other.”³⁰⁵ Further, the Doha Declaration sought, *inter alia*, to resolve “the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements.”³⁰⁶ These statements “link” the WTO to environmental values but lack concreteness. Indeed, one could argue they obfuscate the relationship between the agreements.

As discussed above, the Preamble to the Protocol also attempted to accommodate WTO objectives and rules, noting that “this Protocol shall not be interpreted as implying a change in the rights and obligations of a party under any existing international agreement,”³⁰⁷ but then adding that “the above recital is not intended to subordinate this Protocol to other international agreements.”³⁰⁸ The effect of this language is unclear.³⁰⁹ It does not appear to be a savings clause such that it would clearly except it from the later-in-time rule of *lex posterior*.³¹⁰ If it were not for the contradictory phrases in the preamble, then under a preemption model, Article 30 of the Vienna Convention would indicate which treaty should prevail.³¹¹ As explained by Stewart and Johanson, under the Vienna Convention, where two parties were signatories to the WTO and the Protocol, then the Protocol’s terms would apply, but where one party signed only one of the treaties, that treaty would take precedence.³¹² Although the preamble indicates that the Protocol is not meant to displace existing rights, it immediately qualifies this statement, indicating that the Protocol will not be deemed subservient to other treaties. This language would seem to preclude a clear preemption argument.

Understandably, there was significant discussion among the negotiating parties over the scope of the Protocol’s application:

The African group also referred to social and economic welfare. On the other hand, Switzerland proposed that the Protocol should only deal with safety issues

304. *Id.*

305. World Trade Organization, Ministerial Decision on Trade and Environment, MTN/TNC/45 (MIN) (Apr. 14, 1994), 33 I.L.M. 1267. The Uruguay Round also established the Committee on Trade and Environment. Decision on Trade and Environment, *supra* note 118, Preamble (outlining the scope of the Committee on Trade and the Environment and highlighting its purpose of “making international trade and environmental policies mutually supportive”).

306. Doha Declaration, *supra* note 118, ¶ 31(i).

307. Cartagena Protocol, *supra* note 7, Preamble.

308. *Id.*

309. Stewart & Johanson, *supra* note 161, at 44 (noting that the international community appears to place less weight upon preamble language”).

310. *See supra* note 130.

311. Vienna Convention, *supra* note 130, art. 30.

312. *See Stewart & Johanson, supra* note 161, at 36-37.

complementary to existing international instruments, in particular the WTO, and that socio-economic implications of biotechnology be addressed in other frameworks.³¹³

The negotiators were aware of existing international agreements and the requirement that the Protocol fit within the existing framework.³¹⁴ They failed to adopt a preemption model, or even a choice of law model, but instead accommodated the WTO by reference to existing rights and obligations, something that could be likened to comity.

A more concrete approach would mean amending specific agreements to add a conflict rule or choice of law provision. Kevin Kennedy has already suggested that the SPS agreement itself should be amended to resolve potential conflicts with multilateral environmental agreements.³¹⁵ Such a rule would be difficult to negotiate precisely because it would require parties to face the normative differences the regimes represent.³¹⁶ Still, facing these differences might be preferable to obfuscating them or addressing them in an *ad hoc* or non-transparent manner in dispute resolution.

Although the negotiators rejected accommodation through preemption or a conflicts rule, all the circumstances suggest that the Protocol should at least be considered when evaluating WTO disputes and that the WTO should likewise acknowledge the existence of the Protocol in its disputes. Article 31.3(a) of the Vienna Convention further provides that "there shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."³¹⁷ The Protocol failed to provide for conflict rules or to allow for a preemption argument and instead seems to have settled for accommodation through a general sense of comity. Of course, comity may lead to other forms of accommodation at a later time, particularly explicit deference through conflict resolution. The general exercise of comity in this sense seems less troubling than implicit deference, although less helpful than a clear rule via the choice of law/forum or preemption model. However, it may lead to comity through accommodation, which may undermine transparency and predictability.

313. Record of Negotiations, *supra* note 241, at 14.

314. Antonietta Gutiérrez-Rosati, *Integrating Scientific Information in the Future Implementation of the Protocol*, in CARTAGENA PROTOCOL ON BIOSAFETY: FROM NEGOTIATION TO IMPLEMENTATION, *supra* note 236, at 23.

315. Kennedy, *Resolving International Sanitary and Phytosanitary Disputes*, *supra* note 44, at 103 (noting that NAFTA already has such a provision to accommodate conflicts between it and the CITES, the Basel Convention, and the Montreal Protocol). See also Kennedy, *Why Multilateralism Matters*, *supra* note 38, at 65.

316. Perez, *supra* note 124, at 361-62 (noting that negotiation of conflicts may be problematic).

317. Vienna Convention, *supra* note 130, art. 31.3(a).

VI.
CONCLUSION

The majority of commentators posit, and I would agree, that there are reasonable interpretations of the Protocol and the WTO Agreements that allow the two regimes to operate without conflict.³¹⁸ I would add that this is no accident. As the WTO appropriately takes steps towards measured linkage, other regimes respond. Agreements such as the Cartagena Protocol arise and operate in the shadow of the WTO.³¹⁹ One telling example of regime response is that in negotiating Article 24 of the Protocol (dealing with relationships with Non-Parties), the Record of Negotiations indicates that “[o]n trade with non-Parties, options included permitting such trade if adequate measures to ensure safe movement were taken; limitation of restrictions to those no more stringent than under the WTO; permission with flexibility; and submission of non-Parties to arbitration mechanisms provided under the Protocol.”³²⁰ All but the second of the possibilities considered above have some arguable nexus to the Protocol and its objectives. The second possibility, limitation of restrictions to those no more stringent than under the WTO, measures behavior solely by reference to the WTO. That is accommodation.

Identifying how accommodation forms and functions can help us track the WTO’s causal effect on other regimes, including non-trade regimes and regional trade regimes. Modeling accommodation can also help track the relationship between international agreements.

Finally, we must identify and label accommodation in order to evaluate it. Although accommodation as a response to WTO dominance and linkage may initially seem desirable as a means of coordinating regime benefits, it may also mask fundamental differences and goals among the regimes that require more direct confrontation and resolution. Accommodation may be seen as a benign tool in the larger strategy of regime shifting where developing nations or NGOs can generate counter-regime norms through the creation of soft law.³²¹ As dis-

318. Howse & Mavroidis, *supra* note 196, at 317 (demonstrating that “if WTO law is properly interpreted, GMO-related measures, where non-discriminatory against other WTO Members, can pass the test of consistency with even the most stringent of relevant WTO rules”); Charnovitz, *supra* note 203, at 300 (discussing how the WTO and Protocol may be interpreted in a manner to avoid conflict); Stewart & Johanson, *supra* note 161, at 37-38 (noting that it is not clear that the different applications of the precautionary principle in the SPS agreement and the Protocol are incompatible). *But see* Thomas J. Schoenbaum, *International Trade in Living Modified Organisms: The New Regimes*, 49 INT’L & COMP. L.Q. 856, 862 (2000) (noting the conflict between the Protocol and the SPS with respect to the precautionary principle).

319. *See* Mayr, *supra* note 236, at 12 (noting “factors – such as the legal dispute brought to the WTO by the US against the European Union for its moratorium on GMOs; the new biosafety legislation in Europe; the imposition in bi-lateral trade negotiations on developing countries that have limited scientific capacity to establish possible risks, to accept GM products; and the growing public awareness about the issue – [that] make the Protocol one of the most important legal instruments of our times in the protection of environment and human health”).

320. Record of Negotiations, *supra* note 241, at 75.

321. *See* Helfer, *supra* note 8, at 30 (noting with respect to the Convention on Biological Diversity (CBD) that “[d]eveloping countries have used the CBD’s soft lawmaking activities to re-

cussed above, it may be that accommodation is part of a new dynamic that involves the creation of counter-regime norms,³²² experimental laboratories for policy initiatives,³²³ or integration opportunities where new norms can be developed in one regime and then borrowed in others.³²⁴ Alternatively, accommodation may be a means to thwart effective regime shifting strategies, such as those explored by Professor Helfer, that are meant to foster development of new policy initiatives and integrationist motives. In effect, accommodation may soften what is already soft law. Softening the already soft law containing counter-regime norms dilutes the effectiveness of those norms and neutralizes efforts to explore and discuss the real normative conflicts.

dress these imbalances and to reshape intellectual property protection rules within the biodiversity regime to reflect their interests more accurately”).

322. *Id.* at 58.

323. *Id.* at 55-56.

324. *Id.* at 61.