

**Globalization:**  
**Panacea for the World**  
**Or**  
**Conquistador of International Law and Statehood?**

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# Globalization: World's Panacea Or Conquistador of International Law and Statehood?

## Table of Contents

<b>I.</b>	<b>Introduction.....</b>	<b>2</b>
<b>II.</b>	<b>Globalization .....</b>	<b>6</b>
	A. <i>What is Globalization.....</i>	<i>6</i>
	B. <i>History of Globalization.....</i>	<i>9</i>
	C. <i>Advantages and Disadvantages of Globalization.....</i>	<i>11</i>
	1. Advantages of Globalization .....	12
	2. Disadvantages of Globalization.....	20
<b>III.</b>	<b>Free Trade Agreements .....</b>	<b>42</b>
	A. <i>Definition and Examples .....</i>	<i>42</i>
	B. <i>Free Trade Agreements Pave the Way for Globalization.....</i>	<i>45</i>
	C. <i>The World Trade Organization.....</i>	<i>47</i>
	D. <i>Illustrative Cases.....</i>	<i>51</i>
	1. United States Clean Air Act Challenged .....	51
	2. Gerber versus Guatemala.....	51
	3. EU Attempted to Ban Hormoned Beef.....	52
	4. French Asbestos Ban Challenged by Canada .....	53
<b>IV.</b>	<b>International Law.....</b>	<b>54</b>
	A. <i>History of International Law .....</i>	<i>55</i>
	B. <i>Current state of International Law.....</i>	<i>59</i>
<b>V.</b>	<b>International Law in Conflict with Globalization.....</b>	<b>61</b>
<b>VI.</b>	<b>Solutions.....</b>	<b>66</b>
<b>VII.</b>	<b>Conclusion.....</b>	<b>68</b>

Corporations have been enthroned ... An era of corruption in high places will follow and the money power will endeavor to prolong its reign by working on the prejudices of the people ... until wealth is aggregated in a few hands ... and the Republic is destroyed.

Abraham Lincoln  
Among his last words, 1865<sup>1</sup>

## I. Introduction

Globalization is a complex, multilayer process that affects the economic, political and social structure of the world's nations. To illustrate these complex effects, one can examine the impact of globalization on a small tropical island in Southeast Asia. This island provides a natural home for wild animals, insects, plants, trees, and several thousand human beings, all living in balance with the local ecosystem.<sup>2</sup> Rich with tradition and history, the island's culture permeates every aspect of life. A single week rarely passes without islanders celebrating a ritual, hosting a community event, or sharing in seasonal festivities. Families have created trades, cultivation techniques, and specialized services to make a living. The families are interconnected with each other through their businesses, allowing most people to either work for themselves, a relative, or another community member. For example, one family sells bananas at the local market; another family bakes banana bread with the bananas purchased at market; another runs a small store in the town selling the banana bread. Every family succeeds in their enterprise, supports the other families' businesses, and participates in the economy of the island.

Life on the island has not changed much in the last several hundred years. However, for better or for worse, significant change is now occurring. Last year a McDonald's and two 7-11

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<sup>1</sup> DAVID C. KORTEN, WHEN CORPORATIONS RULE THE WORLD 64 (2d ed. 2001) (quoting HARVEY WASSERMAN, AMERICA BORN & REBORN 84 (1983)).

<sup>2</sup> This example draws facts from several islands, including Ko Samui (Thailand), Isla Mujeres (Caribbean Mexico), and San Andres (Columbia).

stores opened on the island. As promised, this provided new products, cheaper prices, and increased jobs. Also, the city leaders accepted a plan of reorganization of the south end of the island and have approved the building of both a Wal-Mart and movie theater with two screens. Two of the six hotels in the island's capital were bought by Sheraton, bulldozed, and are now being rebuilt into a modern multi-story hotel. Most recently, a large, foreign corporation has offered to pay ten million dollars for the government officials to accept and dispose of several hundred tons of waste product on the uninhabited side of the island.

Initially, the residents of the island were opposed to these changes, prompting the corporations to launch an extensive marketing campaign. The corporations engaged in local politics, offered incentives, lobbied the government, and promoted the idea that they were promising a better future for the people of the island. The campaign was successful, winning the people and the politicians. Businesses opened with slick logos, air conditioning, bright lighting, new products, fresh supplies, and countless goodies never before available on the island. They were an instant success.

These changes on the island will likely produce results not easily foreseeable. Proponents and opponents alike point to numerous outcomes, each claiming either benefits or pitfalls.<sup>3</sup> For example, proponents claim the benefits of new jobs, access to modern products, increased competition, cheaper prices for necessary goods, healthy economic growth, and even world peace through the building of strong trade relations. Opponents suggest such ill results as obliteration of culture, loss of unique regional products, transfer of wealth away from the island to distant non-native corporate owners, and loss of unique skills and business practices that were passed along for generations.

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<sup>3</sup> See *infra* Part II.D (discussing numerous advantages and disadvantages of globalization).

The movement of these international corporations to the island demonstrates one facet of globalization. Stated briefly and over-simplified, globalization is the process of elimination of trade barriers, the spread of products and services across national borders, and the emergence of truly global corporations. Globalization also encompasses the resulting consequences of these trends. The roots of modern globalization extend far back in history, and include such causes as capitalism, the industrial revolution, technology, and trade itself.<sup>4</sup> For example, Spain brought its culture and language to many new lands, Britain influenced nearly every region on the globe, and trade ships from many differing nations sailed the world.

Today, international law—in the form of free trade agreements—enables the globalization process to occur faster and more efficiently than ever before.<sup>5</sup> Generally, trade agreements allow goods and services—especially those originating within the signatory countries—to cross borders with reduced taxes, tariffs, burdens, and restrictions. Most countries of the world are currently members of at least one such agreement, and are often parties to several simultaneous trade agreements. Some well-known trade agreements are the North American Free Trade Agreement (NAFTA), the General Agreement on Tariffs and Trade (GATT), the Treaty of Asuncion (MERCOSUR), the Cartagena Agreement, the African Growth and Opportunity Act, and the Asia-Pacific Economic Cooperation (APEC). Each of these agreements encourages and enables increased trade by easing border restrictions, facilitating cross border movement of goods and services, and reducing taxes or tariffs. In addition, new organizations and political structures are evolving to regulate the trade agreements. The World Trade Organization (WTO) and the European Union (EU) are such structures.

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<sup>4</sup> Although globalization is a new “buzz word,” suddenly very popular, there is nothing new about the globalization process. *See generally infra* Part II.B.

<sup>5</sup> *See infra* Part III where free trade agreements are fully discussed.

With the proliferation of free trade proponents, liberal trade agreements and increasing globalization, debates have sparked between opponents and proponents about the benefits and detriments of free trade and globalization. Debate has centered on the effect of globalization on national sovereignty as well as the effect of globalization on individuals. The effect of globalization and liberalized trade on international law, however, has been largely ignored.

Continuing with our island example, suppose after several years pass, the village and local authorities believe the changes to their island are detrimental. They wish to stop any new foreign corporations or businesses from entering, would like to shut down the already existing corporate entities, would like to offer government subsidies to local craftsmen and farmers, and seek to halt the importation of several products such as genetically modified seeds (sold to farmers and also brought in by foreign agribusiness) and artificially hormoned beef (available at the new McDonald's). What recourse do they have? Are there localized remedies? Regional remedies? Can the government of the country legislate to achieve these desired results? Is there a source of international law that provides answers? Most provocatively, does this recent evolution of globalized commerce on the island supercede or nullify pre-existing recourse to international or national legal solutions?

This article investigates and attempts to answer the questions posed above. Possible effects of globalization on international law and on the sovereignty of nations are discussed. Because free trade agreements and the World Trade Organization greatly accelerate globalization, this paper will focus on recent free trade agreements and the cases that such agreements have produced. In section II, globalization will be defined and thoroughly discussed, including an in-depth look at both the pros and cons of an increasingly globalized world. In section III, free trade agreements are examined. The relationship between the agreements and

globalization is especially scrutinized. Several cases arising from free trade agreements are analyzed in order to illustrate the current world trends, and to show the inter-relatedness between globalization, free trade, and international law. In section IV, international law is discussed, with a special focus on its current status.

Section V is the heart of this thesis, asserting that globalization—fuelled by free trade agreements—is in direct conflict with traditional international law. Globalization has been embraced as a panacea for economic recovery and growth. The strength of recent free trade agreements supporting globalization surpasses the strength of past international agreements, thus fundamentally changing the chemistry of international law. Because free trade agreements are themselves an inherent part of international law (they are treaties, conventions and international agreements), the new, rapid explosion of free trade deeply threatens the long standing body and strength of international law. Section VI proposes solutions, including slowing down the process of globalization and utilizing the already-existing language within trade agreements to enforce cultural and environmental concerns. Finally, section VII provides a conclusion to the thesis.

## **II. Globalization**

### ***A. What is Globalization***

Globalization has been a popular topic in the last decade and is rapidly becoming a common household word. Terms and coined expressions for globalization vary and include neoliberal capitalism, universalism, McDonaldization, modernization, internationalism, diffusionism, Coca-colonization, cultural imperialism, westernization, Americanization, and

cultural or consumerist synchronization.<sup>6</sup> At the most basic level, globalization involves increased movement of products, services, currency, ideologies, religions, and culture between countries and facilitates the sharing of technology and information among people. Globalization “refers to all those processes by which the peoples of the world are incorporated into a single world society, global society.”<sup>7</sup> The substantial capital expenditure needed to produce and transport products and ideologies across borders practically guarantees that only corporations control globalization. David Korten refers to globalization as an integration of “the world’s national economies into a single, borderless global economy in which the world’s mega-corporations are free to move goods and money anywhere in the world that affords an opportunity for profit, without governmental interference.”<sup>8</sup> The concept of globalization changes the social, economic and political landscape of the modern world. It represents a variety of virtues and benefits to world trade as well as controversial issues where such increased trade conflicts with other values.<sup>9</sup>

Thomas Friedman defines globalization as “the inexorable integration of markets, transportation systems, and communication systems to a degree never witnessed before—in a way that is enabling corporations, countries, and individuals to reach around the world farther, faster, deeper, and cheaper than ever before.”<sup>10</sup> Globalization’s one overarching feature, according to Friedman, is integration. Globalization integrates nations, which is in sharp contrast

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<sup>6</sup> JAN NEDERVEEN PIETERSE, *GLOBALIZATION & CULTURE* 59 (2004) (quoting MARTIN ALBROW, *GLOBALIZATION, KNOWLEDGE AND SOCIETY*, at *introduction* (1990)).

<sup>7</sup> *See id.* at 49.

<sup>8</sup> KORTEN, *supra* note 1, at 4.

<sup>9</sup> *See infra* Part II.D (discussing numerous advantages and disadvantages of globalization).

<sup>10</sup> THOMAS L. FRIEDMAN, *LONGITUDES AND ATTITUDES, THE WORLD IN THE AGE OF TERRORISM* 3 (Anchor Books 2003) (2002).

to the divisiveness that marked the cold war era.<sup>11</sup> He asserts that the past was characterized by isolation, walls, and the drama of nation-states, whereas the current globalized system is characterized by the World Wide Web and the power of individuals to influence both markets and nation-states more than at any other time in history.<sup>12</sup> “[Globalization] involves a paradigm shift from the era of the nation state and international politics to politics of planetary scope.”<sup>13</sup> In its most extreme form, globalization refers to total global connectedness, the creation of an entirely borderless world, and the end of the nation state.<sup>14</sup>

The common conception of globalization involves world-wide corporate expansion, currently led by such large entities as Wal-Mart, Altria (Phillip Morris), Burger King, General Motors, AT&T, Boeing, GE, IBM, AOL Time Warner, and other commonly known corporate entities. However, globalization frequently refers to other processes. Our shrinking world and reduced borders produce numerous results, all of which can be properly viewed under the ambit of globalization. One of the most important areas affected by globalization is culture. Jan Nederveen Pieterse states globalization “refers to a much wider and deeper human rendezvous.”<sup>15</sup> He defines globalization “like a prism in which major disputes over the collective human condition are now refracted: questions of capitalism, inequality, power, development, ecology, culture, gender, identity, population, all come back in a landscape where ‘globalization did it.’”<sup>16</sup>

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<sup>11</sup> *See id.*

<sup>12</sup> *See id.*

<sup>13</sup> *Id.*

<sup>14</sup> *See* KENICHI OHMAE, *THE BORDERLESS WORLD: POWER AND STRATEGY IN THE GLOBAL MARKET-PLACE* (1992); *See also*, KENICHI OHMAE, *THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES* (1995).

<sup>15</sup> PIETERSE, *supra* note 6, at 2.

<sup>16</sup> *Id.* at 7.

## ***B. History of Globalization***

Independent nation states are as diverse as the planet itself. Cultures, economies, lifestyles, religions, ideals, agriculture, and products vary in every corner of the globe. The earliest recounted histories demonstrate that human beings capitalized on these differences by trading with other regions and peoples. Trade ships from Venice carried spices, silk and other products from as far away as India and China. Farmers in Spain learned techniques to sow corn seeds from lands as distant as the Mayans. This exchange of culture and goods, trading items from one nation to another, is the historical essence of globalization.

Globalization began with ancient population migration across and between continents.<sup>17</sup> Later came cross-cultural long distance trade; the spreading of world religions; the diffusion of technologies such as agricultural techniques, military advancement, sciences, health care, and even cultural exchanges. Continuing into modern times, globalization takes the form of mass media, including worldwide advertising and access to instant information; multinational corporations, banks, and advanced technologies such as the internet.<sup>18</sup> Although before the 1990's this phenomenon clearly existed, the term "globalization" became popular only recently.

Historically, globalization occurred with international traders, territorial imperialism, and colonization. Empires such as the Roman Empire, Britain, France, Spain, Portugal and Holland stretched their borders, carrying their products, culture, religion, and laws to new regions.

Robert Clark traces globalization to our very roots of humanity.<sup>19</sup> "The essence of the human condition is a fundamental connectedness with parts of the universe across time and space."<sup>20</sup>

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<sup>17</sup> See PIETERSE, *supra* note 6, at 24.

<sup>18</sup> See *generally* PIETERSE, *supra* note 6.

<sup>19</sup> See ROBERT P. CLARK, *THE GLOBAL IMPERATIVE: AN INTERPRETIVE HISTORY OF THE SPREAD OF HUMANKIND 2* (1997).

<sup>20</sup> *Id.*

Modern globalization can be perceived as a natural extension of four historical developments: colonization, the industrial revolution, technology, and capitalism. The first historical root, colonization, occurred for thousands of years. A sovereign nation would declare new lands for itself and subjugate any pre-existing peoples to its rule. The colonizing nation would bring its own culture, tradition, products, and religion, and impose these onto the new territories. The second historical root, the industrial revolution, allowed massive output of products, with less human labor, and thus opened the door for single companies to dominate entire markets. The third root, the modern technology explosion, has tremendously increased communication abilities, facilitated sales of products to people across the globe, and has allowed the rapid movement of both goods and people to anywhere on the planet. The fourth and perhaps most fundamental historical root was the boom of capitalism, with the mantra of “profit”—make money no matter the external cost. The collapse of many communist nations, especially the Russian block, has thrust capitalism to imperial status, with near world-wide emulation. All these historical roots have paved the way for modern globalization. Glimpses of today’s trends can be seen by viewing history. However, profound differences exist between these globalization trends in history and modern day examples. Today, the process is becoming a finely tuned mega machine, able to move huge volumes of products across the globe in a single day. World trade has expanded to include new types of trade such as technology, intellectual property, currencies, services, and products as diverse as whole houses to tiny computer chips with thousands of pages of information encoded in the size of a thumbnail. As one example, between 1997 and 2003, electronic fund transfers soared to nearly \$400 trillion, “more than the combined economic

product of all the countries and territories of the entire world.”<sup>21</sup> Even life itself is traded in the form of patented bacteria, cross life forms, and DNA models.

Though globalization has occurred throughout history, there can be no doubt of its tremendous expansion during the last fifty years. A veritable explosion of inventions, science, technology, energy, travel capabilities, computers, and weaponry has flung itself to all corners of the planet. Global government has also come into play. The United Nations, World Trade Organization, World Bank, International Monetary Fund, and the International Court of Justice are but a few entities that are new to the world.<sup>22</sup>

Viewed historically, globalization may spring from an innate human desire to be connected, to integrate, perhaps to live in peace with other peoples, and to experience the great diversity of the entire planet. In this sense, globalization is part of a great trend driven by the human spirit. Current globalization issues are merely a piece in this larger puzzle; the latest stage to a very old process.

### ***C. Advantages and Disadvantages of Globalization***

In his book, *One World, Ready or Not*,<sup>23</sup> William Greider asserts that globalization is essentially an economic revolution, which “liberates masses of people and at the same time projects new aspects of tyranny. Old worlds are destroyed and new ones emerge.”<sup>24</sup> The advantages motivate and drive us forward into a globalized world with increased liberalized

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<sup>21</sup> Joseph N. Pelton, *The Rise of Telecities, Decentralizing the Global Society*, THE FUTURIST, Jan.-Feb., 2004, at 28, 31.

<sup>22</sup> See discussion *infra* Part III for an in-depth look at the United Nations and the World Trade Organization.

<sup>23</sup> WILLIAM GREIDER, *ONE WORLD, READY OR NOT, THE MANIC LOGIC OF GLOBAL CAPITALISM* (1998).

<sup>24</sup> *Id.* at 11.

trading; the disadvantages should slow us down, allowing us to reflect and consider the best course for humanity and the planet. In order to assess the role of globalization in the modern world and its effect on international law, the advantages and disadvantages of globalization must first be examined. Because of the complexity of globalization's impact on the economic, political and social systems of the world, its effect cannot be summarily concluded as positive or negative. Instead, the effects are both positive and negative. Some of these effects are discussed below.

## **1. Advantages of Globalization**

Tremendous benefits to the world community entice citizens and leaders to embrace globalization. Stated well by the Cato institute:

"Globalization" describes the ongoing global trend toward the freer flow of trade and investment across borders and the resulting integration of the international economy. Because it expands economic freedom and spurs competition, globalization raises the productivity and living standards of people in countries that open themselves to the global marketplace.

For less developed countries, globalization offers access to foreign capital, global export markets, and advanced technology while breaking the monopoly of inefficient and protected domestic producers. Faster growth, in turn, promotes poverty reduction, democratization, and higher labor and environmental standards.

While globalization may confront government officials with more difficult choices, the result for their citizens is greater individual freedom. In this sense, globalization acts as a check on governmental power that makes it more difficult for governments to abuse the freedom and property of their citizens.<sup>25</sup>

Governments across the globe have embraced globalization in hopes of building stronger economies, creating new jobs, and providing increased services and products to the people.

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<sup>25</sup> Cato Institute Center for Trade Policy Studies, *available at* <http://www.freetrade.org/issues/globalization.html>, (last visited Mar. 2004).

Generally the spirit early in this new millennium is one of pro liberalization. Demonstrating this spirit, USA Today provided an in-depth article about Portugal, stating: “[a]ny U.S.-based company considering Portugal as an export market can find all the information and assistance necessary to successfully capitalize on the opportunities in the country ....”<sup>26</sup> The article called Portugal “an extremely favorable business climate,”<sup>27</sup> because Portugal has allowed the privatization and liberalization of its economy and because Portugal “has seen the disposal of more than 100 public enterprises ....”<sup>28</sup> Portugal is proud of turning over their public commons to private enterprise and industry.

### **a) Internet and Technology**

Technology has the power to improve the lives of people and the environment. Access to technology achieves much more than mere consumerist bliss and personal benefits. For example, around the planet huge numbers of people currently burn their trash, which includes plastics, inked boxes, rubber products and more—all of which cause tremendous air pollution. Technological advancements in trash containment, disposal, and waste management could provide much of the developing world with new abilities to process garbage in an environmentally safe manner. Globalization allows technological breakthroughs and advancements from one country to benefit all other countries that allow importation of such technology.

The internet is perhaps the most celebrated of the technological advancements that is now available to the masses, thanks in large part to the effect of globalization. The internet has

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<sup>26</sup> *Portugal, Showcasing the Successes*, USA Today, Mar. 15, 2004, Our World supplement, at 1.

<sup>27</sup> *Id.* at 2.

<sup>28</sup> *Id.*

improved life for many, especially modernizing the world of people who otherwise would not have modern conveniences. One can go to the Web to transfer money, purchase “name brand” products from nearly anywhere on the globe, communicate with friends, family and co-workers, and participate in online chats discussing virtually everything. Websites created in one locality can be accessed from anywhere in the world.

Today’s world potentially confers unprecedented power to those individuals poised to grab it. From nearly any place on the globe, the internet may be utilized for speech, disseminating information, transferring money, accessing bank accounts, and purchasing air tickets. Individuals in the most remote or repressed areas of the world may be able to access news and locate tremendous resources of information never before available or possible. Essentially, the possibility now exists for a global free press. Small non-profit organizations with little money, as well as individuals working from their own home, may now single handedly reach out to thousands, possibly millions of people, to deliver their message. Individuals can discover and even remedy human rights violations which, due to technology, are now more easily detected. “In the quest for global peace and social justice, the internet and other emerging network technologies provide powerful tools to support our work.”<sup>29</sup> Further illustrative of the power of the internet, Thomas Friedman describes how Jody Williams won the Nobel Peace Prize in 1997 for building an international coalition to bring about a treaty outlawing landmines.<sup>30</sup> She apparently conducted her campaign entirely on the internet.

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<sup>29</sup> Mark Surman & Katherine Reilly, *Appropriating the Internet for Global Activism*, YES, Spring 2004, at 38, 38.

<sup>30</sup> See FRIEDMAN, *supra*, note 10, at 5.

## **b) Comparative Advantage**

Proponents of globalization point to “comparative advantage” as a justification and advantage to promoting wide scale international movement of goods. “Comparative advantage” is the concept that if one region makes or grows a certain product particularly well or efficiently, then that region should concentrate on that product, selling it to the whole world. That same region can then purchase other necessary products from other regions that specialize in those necessary products. For example, Columbia grows exceptional coffee beans. The climate is nearly perfect; generations of prior growth has “primed” the soil, creating fertile grounds for the beans. Evolved labor practices, agricultural “know how,” experience and unique expertise add to Columbia’s winning formula for coffee production. A totally different region, Silicon Valley, creates computer chips and other computer products. Silicon Valley has become the gravitational center for the high technology business community. Plethoras of production facilities, knowledge banks, and nearby networking partners make Silicon Valley the world leader in this area. Comparative advantage occurs when Columbia specializes in growing coffee beans, and Silicon Valley specializes in the computer industry. Comparative advantage allows each region to focus on what it does best, and to expand its product for sale around the whole world. Everybody benefits: the Columbian coffee growers and Silicon Valley chip makers both increase the market for their goods, and likewise receive the benefit of inexpensive specialized goods from other regions.

## **c) A Unified World**

Globalization unifies and integrates people from all corners of the globe. Kant said that war cannot exist between nations with strong trade relations. Yesterday’s world consisted of

restricted trade between nations with taxes, tariffs and regulations preventing imported goods from equally competing with domestic goods. These taxes and tariffs were put in place to protect the domestic product of a nation from being outsold by an imported good. Known as protectionism, this practice served immediate objectives such as guaranteeing a nation's products would not be undersold by competing foreign products. At the same time, some nations attempted to use political or military power to export their goods without any restrictions, and yet freely regulate incoming importations. A notable example of this was the Opium War between China and England. Although England had outlawed opium on its own soil, it fervently traded opium to China in exchange for Chinese products. In the early 1800's, China had literally millions of opium addicts and began to close opium dens and prohibit the trade of opium. In response, England sent war ships to China in 1840 to pressure the Chinese government into continuing importation of opium. Two years later the Chinese were forced to agree to the Treaty of Nanking. The treaty provided the British with five open ports and no restrictions for trade. As a consequence, opium trade more than doubled in the three decades following the Treaty of Nanking. The globalization process today would not permit such a one-sided trade agreement.

Generally, the world was politically divisive, leading to economic barriers, with more powerful nations enjoying free access to the goods of the world and other poorer, less powerful nations relying only on their own abilities to make products. Even early free trade agreements fashioned a level of protectionism, in that they essentially created an exclusive "club" where the few members enjoyed free trade benefits amongst themselves, but other nonmember nations did not. Modern globalization poses the possibility of entirely ending this level of protectionism, ultimately leading to a more unified and integrated world.

#### **d) Creation of Jobs**

Globalization and corporate expansion have created new markets and increased demand for goods and products, leading to spurred sales, increased production and more money in the economy. Theoretically, this leads to job creation and higher wages for those already employed.

Corporate globalization also creates new job markets in the communities they enter—whether those communities are foreign or domestic. The new jobs may involve extensive training and the teaching of specialized skills to prospective employees in the community. In many cases, these new jobs provide higher wages than the pre-existing employment in the area. The general work conditions also may be better than such pre-existing employment: the workplace may have air conditioning, cleaner and safer work environments, and machinery to ease the “wear and tear” on the workers.

In northern Mexico alone, over 750,000 new jobs were created after the implementation of NAFTA.<sup>31</sup> Multi-national corporate factories built on the Mexican side of the border to employ Mexicans are known as *maquiladoras*. The *maquiladora* workers now make an average of \$4,416 per year, and many get profit sharing, bonuses, and health care plans.<sup>32</sup> In Central America, over 500,000 jobs have been created. In China, literally millions of new jobs have been created.<sup>33</sup>

Increased jobs ignite growth within communities and provide security to those that obtain the new jobs. Likewise, the standard of living for the workers improves, both in terms of wages and benefits. From the other side, the corporations benefit by getting cheaper labor. There is a

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<sup>31</sup> See Lucinda Fleeson, *Leaving Laredo*, MOTHER JONES, Sep.-Oct. 2003, at 24, 24.

<sup>32</sup> See *id.*

<sup>33</sup> See Charles Bowden, *Keeper of the Fire*, MOTHER JONES, July-Aug. 2003, 68 (quoting Charlie Kernaghan).

frequent turnover of employees, giving rise to a constant youthful workforce in free zone factories. It has been said that the factories may get older with time, but the workers never age.<sup>34</sup>

### **e) Global Efficiency and Sharing of Inventions**

In addition to the increased demand and supply of products resulting from globalization, there is a corresponding increase in the sharing of information, resources and technology. This helps assure that resources are used efficiently and that research and development is not overly redundant. The greatest inventions of an era are quickly available around the world. If Italy invents and patents a better orange juice squeezer, other countries will purchase and use it. Everyone benefits from the Italian invention, and when the patent expires, the whole world can freely reproduce it either for personal use or for resale. Microsoft provides a good example, where much of the world has benefited from its products.

For political and economical reasons, some countries are poised to engage in and support highly costly research and development, whereas others may have no such ability. Nevertheless, the “spoils” of such research will be equally available to all who may benefit. A globalized world permits such “sharing” and equal distribution of new inventions. Put simply, the world becomes inter-connected, where each member benefits from the highest achievements of every other member.

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<sup>34</sup> See GREIDER, *supra* note 23, at 98.

## **f) New Supplies of Resources**

Up until the 1980s, large parts of the world were inaccessible to foreign entities.<sup>35</sup> For example, the Soviet Union, Eastern Europe, and China were essentially totally disengaged from the western corporate excavation of the world's resources. However, with the Berlin wall coming down, China entering the world market, and the advancement of free trade agreements, the corporate reach "has extended into virtually every domain of even remote rural communities around the world."<sup>36</sup> The resource pool, although of course limited, is seemingly fattened. Businesses that were once threatened with reduced natural resources now can reach further, across the planet if necessary, to find new supplies. Large transnational corporations have likewise tremendously benefited, discovering new well-springs of earth's resources.

## **g) Pharmaceuticals**

While some globalized products achieve success through pure consumerism (toys, CD players, other gadgets), others are necessary for human survival (food and medicines). The 21<sup>st</sup> century is poised to bring an onslaught of new diseases, infections, and other human ailments. Many of the indigenous populations have no ability to fight these sicknesses, and no means of combating them with modern medicine. Larger, usually westernized nations often do have such ability and means. Globalization—through trade, transportation abilities, patent sharing, and advanced science—allows these medicines and pharmaceuticals to be sold and delivered to people in need.

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<sup>35</sup> See JOHN CAVANAGH ET AL, ALTERNATIVES TO ECONOMIC GLOBALIZATION, A BETTER WORLD IS POSSIBLE, A REPORT OF THE INTERNATIONAL FORUM OF GLOBALIZATION 79 (2002) [hereinafter IFG REPORT].

<sup>36</sup> See KORTEN, *supra* note 1, at 80.

## **2. Disadvantages of Globalization**

### **a) Comparative Advantage**

Comparative advantage, the notion that each region should produce what it is best equipped to produce, is also cited as a disadvantage by opponents. A region may become over-specialized in one type of product, and may lose the ability to produce other important products, thereby becoming overly dependent upon trade for the survival of its citizens. After decades, even centuries, of specializing in only one industry, a country can become too narrowly focused on that one industry, so that other necessary domestic industries may be impeded or wiped out. If specialized crops or cattle grazing occupy the majority of available land, there is no space for corn and beans. For example, a coffee growing nation may forgo food production in favor of coffee if coffee beans deliver a higher price. This can lead to a variety of problems such as an unbalanced planting schedule, a saturation of the soil of coffee beans, and therefore ultimately a decrease in coffee production due to over-taxed crops. The soil may also become inhospitable to other crops, leaving the nation in a bind as to what to produce. Further, as the country increases its production and expands its export of a few specialized products, there is little room for developing new trades. The nation may not be able to keep up with changes in demand or advancement in technology. Likewise, once a region advances in one particular direction, it may be hard to retreat. For example, only a few decades ago Silicon Valley was primarily a fertile growing region. Now that Silicon Valley has advanced in the direction of computer technology, it would be extremely difficult to return to a growing region since the fields have been destroyed and paved over.

The comparative advantage theory fails to benefit nations who do not have a comparative advantage in any product. When those regions participate in a world trade system based on the comparative advantage theory, they falter because foreign goods appear on their markets, but they have no products of their own to successfully export. Therefore, countries with the most success in exporting their products will be wealthier nations, while those countries that have few or no exportable products are left behind. Those countries that have already developed exportable products will be the biggest winners. In the most extreme cases, globalization has the effect of upsetting smaller—usually poorer—regions that have in the past been self sustaining and autonomous. In other words, as foreign products enter into new markets, natural balances can be upset; money can flow outward; new (unnecessary) needs can be created; the ability to be self sustaining lost. In fact, some theorists contend that self sustaining regional communities are anathema to global corporations. As stated in the IFG Report:

There is far less opportunity for global corporations if local populations or countries can satisfy their needs internally or regionally than if economic activity is designed to move back and forth across oceans, exporting, importing, or reworking it and then exporting it again, with thousands of ships passing each other in the night. That's what builds global economic growth and provides opportunities for global corporate operations. But alas, it's also what destroys the environment fastest and makes countries dependent on external forces they cannot control.<sup>37</sup>

### **b) Demand for Unnecessary Products**

As discussed earlier, the very essence of globalization is increased movement of goods between nations. The demand for products is often now worldwide rather than local. Corporate media, including television and advertising, play a large role in developing new markets.

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<sup>37</sup> IFG REPORT, *supra* note 35, at 25.

Corporate media can homogenize consumer desires and shape values. Corporations use the powerful tool of television to reach the most remote areas of the planet, creating a desire in the minds of the listeners for their products, establishing firm trademark recognition, and creating a demand for their goods. Over 600 billion dollars was spent in 1989 by corporations on advertising and promotions.<sup>38</sup> The result of such massive world wide marketing is a “generalized global consumer culture.”<sup>39</sup> Incredibly, corporations spend far more per capita on advertising than the entire world spends on education!<sup>40</sup>

In the 1950s, Coca Cola intensified its distribution to new territories. Coke utilized poor water quality in Mexico and Central America to advance a major marketing campaign throughout the region. Soon, nearly everyone in those regions knew the name Coca-Cola, and drank Coke rather than water. Likewise, in this same region, Nestles Corporation heavily marketed sweetened, condensed milk. The mothers of the area soon began to purchase the canned milk, believing it was better for their babies. The mothers had, of course, access to breast milk which was healthier and less expensive than the condensed milk but they were persuaded via the advertising campaign that they should be purchasing Nestles’ product. These examples demonstrate how foreign products, once inaccessible and unnecessary, can become entrenched in new territories. Often, the people pay more money for these foreign products than for similar local products. Further, people often develop misplaced dependencies on the foreign products. Human beings do not “need” Coke, Pepsi, or Fritos to live happy, healthy lives, although corporate advertising and promotions lead to such ridiculous results.

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<sup>38</sup> See KORTEN, *supra* note 1, at 155.

<sup>39</sup> *Id.*

<sup>40</sup> *See id.*

### c) High Transportation Costs

Tremendous inefficiency occurs by transporting goods around the world. In a fully globalized world, maximizing the comparative advantage theory, each nation and geographic area would profit by selling its products to many other regions, sometimes across the globe. The resulting environmental cost is ignored as is the high shipping costs. For example, oil is often drilled in one location, carried across seas, transported to locations such as the northeast of the United States for processing, and then re-transported back on the ground and across the seas for sale as gasoline or petroleum products. The thousands of miles of transport creates a certain amount of pollution and introduces new hazards such as spills. Likewise, apples are grown in Watsonville, California, then shipped to warehouses as far away as the Midwest for processing and packaging, and then re-shipped back to Watsonville to sell. Wafers used by semiconductor companies are often designed and fabricated in the U.S., then flown to Malaysia or the Philippines for assembly, and then flown around the world for use in electronic products.<sup>41</sup> These large transportation movements are cited as a disadvantage because of high costs, inefficiency, and the ensuing environmental damage.

For example, the building and production process for McDonnell Douglas “Triple Seven” aircraft involves the assembly of parts from hundreds of varied sources:

On the shop floor, wooden crates marked Belfast, Ireland, contained nose landing-gear doors. Stacked on a metal rack were outboard wing flaps, with tags from Alenia of Italy.

The 777’s entire fuselage traveled in quarter sections from Japan, shipped by Mitsubishi from Nagoya to Puget Sound, where the pieces were barged from Tacoma to the port of Everett, then hauled by railcars up the steep grade to the factory. Wingtip assembly came from Korea.

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<sup>41</sup> See GREIDER, *supra* note 23, at 83.

Rudders from Australia. Dorsal fins from Brazil. Main landing gears from Canada and France. Flight computers from the United Kingdom.<sup>42</sup>

#### **d) Disregard of Domestic Laws**

As corporations and their products enter foreign markets, they must interface with foreign laws. However, they may choose to not follow these laws and instead pay the ensuing penalties, if any. Many of the nations allowing entrance of *maquiladoras*<sup>43</sup> and foreign corporate factories are poorer nations, with primitive legal climates.<sup>44</sup> Industry has taken advantage of this and revived some of the worst forms of exploitation; abuses outlawed long ago in the advanced economies, including physical dangers to workers and the use of children as expendable cheap labor.<sup>45</sup> Generally, the primary reason for corporate globalization is profit, and in many cases it is not profitable to carefully follow local laws or customs. When profit margins outweigh small penalties for disobedience, the result is a complete disregard for laws. Disastrous consequences can occur, as happened with Union Carbide in Bhopal, India. There, Union Carbide was able to have a chemical plant built with little or no direct involvement by the parent corporation, completely distancing itself from Indian laws and regulations. The plant was operated by an Indian corporation, while the U.S. based corporation maintained over 50% ownership.<sup>46</sup> India was one of nearly forty countries where Union Carbide had affiliates and other business interests.<sup>47</sup> On December 3, 1984 the plant leaked large amounts of methyl isocyanate (MIC) into the nearby village. Nearly 4000 people were killed from inhaling MIC fumes, and over 11,000

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<sup>42</sup> *Id.* at 129.

<sup>43</sup> See discussion *infra* Part II.C.2.i.

<sup>44</sup> *Id.* at 34.

<sup>45</sup> See *id.*

<sup>46</sup> See Jackson B. Browning, *Union Carbide: Disaster at Bhopal*, at <http://www.bhopal.com/pdfs/browning.pdf> (last visited April 10, 2004).

<sup>47</sup> See *id.*

permanent disabilities were reported.<sup>48</sup> In finding no liability for the American corporation, the 2nd Circuit Court of Appeals concluded that “the plant has been constructed and managed by Indians in India. No Americans were employed at the plant at the time of the accident... No Americans visited the plant for more than one year prior to the accident, and during the 5-year period before the accident the communications between the plant and the United States were almost non-existent.”<sup>49</sup> Reported sales from the Bhopal plant during 1984, the year of the accident, surpassed nine billion dollars.<sup>50</sup>

Robert Monks, in his book *The Emperor’s Nightingale*, provides a good summary of the corporate position: “The corporation in effect asks whether the costs of disobedience—discounted by the probability of being discovered, prosecuted, and fined (there is almost no risk of jail)—equal the costs of compliance. In many cases, the costs of disobedience are lower than the costs of compliance, and so many corporations find it to their economic advantage to break the law.”<sup>51</sup>

Often, countries desire to lure corporate entities to build factories on their soil, and thus obtain the various benefits mentioned earlier. In their attempt to entice such corporations, the countries may change their laws to be more favorable for business. For example, Prime Minister Durao Barroso explained why business should consider relocating to Portugal: “[w]e already have one of the lowest corporate tax levels in the Eurozone, but we have decided to enhance this

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<sup>48</sup> *See id.*

<sup>49</sup> *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195, 200 (2nd Cir. 1987).

<sup>50</sup> *See Browning*, *supra* note 46.

<sup>51</sup> IFG REPORT, *supra* note 35, at 133 (quoting ROBERT A. G. MONKS, *THE EMPEROR’S NIGHTINGALE: RESTORING THE INTEGRITY OF THE CORPORATION IN THE AGE OF SHAREHOLDER ACTIVISM* (1998)).

with an incentives package that includes significant tax cuts, loans for fixed asset investments, and cash grants for training expenses, as well as social security exemptions ....”<sup>52</sup>

### **e) Loss of Culture**

Civilizations and peoples were once as culturally varied as the species, life forms, and geographic regions of the earth. Globalization threatens this diversity because the largest corporate enterprises are able to promote and sell their products to ever increasing markets. A typical tourist in many countries encounters virtually hundreds of globalized products, such as brand name candy bars, sodas, fast food restaurants, clothing, and automobiles. Where once products varied tremendously from region to region, now the largest, most successful corporations have succeeded in saturating distant markets to create a world wide landscape of fewer products. Consider an example from India, “where the indigenous population has used the neem tree for medicinal purposes for generations. After a U.S. importer discovered the tree’s pharmaceutical properties, multinational companies from the U.S. and Japan sought and received numerous patents on products made from the tree, leaving the indigenous populations unable to profit from knowledge they have developed over centuries.”<sup>53</sup>

From pool halls to mini-marts to department stores to fast food chains to book stores, there exists an expanding homogenous nature to businesses across the United States, and even much of the world. With few exceptions, products are increasingly similar, brand names are the same, and corporate logos are universal.

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<sup>52</sup> Portugal, *supra* note 26, at 2.

<sup>53</sup> LORI WALLACH AND MICHELLE SFORZA, WHOSE TRADE ORGANIZATION, CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY 8 (1999) [hereinafter WHO’S TRADE ORGANIZATION].

As foreign entities, private businesses, and corporations expand to other nations, they become part of the culture in which they operate. When Burger King opens up in El Salvador, it becomes part of the local scene. El Salvadoreños become accustomed to a different kind of burger and the experience of American fast food. Travelers and tourists can identify something common to them, a familiar experience, helping the foreign corporations to be successful. As an example of U.S. corporate expansion, in Quintana Roo Mexico, a few thousand miles from the California border, one can find Office Depot, McDonalds, Burger King, Tony Roma's, Costco, JC Penny, Sears, Dominos Pizza, Seven Eleven, and countless other such entities. Each of these familiar corporations either replaces local businesses, or diminishes future prospects for local businesses. Because these large international businesses have huge financial reserves, they are more likely to succeed, while other less financially strong enterprises cannot so easily endure through hard times. The net effect is the multinational entities survive, becoming part of the culture in which they operate, and thus ultimately changing the local culture. There is something sad about children recognizing Ronald McDonald, Mickey Mouse, and the Nike symbol, while many cannot recognize names of prime ministers, presidents, or famous historical figures.<sup>54</sup>

#### **f) Loss of Crop Diversity**

Human life on earth has survived for tens of thousands of generations eating indigenous fruits and vegetables. However, in the last single generation, numerous attempts to genetically manipulate our food supply have successfully occurred. Genetically modified crops cannot regenerate themselves, but must be purchased every year. As genetically modified crops take the

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<sup>54</sup> See FIDEL CASTRO, CAPITALISM IN CRISIS, GLOBALIZATION AND WORLD POLITICS TODAY 55 (David Deutschmann ed.) (2000). "It is sad to hear—and it is true—that if a survey is made among Mexican or Latin American children to ask who were Hidalgo and Morelos, or if you ask Central American children who was Morazan, or in Latin America who was Bolivar, they do not know. Yet a great majority of those children know who Mickey Mouse is. *Id.*

space of indigenous crops, many indigenous crops become obsolete and even extinct. Likewise, any specific breed or crop that is perceived as “better” than others will be grown, while the other less desired crops will be removed. The “better” crops are often only considered more desirable for large, mass production purposes. The net effect is a form of artificial evolution, where certain selected breeds of each type of crop, some of which are genetically modified, are planted in such mass that many other breeds are lost. The Food and Agriculture Organization released a report demonstrating that “the world has already lost up to 75% of its crop diversity because of the globalization of industrialized agriculture.”<sup>55</sup> With such tremendous loss of native breeds of fruits, vegetables, and grains, the entire food chain (and thus all of life) is threatened. With less breeds in existence, fewer diseases or unforeseen destructive processes could wipe out those breeds.

As one example of the effects of the global trade in crops, Mexico had over three million families in the corn business, harvesting literally hundreds of varieties of indigenous corn.<sup>56</sup> Mexico has been growing corn (or maize) for over 10,000 years.<sup>57</sup> Corn farmers were able to plant corn in tremendously diverse areas including jungle, desert, mountain, and sea. Each year farmers could plant a new generation of crops from the seeds of the current year’s crop. They learned to use natural weather patterns and cycles to dictate their techniques. Many utilized rainfall systems to irrigate. Most of these farmers produced relatively small lots of corn, selling in local or perhaps regional markets, and few sold their products across national borders. Free trade agreements have allowed foreign corn corporations to aggressively sell their corn, including genetically modified corn, in Mexico, competing with the local farmers. Of course,

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<sup>55</sup> IFG REPORT, *supra* note 35, at 27.

<sup>56</sup> See Timothy A. Wise, *Fields of Free Trade, Mexico’s Small Farmers in a Global Economy*, DOLLARS & SENSE, Nov.-Dec. 2003, at 14, 14.

<sup>57</sup> See Gawain Kripke, *Make Trade Fair*, DOLLARS AND SENSE, Nov.-Dec. 2003, at 19.

theoretically the farmers could also attempt to sell their corn to foreign buyers, but they lack the money, power, and output capability. The foreign corn companies promised more consistent crops, sweeter corn, bug resistant fields, and side benefits such as support and even machinery. As small, local, poor farmers began to replace their traditional ways, indigenous corn fields were torn up, bulldozed, and replanted with the foreign (globalized), genetically modified corn.

Heavily subsidized Canadian and U.S. agribusiness exported cheaper corn, benefiting from reduced tariffs. Additionally, they bought land to continue re-planting the genetically modified seeds. The results have been disastrous for the corn farmers of Mexico. “Two and a half million farmers and their families have been driven out of their local markets and off their land.”<sup>58</sup> Indigenous strains of corn are being lost forever, as only the corn best suited for major agribusiness survives. The wide diversity of corn—with varying leaves, heights, colors, kernels, sweetness factors, growth time, durability, and transportability—is being narrowed to the few “superior” strains, and to the genetically modified strains.<sup>59</sup> Worldwide, over 90% of all varieties of corn have been lost forever.<sup>60</sup> The same story is true with other crops. The Rural Advancement Foundation International reports that 97% of all vegetable varieties available a century ago are now extinct.<sup>61</sup>

### **g) Environmental Destruction**

All is not well on our planet. Mother Earth has witnessed in the last fifty years the largest onslaught of environmental annihilation in history. Literally millions of acres of rainforests are being clear-cut and burned, natural resources are being depleted, and thousands of tons of toxic

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<sup>58</sup> Jeff Faux, *NAFTA at 10: Where Do We Go From Here?*, THE NATION, Jan. 2, 2004, at 11, 11.

<sup>59</sup> See FATAL HARVEST, THE TRAGEDY OF INDUSTRIAL AGRICULTURE 77 (Andrew Kimbrell ed., 2002) [hereinafter FATAL HARVEST].

<sup>60</sup> See *id.*

<sup>61</sup> See *id.* at 71.

waste exists without an adequate manner of disposal. Countless species have become extinct; water supplies such as rivers and lakes are often undrinkable without treatment, the air is polluted, and our oceans are burdened with continuous dumping of sewage, waste, and effluent from factory smelters.

Planet earth is an ecosystem, not unlike a giant aquarium, where a delicate balance of literally thousands of “ingredients,” such as air, water, temperature, natural resources, healthy oceans, barren deserts, swamp land, mountains, trees, plants, vegetation, insects, bacteria, and animals combine together to sustain life. These “ingredients” exist within narrow parameters, in perfect balance and harmony. Human beings must have exacting conditions for survival. For example, amongst millions of other planets throughout the galaxies, scientists still debate whether any one of those planets has such exact, perfect conditions to sustain human life. Altering our balance of the ecosystem in any way may lead to unsustainable conditions and the demise of human life on the planet.

The quest for profit often conflicts with the protection of the environment. Nearly every manufacturing plant and factory produces pollution of some sort. The Mediterranean ocean alone receives waste from 140,000 European factories.<sup>62</sup> When the bottom line is the dollar, such pollution is a mere by-product, an inconvenience, to be disposed of in any manner allowable or economical. Factories and manufacturing plants routinely contribute tremendous damage to the planet and thus to all people on earth. As of 1996, some 70,000 human-made, synthetic chemicals were methodically and steadily released into the air and water.<sup>63</sup> Agro-

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<sup>62</sup> See CASTRO, *Supra* note 54, at 52.

<sup>63</sup> See KORTEN, *Supra* note 1, at 301 (quoting Marcia Vickers and Gary Weiss, *The Wall Street Hype Machine*, BUSINESS WEEK, Apr. 3, 2000, at 168).

business applies over fifty carcinogenic pesticides in massive amounts to major food crops.<sup>64</sup> The WTO website proudly declares: “[C]hemicals emerged as the product group with the strongest trade growth over the last two years.”<sup>65</sup> In the late 1930s there were thirty-two pesticide products registered in the U.S.; there are now more than 20,000, and farmers use over a billion pounds of pesticides annually.<sup>66</sup> The effects of this dramatic increase in chemical and pesticide use cannot be determined. However, we may know soon enough: “[t]oday’s teenagers will also be the first to shift from an industrial to a transgenic diet. Chemical fertilizers, pesticides, growth hormones, antibiotics, irradiation, and artificial flavors and colors have become blandly familiar, but now more than sixty percent of processed foods contain at least one genetically modified ingredient.”<sup>67</sup>

Laws deal with the question of how to regulate or permit pollution, but rarely with the question of how to prevent or halt it. The result is the well-known “race to the bottom,” where the nation or geographic region which allows the greatest amount of pollution, permits the most environmentally unsafe waste, regulates the least, and monitors nothing, comes out ahead. This standard creates the most desirable location for opening or relocating factories, industrial plants, or any other polluting enterprise. Jeremy Brecher, in his article *Global Village or Global Pillage*, discusses this concept: “The recent quantum leap in the ability of transnational corporations to relocate their facilities around the world in effect makes all workers, communities and countries competitors for these corporations’ favor. The consequence is a ‘race to the bottom’ in which wages and social conditions tend to fall to the level of the most

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<sup>64</sup> See FATAL HARVEST, *supra* note 59, at 52.

<sup>65</sup> Available at [http://www.wto.org/english/news\\_e/pres03/e/pr363\\_e.htm](http://www.wto.org/english/news_e/pres03/e/pr363_e.htm) (last visited Mar. 2004).

<sup>66</sup> See Rebecca Clarren, *Fields of Poison*, THE NATION, Dec. 29, 2003, at 23, 23.

<sup>67</sup> ADBUSTERS, Nov.-Dec. 2002 (this edition was not paginated).

desperate.”<sup>68</sup> As one telling example, the Philippine government ran an ad in *Fortune* magazine, attempting to lure businesses to the Philippines. While directly suggesting moving factories, companies and manufacturers to their country, the ad stated: “we have felled mountains, razed jungles, filled swamps, moved rivers, relocated towns ... all to make it easier for you and your business to do business here.”<sup>69</sup>

In a world of international trade relations, everything including garbage, greenhouse gasses, effluent and other contaminated pollution is a “product.” Developed countries now routinely sell their toxic waste to lesser developed, poorer countries. Besides the justification that toxic waste is a product like any other, several high ranking officials voiced further reasons to support the sale of toxic waste. U.S. Secretary of the Treasury, Lawrence Summers, in his capacity as Chief Economist of the World Bank, recently announced “it is economically most efficient for the rich countries to dispose of their toxic wastes in poor countries, because poor people have both shorter life spans and less earning potential than wealthy people.”<sup>70</sup> The economist argued “it is a moral duty of the rich countries to export their pollution to poor countries because this provides poor people with economic opportunities of which they would otherwise be deprived.”<sup>71</sup>

In addition to environmental degradation of nation states and sovereign territories, the global commons—that which is “owned” and shared by all nations—has been increasingly appropriated in careless and exploitative manners. “The atmosphere, oceans, and even outer space have become dangerously polluted, freely appropriated by oil, energy, shipping, and toxic

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<sup>68</sup> KORTEN, *Supra* note 1, at 205 (quoting Jeremy Brecher, *Global Village or Global Pillage?*, *THE NATION*, Dec. 6, 1993, at 685, 688).

<sup>69</sup> KORTEN, *supra* note 1, at 161.

<sup>70</sup> *Id.* at 91.

<sup>71</sup> *Id.*

industries as convenient sites to dump effluents and wastes.”<sup>72</sup> In 1990, an American owned battery “recycling” plant in Mexico transported batteries across the border to Mexico, then simply opened and dumped their acid on the ground.<sup>73</sup> In 1991, an American corporation sold 1000 tons of toxic waste to Bangladesh. The poisonous quality was discovered only after one third of the waste had been emptied onto fields.<sup>74</sup> In 1993, a German corporation sent 230 tons of toxic waste to Ukraine. The German corporation declared the waste as “building materials,” and “consumer goods,” yet it contained pure DDT, hydro cyanic acid, laboratory chemicals, and extremely toxic mercury wastes.<sup>75</sup> In 1992, Italian and Swiss corporations attempted to sell Somalia twenty years worth of toxic waste in exchange for 80 million dollars.<sup>76</sup> These examples show how little consideration may be given to environmental concerns.

## **h) Finite Resources and Externalized Costs**

Creation of products and goods requires resources and raw ingredients that are often part of the earth’s ecosystem. When corporations must extract and harvest those resources in their home country, they may be very limited indeed. Some companies start out with ample resources in their home country, but later exhaust those resources. Needing more, they journey far and wide in search of the resources they need. If they can expand to other nations and new territories to obtain those resources, perhaps in more abundance and for cheaper prices, their existence is assured, and likely their profit margin will rise. For example, NAFTA and the WTO have

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<sup>72</sup> IFG REPORT, *supra* note 35, at 90.

<sup>73</sup> See LAKSHMAN D. GURUSWAMY ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER 697 (2d ed. 1999).

<sup>74</sup> See *id.*

<sup>75</sup> See *id.* at 698.

<sup>76</sup> See *id.* at 695.

defined water as a tradable commodity, which allows freshwater (“blue gold”) from rivers, streams and lakes to be sold on the open market. *Fortune* magazine said water is “one of the world’s great business opportunities. It promises to be to the 21<sup>st</sup> century what oil was to the 20<sup>th</sup>.”<sup>77</sup>

Other examples of limited raw resources include oil, coal, iron, fish, plants, and trees. The prices for resources are dictated by political, as well as economic factors, resulting in a market price that excludes the environmental costs. Gasoline, for example, would be priced much higher if the true, full costs were incorporated into its price. Gas and oil companies sell for whatever the market value dictates, without taking into account the extremely limited (and thus precious) supply of natural resources necessary for continued production.

These unseen or hidden costs, which are not allocated to the producers, nor to the consumers, are labeled “externalized costs.” For example, when the U.S. Forestry Service permits unlimited salmon fishing in rivers, the availability and cost of salmon drops, the salmon producers are profitable, consumers are happy, and for a few years the licensing program seems entirely successful. Externalized costs that must be paid in one fashion or another include rapidly disappearing salmon, possibly to the point of extinction in certain rivers, the numerous other effects of reduced salmon, and the later loss of income to individuals and small businesses that thrive from fishermen. David Korten, former faculty member of the Harvard University Graduate School of Business and staff member of the Harvard Institute for International Development provides another powerful example and description of the detriments of externalized costs:

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<sup>77</sup> Kevin Murray, *Whose Right to Water*, DOLLARS & SENSE, Nov.-Dec. 2003, at 23, 23 (quoting FORTUNE, May 2000).

The consequences are similar when a chemical corporation dumps wastes without adequate treatment, thus passing the resulting costs of air, water, and soil pollution to the community in the form of health costs, genetic deformities, discomfort, lost working days, a need to buy bottled water, and the cost of cleaning up contamination, if the users of the resulting chemical products were required to pay the full cost of their production and use, there would be a lot less chemical contamination in our environment, our food and water would be cleaner, there would be fewer cancers and genetic deformities, and we would have more frogs and songbirds. If the full cost of producing and driving cars were passed on to the consumer we would all benefit from a dramatic reduction in urban sprawl, traffic congestion, the paving over of productive lands, pollution, global warming, and depletion of finite petroleum reserves.<sup>78</sup>

### **i) Maquiladores and Free Zones**

Another effect of globalization is the movement of people and jobs across borders. Factories move to where the labor is cheap. As Ross Perot heralded to the nation before NAFTA became law, there will be a “great sucking sound” from the north to the south. Just south of the U.S. border, in what has been labeled “free-trade zones,” factories and production plants now exist, known as *maquiladores*. Among the thousands of transnational assembly plants now in this free trade zone are General Electric, General Motors, Ford, GTE Sylvania, RCA, Westinghouse, and Honeywell. Their location and legal jurisdiction is rather nebulous, because they are mostly foreign entities (not Mexican), with a labor force entirely Mexican. Likewise, in Jamaica and other areas, the world has created “free zones,” which can be described as several hundred acres of land that literally sit in “no man’s land,” not technically part of Jamaica, not part of the nationality of the ownership, kind of a country of its own, but with few laws or regulations. One unfortunate characteristic of maquiladores and free zones is a dearth or paucity of rights, including the right to unionize. Likewise, corporations gravitate toward these zones

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<sup>78</sup> KORTEN, *supra* note 1, at 83.

because non-existent or extremely minimal environmental regulations provide a powerful lure.

David Korten states the consequences well:

An investigative team from the U.S. General Accounting Office reported to Congress that all six newly opened U.S. plants it inspected in Mexico were operating without the required environmental licenses. Other studies have found evidence of massive toxic dumping in the maquiladora zones, polluting rivers, groundwater, and soils, and causing severe health problems among workers and deformities among babies born to young women working in the zone. ...The workers live in shantytowns that stretch for miles. The dwellings are constructed of scrap materials and have no sewer systems; most have no running water. Worker families commonly store water in discarded barrels—the markings show that they once contained toxic chemicals.<sup>79</sup>

Nevertheless, people are attracted to these jobs because of the wages or because no other jobs may exist as the corporate entities overwhelm the region. However, by taking such jobs, they are often displaced from their homes, and more importantly from traditional, subsistence work of their past. For some of the poorer nations, local traditions, activities, ceremonies, and harmonious living no longer dominate the culture and daily living. In the end, families have been disrupted to the point of complete separation, people have been re-located to areas foreign to them, prior job skills lost, and culture obliterated.

## **j) National Security could be Threatened**

Huge sums of money, even billions of dollars can be transferred across the globe in seconds. Approximately one trillion dollars changes hands each day.<sup>80</sup> Although clearly there are advantages to this ease in moving money around the world, there are also concerns. Such huge sums begin to be untraceable, de-linked to anything of real value (for example, gold).

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<sup>79</sup> *Id.* at 132.

<sup>80</sup> *Id.* at 181.

Further, as millionaires become billionaires, and billionaires grow their wealth, a genuine threat exists to governments of the world. To quote Business Week: “In this new market ... billions can flow in or out of an economy in seconds. So powerful has this force of money become that some observers now see the hot-money set becoming a sort of shadow world government—one that is irretrievably eroding the concept of the sovereign powers of a nations state.”<sup>81</sup>

Free trade and globalization, by definition, create a tremendously increased international market for products. As more people and goods cross international borders, security becomes a serious challenge. It is simply more difficult to keep track of larger numbers of people crossing borders. Likewise, illustrative of the power of the internet, it is said the attacks on the twin towers could not have occurred without the internet.<sup>82</sup>

### **k) Stateless Corporations**

Some corporations exist entirely independently of any nation. They are truly transnational entities. Others that are based in a country, such as Japan or the U.S., have learned how “to juggle multiple identities and multiple loyalties.”<sup>83</sup> These multinational corporations operate within many varying nations as if they were a private citizen. They build large employment facilities wherever their costs will be minimized. Although they may employ many laborers from within the country where their factories are located, their first loyalty may be to profits and not to the individual employees, locality, or nation, in which they operate.<sup>84</sup>

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<sup>81</sup> KORTEN, *supra* note 1, at 177 (quoting *Hot Money*, BUSINESS WEEK, March 20, 1995, at 46).

<sup>82</sup> *See id.* The internet was likely utilized to control money, access information, track flight information, and for communication purposes amongst the terrorists.

<sup>83</sup> KORTEN, *supra* note 1, at 126 (quoting *The Stateless Corporation*, BUSINESS WEEK, May 14, 1990, at 98).

<sup>84</sup> *See* KORTEN, *supra* note 1, at 127.

Corporations that clearly belong to one nation, such as Sony in Japan, or General Motors in the U.S., are now spread out across the planet, so that physically it is hard to categorize them as fully belonging to their home country. For example, Sony has relocated so many of its factories to other areas, such as Southeast Asia and Mexico, that “soon, 60% of its entire workforce will be outside Japan.”<sup>85</sup> Likewise, IBM has eliminated more than half its American workforce, and by 1995 had more employees overseas than at home.<sup>86</sup> This trend toward stateless corporations has occurred only recently. Corporate products built in the 1950s were generally made 100% in America. Today, that is no longer the case; for example, at the end of 2000 a whopping 85% of new McDonnell Dougless planes were made in China.<sup>87</sup>

### **I) A Smaller Planet**

Globalization, almost by definition, has the effect of “shrinking” the vastness of the world. In the past, many parts of the planet were inaccessible or extremely difficult to reach. Purchasing products from far away lands was exotic, reserved for the adventurous world travelers, and required careful planning for transportation. Likewise, mere communication to other regions of the world was, not too long ago, a difficult feat. Today’s world is of course tremendously different, largely because of the effects of globalization. Cross border movement of goods can occur at blindingly rapid speeds. Communication is instantaneous; travel to almost anywhere can be easily accomplished; products from anywhere can be purchased easily and sent right to your door.

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<sup>85</sup> GREIDER, *supra* note 23, at 15.

<sup>86</sup> *See id.* at 216.

<sup>87</sup> *See id.* at 126.

Although laws and jurisdiction are geographic in nature, exercised by sovereign states, globalization has broadened the reach of governments into both foreign nations and into private citizen's actions. Where once legal jurisdiction ended at the border unless certain exceptions applied, these legal barriers are now evaporating.

Illustrative of the extended reach of governments across traditional borders, especially through high technology and the World Wide Web, an individual utilized Yahoo! to place Nazi items for sale on the internet. Although this was perfectly legal where the individual lived, and where Yahoo was based (California), the activity was a violation of French law. Anyone in France with access to the internet could participate in the auction, and could thus purchase the paraphernalia.

The Ligue Contre La Racisme et L'Antisemitisme (LICRA) along with Union Des Etudiants Juifs de France (UEJF) sued Yahoo in French court to force Yahoo to cease and desist maintaining any websites that conduct the sales of Nazi material.<sup>88</sup> The plaintiffs claimed French citizens could get online directly from their own living room (inside France), to view and even purchase these items, which, they claimed, offended French law. Essentially, plaintiffs claimed there was no difference between violating French law in France, or by violating French law on the Internet. No matter where the material originates, and no matter where the hosting Website is located, plaintiffs claimed if a French citizen located in France could view it on the Internet, there must be liability.

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<sup>88</sup> See UEJF and Licra v. Yahoo! Inc. and Yahoo France, May 22, 2000, *available at* <http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm> (last visited Mar. 2004). This is an English translation of a French case, originating in the Tribunal de Grande Instance de Paris, France.

The French court agreed with the plaintiffs, finding that although the damage was suffered in France, jurisdiction was competent over the dispute.<sup>89</sup> The court held that Yahoo! could use its high degree of technical knowledge to prevent French citizens from accessing the Nazi material, and ruled Yahoo! had therefore committed a fault on French territory.<sup>90</sup> Yahoo! was ordered to pay 100,000 euros per day until the order violation was terminated.

Yahoo! responded by bringing legal action in the United States Federal Court to enjoin the French court from exerting its jurisdiction.<sup>91</sup> Yahoo! claimed that the French courts exceeded their jurisdiction by reaching a private California based company without any traditional bases of jurisdiction. Yahoo! won its suit in the United States federal court, thus creating a clashing of opinions between the two countries. Plausibly both opinions remain valid in their respective countries, but without any means of enforcement. Demonstrating the complex issues raised, the court stated: “the specific facts of this case implicate issues of policy, politics, and culture that are beyond the purview of one nation's judiciary.”<sup>92</sup> With borderless technology, the reach of sovereign nations now extends to all corners of the world. With free flowing ideas and information across borders, the physical distance between speaker and audience is rendered virtually meaningless.<sup>93</sup>

Similar cases are emerging. A twenty-eight year old businessman, Graham Waddon, set up a series of pornographic websites in the United States. These websites catered to many forms of prurient desires, including pedophiles and sexual deviants. In 1999, the United Kingdom began a legal fight against the websites, charging that they were accessible in the United

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<sup>89</sup> *See id.*

<sup>90</sup> *See id.*

<sup>91</sup> *Yahoo v. Licra*, 169 F.Supp 2d 1181 (2001).

<sup>92</sup> *See id.*

<sup>93</sup> *Id.*

Kingdom and therefore the United Kingdom had a right to stop them. The English magistrate ruled “the content of American Websites can come under British jurisdiction.”<sup>94</sup> Likewise, an Italian court ruled on defamatory language appearing on the Internet.<sup>95</sup> The court concluded the act of defamation occurred when and where the defamatory statements were received.<sup>96</sup> The court stated “the offense is perpetrated when the recipients view the defamatory statements.”<sup>97</sup> Thus, the Italian court essentially held there are no national boundaries for libel on the Internet, and established jurisdiction over perpetrators of defamation, even though there may be no physical ties to Italy. As a final example, an Australian citizen posted on the internet his opinion that the Holocaust never occurred. This violated German law, and the German Federal Court of Justice held “all material published on the Web is subject to German legislation.”<sup>98</sup> Laws remain geographic, but technology is borderless. Therefore, governments now have a global reach. This extended reach has the effect of shrinking the size of the planet, and allowing governments to claim jurisdiction over activities that physically do not occur within their national borders. These examples show how governments are extending their jurisdictional reach beyond the traditional geographic boundaries.

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<sup>94</sup> The BBC Online Network (July 1, 1999), *available at* [http://news.bbc.co.uk/hi/english/sci/tech/newsid\\_382000/382152.stm](http://news.bbc.co.uk/hi/english/sci/tech/newsid_382000/382152.stm) (last visited Mar. 2004).

<sup>95</sup> *See No National Boundaries for Libel on the Internet*, Court of Cassation – Section V: penal – Closed session, Judgement No. 4741, Nov. 17th-Dec. 27th 2000, *available at* <http://www.cdt.org/speech/international/001227italiandecision.pdf> (last visited Mar. 2004).

<sup>96</sup> *See id.*

<sup>97</sup> *Id.* at 1.

<sup>98</sup> Steven Clift, *Cross-Border Jurisdiction over Internet Content Use*, THE MAIL ARCHIVE 3, <http://www.mail-archive.com/do-wire@tc.umn.edu/msg00287.html> (last visited Mar. 2004).

### **III. Free Trade Agreements**

#### ***A. Definition and Examples***

Free trade agreements, in their most basic sense, allow goods to be exchanged and moved across borders without imposition of tariffs, quotas, taxes, or other restrictions. Several hierarchical levels of substantive trade agreements exist. One such status is that of “most favored nation.” Those nations who have the status of most favored nation essentially agree to trade with each other on the best conditions that they trade with any other nation. They are not required to trade under good conditions, but if they do so, they must trade with all other members on those same good conditions. Another characteristic of trade agreements is for members to provide to each other “national treatment,” which simply means each nation must treat other nation’s products the same as they treat products produced in their own nation. National treatment is best described by Article three of the General Agreement on Tariffs and Trade<sup>99</sup> (GATT), which states that taxes, laws, regulations and other requirements “should not be applied to imported or domestic products so as to afford protection to domestic production.”<sup>100</sup> It further states in Article three that imported products “shall be accorded treatment no less favourable than that accorded to like products of national origin.”<sup>101</sup>

Free trade agreements do not intentionally disrupt national autonomy or the right to domestically regulate. The only stated purpose of a free trade agreement is to assure that member nations do not enact legislation to protect domestic production. Otherwise, theoretically, all national legislation is beyond the reach of free trade agreement tribunals and

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<sup>99</sup> The General Agreement on Tariffs and Trade, Oct. 30, 1947, *available at* [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm) (last visited Mar. 2004) [hereinafter GATT]. The newer versions of GATT incorporate the body of the original 1947 GATT.

<sup>100</sup> *Id.* at art. III. para. 1.

<sup>101</sup> *Id.* at art. III. para. 4.

panels. A step beyond free trade agreements is the creation of a customs union, such as the European Union (“EU”), where both products *and* people can freely cross borders.

To illustrate the impact of free trade agreements, one can trace the flow of goods produced by a hypothetical U.S. corporation (hereafter called HC) that wishes to sell its blankets within Mexico. HC may claim its blankets are more durable, better quality, warmer and cheaper than those already available in Mexico. As a large corporation, HC could produce the blankets in mass, and thus produce them for less than smaller businesses. However, without an applicable trade agreement, Mexico could tax, regulate and even restrict the sales of HC’s blankets altogether. The Mexican government would consider such possible restrictions if, for example, Mexican citizens make blankets throughout Mexico, and depend on that business for survival. The government may further wish to preserve its cultural integrity in the Mexican blanket industry by not displacing weavers who have plied their traditional crafts for centuries.

However, with a free trade agreement, such as NAFTA, HC’s blankets could be imported without restriction, and the U.S. corporation could freely sell its blankets in Mexico (assuming the blankets “originate” in the U.S. and no exceptions apply). The Mexican population would be able to purchase cheaper, warmer, lighter, and more durable blankets. Besides selling “better” blankets, the corporation would have the ability to advertise nation-wide, manufacture in mass volume, and deliver to all sectors of the Mexican market. Therefore, the U.S. made blankets would likely sell well, possibly dominating the market. In sum, the people gain access to better, cheaper blankets, and gain rights to export products themselves. On the other hand, the Mexican government would no longer gain tariffs from the blanket industry, profits from HC’s blanket sales would flow out of the country to HC and its shareholders, and some Mexican people would lose their livelihood (as well as their cultural history).

The North American Free Trade Agreement<sup>102</sup> (NAFTA) provides a good example to illustrate the details of one representative free trade agreement. NAFTA provides its signatories with most favored nation status as well as obligating national treatment amongst the members.<sup>103</sup> It further eliminates tariffs, border taxes, and restrictions on goods originating in Canada, Mexico, or the United States.<sup>104</sup> NAFTA also has two side agreements, incorporated by reference into the entire agreement. One side agreement relates to environmental protection<sup>105</sup> and the other relates to labor cooperation.<sup>106</sup> NAFTA is especially worthy of scrutiny because a much more extensive agreement, the Free Trade Agreement of the Americas (“FTAA”) may soon be operative along with NAFTA for all of South, Central, and North America.

Perhaps the most “celebrated,” or well known case to arise as a result of NAFTA was the *Tuna-Dolphin* case.<sup>107</sup> The U.S. enacted the Marine Mammal Protection Act (MMPA) of 1977 to reduce the number of dolphins killed during tuna fishing. The MMPA “prohibits the importation of tuna from countries that harvest tuna using purse seine [dolphin killer] nets.”<sup>108</sup> Mexico used purse seine nets to capture tuna, which resulted in a huge number of dolphin deaths. The U.S. banned the importation of tuna from Mexico as well as other countries that used purse

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<sup>102</sup> See North American Free Trade Agreement (NAFTA), Dec. 8, 1993, 107 Stat. 2057, 32 I.L.M. 289, available at <http://www.sice.oas.org/trade/naftatce.asp> (last visited Mar. 2004) [hereinafter NAFTA].

<sup>103</sup> See NAFTA art. 301.

<sup>104</sup> See NAFTA art. 302.

<sup>105</sup> The North American Agreement on Environmental Cooperation, available at <http://www.sice.oas.org/trade/naftatce.asp> (last visited Mar. 2004).

<sup>106</sup> The North American Agreement on Labor Cooperation, available at <http://www.sice.oas.org/trade/naftatce.asp> (last visited Mar. 2004).

<sup>107</sup> United States – Restrictions on Imports of Tuna, Report of the Panel, Sep. 3, 1991, DS21/R; United States – Restrictions on Imports of Tuna, Report of the Panel, Jun. 1994, DS29/R [hereinafter *Tuna-Dolphin*]. There were two cases brought against the United States, both under GATT, both with the same results.

<sup>108</sup> WHO’S TRADE ORGANIZATION, *supra* note 53, at 44 n. 45 (quoting 16 U.S.C. Section 1371(a)(2)).

seine nets. Mexico sued, claiming that the MMPA was an illegal restriction on trade. A 1991 GATT panel ruled that the MMPA was an unjust barrier to trade. The U.S. refused to implement the GATT ruling, choosing to uphold its domestic legislation protecting dolphins, and continued to bar any importation of tuna not complying with the law. The issue arose again in 1997 when Mexico threatened to bring the case to the WTO. The threat of WTO sanctions for violation of NAFTA prompted the United States to pass what is known as the “Dolphin Death Act,”<sup>109</sup> which complied with the GATT ruling.

The limit on national sovereignty required by free trade is demonstrated by *Tuna-Dolphin*, as well as many other cases. Free trade agreements involve a balance between the two extremes of national sovereignty and unrestricted trade. A free trade agreement stays the hand of participating governments to regulate the entry of goods into their nation. Most nations are choosing, for the aforementioned reasons, to voluntarily submit to a degree of reduced power within their own borders. However, long after signing, and after implementation of the agreement, nations may regret that they are powerless to regulate, restrict, or even control many goods, products, and services within their jurisdiction. This is the price for free trade, and at present most nations of the world seem to be willing to pay this cost without considering possible future tribulations.

### ***B. Free Trade Agreements Pave the Way for Globalization***

Free trade agreements pave the way for an increase in both the volume and speed of globalization. For example, the alcohol market in Mexico was almost entirely dominated by domestic products merely a decade ago. Foreign-produced liquor, such as Jack Daniels

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<sup>109</sup> *Id.* at 25.

Whiskey, Bailey's Irish Cream, and Johnny Walker Scotch were subjected to taxes and tariffs. Therefore, foreign-produced alcohol was sold at several times the price of domestic alcohol, resulting in a small market for the imported liquors. Since NAFTA became effective as a phase-in agreement in the mid-1990's, importation taxes and tariffs have declined to zero leading to an increased market for imported alcohols. Now, most small village stores sell Johnny Walker along side Jose Cuervo. NAFTA, in effect, created a new market for Canadian, United States, and Mexican products to compete freely within the countries.

The EU's custom union is another example of a relatively recent, and fairly dramatic, free trade agreement. Where individual European countries were once extremely protective of their products, and charged high tariffs on many imports, now many of those goods originating within the EU can freely pass across borders. Further, after goods come into *any* of the EU countries (and a tariff is paid), those goods can then pass to all other EU countries. In fact, where once there were physical borders, in most of Europe they no longer exist. In effect, the trade agreement creates a high speed, massive interchange of goods and products throughout most of Europe.

Disputes, challenges and "lawsuits" arising under a free trade agreement are brought to the tribunal created or designated in the agreement. NAFTA and the WTO have a panel process, where arguments are heard, briefs are filed, and a decision is rendered.<sup>110</sup> Each of these panels may be appealed to the appellate body for a final decision with no further appeals. These decisions illuminate the law surrounding the status and operation of free trade agreements. Similar to case law in any common law jurisdiction, these reports reveal how the agreements are

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<sup>110</sup> See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, 33 I.L.M. 1125, 1226- 47 (1994) (establishing, in Annex 2, an "Understanding on Rules and Procedures Governing the Settlement of Disputes").

being applied and ultimately enforced. Although they may not be binding precedent, they certainly are persuasive and often cited.

There has been a proliferation of trade agreements since the 1990s. NAFTA, the African/Caribbean trade bill, the Vietnam trade bill, and permanent trading relations with China are some examples of recently established trade agreements. The office of the United States Trade Representative ([www.ustr.gov](http://www.ustr.gov)) provides comprehensive information about trade agreements across the globe. Approximately one hundred regional agreements are currently in force, and 75% of them entered into force in the last decade.<sup>111</sup> Each of these agreements creates new markets for businesses to expand their territories. Each agreement potentially generates new and fertile ground for resource excavation, factory relocation, low cost labor, increased exports, and “fresh” consumers. Each contributes to the new globalized world.

### ***C. The World Trade Organization***

In 1995, the World Trade Organization<sup>112</sup> (WTO) was created, replacing the General Agreement on Tariffs and Trade<sup>113</sup> (GATT). One hundred and thirty four member states signed the new agreement. Today, 146 nations are members of the WTO. Its purpose is to oversee, enforce, and standardize trade amongst the member nations. GATT and the WTO have helped to create an unprecedented trading system contributing to strong economic growth. In its own

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<sup>111</sup> Available at <http://wto.org> (last visited Mar. 2004). See also <http://www.ustr.gov> (last visited Mar. 2004).

<sup>112</sup> See generally The Agreement Establishing the World Trade Organization, Apr. 15, 1994, available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf) (last visited Mar. 2004) [hereinafter WTO Agreement]. The WTO is discussed thoroughly, *infra* part III.C.

<sup>113</sup> See *infra* Part III.C.

words, “The result is also a more prosperous, peaceful and accountable economic world.”<sup>114</sup> The WTO largely incorporates the older GATT and provides that “each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the [various multilateral free trade agreements].”<sup>115</sup> In essence, the WTO sets up a massive free trade agreement, where member states may import and export their goods with few restrictions. The WTO forbids any nation from enacting or enforcing legislation that may be perceived as a burden on trade. Under the WTO, trade between nations was to be freer, easier, safer, accessible, and encouraged. The WTO wholeheartedly supports and promotes trade. In the words of Director-General Supachi: “[t]he world’s political leaders must ... demonstrate their willingness to spur the global economy through greater trade liberalization and more equitable trade rules.”<sup>116</sup>

Generally, a WTO challenge occurs when a plaintiff country (usually an exporting country) complains that the actions of defendant country violate an applicable trade agreement. Typically, for the challenge to succeed, the WTO panel must find 1) defendant government has enacted legislation or imposed other binding laws to restrict, tax, or burden an imported item; 2) There is a domestic national product of the plaintiff nation which is “like” the foreign imported product. “Like” products may be found by examining such factors as the properties, nature, quality, end use, and tariff classification of the products;<sup>117</sup> 3) The restriction must be found to

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<sup>114</sup> The WTO in Brief, *available at* [http://www.wto.org/english/thewto\\_e/whatis\\_e/inbrief\\_e/inbr00\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm) (last visited Mar. 2004).

<sup>115</sup> WTO Agreement art. XVI. Para. 4.

<sup>116</sup> *Available at* [http://www.wto.org/english/news\\_e/pres03/e/pr363\\_e.htm](http://www.wto.org/english/news_e/pres03/e/pr363_e.htm) (last visited Feb. 2004).

<sup>117</sup> *See e.g.*, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, World Trade Organization Report of the Appellate Body, Mar. 12, 2001, AB-2000-11, *available at* [http://docsonline.wto.org/GEN\\_viewerwindow.asp?D:/DDFDOCUMENTS/T/WT/DS/135ABR.](http://docsonline.wto.org/GEN_viewerwindow.asp?D:/DDFDOCUMENTS/T/WT/DS/135ABR.)

protect the national product; 4) An exception must not be applicable to the defendant government's action, such as a restriction legitimately based upon protecting public morals, human health, animal welfare, or relating to the importations of gold.<sup>118</sup> If the panel finds all of these four factors, then the challenge succeeds, and the protective legislation of the defendant government is held invalid by the WTO panel.

The creation of the WTO provided enforcement power for global trade agreements. WTO panel rulings are binding, and do not require consent to be enforced. Unlike other international treaties and unlike the GATT which preceded the WTO, countries must respond to any challenge (jurisdiction is automatic, not voluntary) and must subject themselves to panel rulings or face strong global sanctions and fines. Before the current WTO and GATT regime came into existence, international law, and international disputes contained the ideals of conciliation, consensus, fervent respect for sovereignty, and originality to sculpt unique solutions to fit the needs of all parties. The WTO operates in a more rigid and defined mode—adhering to the letter of the law—closer to a typical tribunal that applies the law indiscriminately and harshly, treating the member countries as traditional parties to a legal action, where the loser is analogous to a criminal defendant in violation of a penal code. This reflects the choice of member nations to place global trade on a higher priority level than perhaps ever before.

Proponents of the WTO envisioned a world where the best results of comparative advantage and globalization would materialize. Advocates suggested the U.S. trade deficit would decrease by sixty billion dollars within ten years.<sup>119</sup> President Clinton declared a golden opportunity “to add \$1,700 in income to the average family's income in this country over the

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DOC.HTM (last visited Mar. 2004) [hereinafter *Asbestos*] (discussing the properties and factors to be examined for determining whether two products are “like” products).

<sup>118</sup> See GATT art. XX.

<sup>119</sup> See WHO'S TRADE ORGANIZATION, *supra* note 53, at 2.

next few years, to create hundreds of thousands of high-wage jobs, to have the biggest global tax cut in history and to fulfill our two responsibilities: our responsibility to lead and remain engaged in the world and our responsibility to try to help the people here at home to get ahead.”<sup>120</sup>

Not everyone agreed that the WTO would bring about those glorified results. Union members, environmentalists, youth, indigenous peoples, human rights activists, small farmers, and others have protested the WTO.<sup>121</sup> They claim the WTO is a tool for the largest corporations and wealthiest businesspeople to achieve essentially a huge transfer of wealth from the poorest nations into their own coffers. Environmental protections, public health regulations, national industry subsidies, or labor laws all may be challenged if viewed as a barrier to trade. Other opponents point to the loss in democracy, as WTO tribunals are not elected, and not public, yet they make far-reaching decisions which sometimes replace a nation’s law-making process. “When a panel decides that a domestic law violates WTO rules, it may recommend that the offending country change its law. It becomes, in effect, the world’s highest court.”<sup>122</sup> Another issue is that poorer and undeveloped countries cannot utilize the WTO to initiate challenges because of prohibitively high litigation costs. Likewise, such countries cannot adequately defend themselves, opting instead to acquiesce and make necessary changes to comply with the plaintiff countries demands.

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<sup>120</sup> GREIDER, *supra* note 23, at 196 (quoting President Bill Clinton, *Presidential Documents*, November 28, 1994).

<sup>121</sup> *See generally*, KORTEN, *supra* note 1.

<sup>122</sup> *Id.* at 169.

## ***D. Illustrative Cases***

### **1. United States Clean Air Act Challenged**

A few months after the WTO was created, the first challenge to a domestic law as a violation of free trade was initiated. Venezuela and Brazil challenged a provision of the 1990 amendment to the U.S. Clean Air Act claiming the law unfairly discriminated against imported gasoline, giving an advantage to U.S. produced gasoline.<sup>123</sup> The U.S. Clean Air Act amendment aimed to reduce emissions from automobiles by limiting gasoline contaminants. The challenge asserted that the Clean Air Act unfairly discriminated against imported gasoline, giving an advantage to U.S. produced gasoline. The WTO ruled in favor of Venezuela and Brazil, forcing the U.S. to relax its clean air standards. The Environmental Protection Agency (EPA) now states in its guidelines: “The EPA will implement clean air rules as long as they are ‘consistent with the obligations of the U.S. under the WTO.’”<sup>124</sup> The ruling of the WTO demonstrated that trade could triumph with respect to a country’s attempt to protect the environment and the health of its citizens. Domestic law in this case was superceded by a WTO panel.

### **2. Gerber versus Guatemala**

Gerber Food markets a breast milk substitute to mothers all over the world. Critics have proclaimed such substitutes as a health hazard for babies. UNICEF proclaims that over one million babies die each year because of breast milk substitutes.<sup>125</sup> Guatemala enacted domestic legislation, similar to U.S. cigarette warning legislation, which required breast milk substitutes to

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<sup>123</sup> WHO’S TRADE ORGANIZATION, *supra* note 53, at 5.

<sup>124</sup> *Id.* at 20 (quoting 62 Fed. Reg. 24776, May 6, 1997, at Appendix 19).

<sup>125</sup> *See id.* at 115.

carry a warning and prohibited pictures of healthy babies on their products. Gerber products carried a trademarked logo of a healthy, pudgy infant, known as the “Gerber Baby,” and contained no warning. Therefore, the Guatemalan government refused to allow Gerber to sell its substitute in Guatemala until it complied with the law. Instead of complying, Gerber threatened action in the WTO. The mere threat proved to be enough, “Guatemala changed the law so that imported baby food products would be exempt from Guatemala’s stringent infant food labeling policy.”<sup>126</sup>

### **3. EU Attempted to Ban Hormoned Beef**

The European Union banned the sale of any beef that derives from cattle treated with artificial growth hormones. All such beef was banned, whether originating from within the EU or anywhere else. The EU ban was based on a belief that artificial hormones in beef contained carcinogens, posing a health risk. The belief was not necessarily supported by science nor was it considered to be a medical fact. The U.S. challenged the ban in the WTO,<sup>127</sup> declaring the ban an unlawful infringement on the U.S. right to export beef to the EU. The appellate body of the WTO ruled in favor of the U.S., upholding the lower panel, and forcing the entire EU to allow the sale of hormoned beef.<sup>128</sup> After the final ruling, the EU still refused to accept the “tainted” beef. On July 12, 1999, the WTO imposed 116.8 million dollars in sanctions on the EU. In the end, the EU had to allow for the importation of the beef. In order to protect its citizens from a potentially hazardous health threat, the EU instituted a labeling system for all beef, so that the

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<sup>126</sup> *Id.* at 117.

<sup>127</sup> *See* EC Measures Concerning Meat and Meat Products (Hormones), World Trade Organization Report of the Appellate Body, Jan. 16, 1998, AB-1997-4, WT/DS26/AB/R, WT/DS48/AB/R.

<sup>128</sup> *See id.*

consumer may choose which beef to buy. As of this writing, the labeling has not been challenged in the WTO.

#### **4. French Asbestos Ban Challenged by Canada**

Asbestos is known to cause a variety of cancers in human beings and has, therefore, been banned in many countries including Germany, Austria, Denmark, the Netherlands, Finland, Italy, Sweden and Belgium. In 1996, France banned both the domestic production of asbestos as well as the importation of asbestos. Each year, France alone loses at least 2,000 people to asbestos-related cancer.<sup>129</sup> Canadian asbestos manufacturers were severely hurt by the French ban, which resulted in Canada challenging the ban in the WTO.<sup>130</sup> The French defended the challenge claiming that the ban does not violate trade principles because it is equally applied to both foreign and domestic asbestos, does not treat national products differently from imported products, and was enacted for public health reasons (and thus valid according to Article XX<sup>131</sup> exceptions). However, Canada claimed that the ban resulted in protectionism, asserting the French materials that were used for similar purposes, even though not containing asbestos, were “like” products. Therefore the ban resulted in protection of French products while totally restricting the importation of equivalent Canadian products. The result, according to Canada, was to create a strong market for French products, while wiping out the Canadian market.

The initial GATT panel<sup>132</sup> found a violation of Article three, holding the products to be “like,” and thus requiring the French ban to be lifted or modified. However, the appellate body reversed. The appellate body’s analysis maintained that the most important factor for a

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<sup>129</sup> *See id.* at 183.

<sup>130</sup> *See Asbestos, supra* note 117.

<sup>131</sup> Article XX of GATT provides exceptions for protecting public morals, human health, animal welfare, or the importations of gold. *See GATT, supra* note 99.

<sup>132</sup> This was a GATT panel because the case arose before the inception of the WTO.

challenge to succeed is whether the legislation (in this case a total ban) is “likely to influence the competitive relationship.”<sup>133</sup> The appellate court said the panel did not make this analysis correctly, did not fully examine all factors to determine “like.” In the Court’s words, “panels must examine fully the physical properties of products.”<sup>134</sup> To determine if products are “like,” an examining panel should consider health factors; “the panel erred ... in excluding the health risks...”<sup>135</sup> Therefore, in this case the government ban was ultimately allowed.

In summary, most cases demonstrate a trend of upholding free trade agreements to such an extent as to seriously impede on national sovereignty. Perhaps sovereignty is being infringed beyond the original expectations of the signing members. Could the U.S. have anticipated that its dolphin protection law or its Clean Air Act would be overturned by a distant tribunal? Should we be concerned that these tribunals cannot be appealed in any U.S. court; even the U.S. Supreme Court cannot touch a decision of a WTO panel. Concerned groups such as Public Citizen have voiced trepidation: “In the WTO forum, global commerce takes precedence over everything—democracy, public health, equity, the environment, food safety and more.”<sup>136</sup>

#### **IV. International Law**

There is of course no world legislature to make binding laws on all nations. Instead there are a variety of agreements between nations, and there are traditions, customs, long term practices, and highly publicized writings from legal scholars. Together, these alternatives to legislative statutes form a compilation of “international law.”

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<sup>133</sup> Asbestos, *supra* note 117, at para. 114.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at para. 116.

<sup>136</sup> WHO’S TRADE ORGANIZATION, *supra* note 53, at 7.

However, the body of law that has come to be known as international law is extremely important in an ever increasing global world. Domestic laws exist to provide order, fairness, rules and retribution. International law developed largely as an outgrowth of the World Wars, with the goal of preventing war. Further, individual citizens may benefit, at least to the extent they can find protection under international law.

### ***A. History of International Law***

Although the historical roots of international law can be traced to the earliest peace treaties, scholars usually cite the Peace of Westphalia in 1648 as a major milestone establishing a framework for peace and cooperation in Europe, and thus for international law.<sup>137</sup> In 1920, following World War I, the League of Nations was founded. Later, World War II brought a variety of gruesome war stories and horrible deaths of soldiers. The world was stunned and shocked, leading to a collective realization that unilateral acts of aggression and war could not be sustained. From the pain of World War II, the governments sought new ways to prevent past atrocities in the future. Thus, the world community united around a common cause, leading to the formation of the United Nations<sup>138</sup> (UN). “It is an organization charged with peace-keeping

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<sup>137</sup> See THOMAS BUERGENTHAL & HAROLD G. MAIER, PUBLIC INTERNATIONAL LAW 16 (2d ed. 1990).

<sup>138</sup> See, e.g., U.N. CHARTER art. 1, paras. 2-3 (stating that goals of the United Nations include “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace” and “[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.); See also, e.g., U.N. CHARTER PMBL., “WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of

responsibilities; with the development of friendly relations among nations; with the achievement of international cooperation in solving international problems of an economic, social, cultural and humanitarian character; with the promotion of human rights and fundamental freedoms for all human beings without discrimination.”<sup>139</sup> Article 2(3) of the charter of the UN “commits members to settle their disputes by peaceful means.”<sup>140</sup> Article 2(4) requires member states to “undertake to refrain from the threat or use of force against the territorial integrity or political independence of other states.”<sup>141</sup>

Regarding matters of peace and security, the UN has limited power to make binding resolutions. However, in all other matters, the UN system is based upon negotiation, mediation, conciliation, inquiry, and good offices.<sup>142</sup> General assembly resolutions “do not have the force of law.”<sup>143</sup>

The principal judicial organ of the UN is the International Court of Justice (ICJ). This court is competent to hear disputes between member nations, and must base its law on international law, not on domestic law. The ICJ only has jurisdiction over member states that willfully consent to such jurisdiction. The UN and the ICJ are greatly weakened by the lack of jurisdiction. However, the UN was never intended to be a police force, but rather it serves to foster friendly relations amongst members, and to avoid the horrors of war that were witnessed in World War II. This volunteer-based jurisdictional system encourages self-restraint among

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men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom....” *Id.*

<sup>139</sup> *Id.* at 38.

<sup>140</sup> LORI F. DAMROSCH ET AL, INTERNATIONAL LAW 934 (4<sup>th</sup> ed. 2001).

<sup>141</sup> *Id.*

<sup>142</sup> See Aaron J. Lodge, *Legislation Protecting Confidentiality in Mediation: Armor of Steel or Eggshells?* SANTA CLARA L. REV. 1093 (2001) (providing a thorough general discussion on mediation).

<sup>143</sup> BUERGENTHAL, *supra* note 137, at 43.

member nations and fosters a cooperative relationship under a type of honor system. However, it also can be criticized as weak and unable to truly prevent renegade governments. Two examples illustrate this “weakness:” 1) Egypt, Cameroon, and Mexico were among the earliest to ratify the Convention against Torture, yet they continued to have some of the worst torture practices well into the last decade.<sup>144</sup> 2) The brutal episodes of mass killing in Cambodia, Rwanda, and Yugoslavia occurred in countries that had ratified the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.<sup>145</sup>

The UN has several principal organs, and numerous subsidiaries. Additionally, some international organizations are affiliates to the UN, and work together in tandem. For example, the International Telecommunications Union, the Universal Postal Union, and the International Labor Organization, the World Bank, and the International Monetary Fund are all such organizations. All such subsidiaries and affiliates of the UN operate on the same principles of mediation and conciliation, rather than forcing compliance through sanctions or military strength. Taking as an example, the International Labor Organization (ILO), whose purpose is to protect the wages, rights and safety of workers, the ILO has created hundreds of conventions since their formation. All of these conventions are consensually ratified, and consensually enforced. Then in 1998, the ILO strengthened the convention creating a declaration that all ILO members **must** endorse the principles and rights in the ILO constitution. Thus, all Member Nations, “even if they have not ratified the Conventions in question, have an obligation arising from the very fact of ILO membership to respect, to promote and to realize the principles

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<sup>144</sup> See Oona A. Hathaway, *Two Cheers for International Law*, THE WILSON QUARTERLY, autumn 2003, at 50.

<sup>145</sup> See *id.*

concerning the fundamental rights which are the subject of those Conventions.”<sup>146</sup> The core conventions included in this mandate are the 1973 Minimum Age Convention and the effective abolition of child labor.

However, such a binding declaration by the ILO may have violated the notion that each Member State can choose which conventions to ratify. Effectively, the ILO has forced the hand of every single Member State on the issue of child labor, even though the 1973 convention “is by a wide margin the least ratified of the seven “core” conventions”. The results have been unimpressive, but perhaps predictable. Many Member States have continued their labor practices of allowing child labor without flinching, essentially ignoring the ILO declaration. Some Member States argue they are in full compliance, by re-defining “child labor” in such a way to create major exceptions.<sup>147</sup> Other States attack the declaration itself, especially a part of the declaration that encourages the WTO, IMF, and the World Bank to be involved with possible enforcement. Still other Member Nations “believe that it is hypocritical for developed nations to expect developing nations to abide by labor standards they did not attain at a comparative stage of economic and social development.”<sup>148</sup>

The recent developments in the ILO demonstrate perhaps a move toward enforceability of conventions. However, the essential underlying strength of the UN has never been its enforcement abilities. Its strength instead lies in relationship building, encouragement, working toward common goals, placing human rights above economic growth, and consensual judicial systems.

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<sup>146</sup> David M. Smolin, *Conflict and Ideology in the International Campaign Against child Labour*, 16 HOFSTRA LAB. & EMPLOYMENT L.J. 383, 420 (1999).

<sup>147</sup> The ILO does not define the exact meaning of child labor, which creates ambiguity. For example, if a child is merely helping out in the family run restaurant, it is not clear whether that qualifies as child labor.

<sup>148</sup> See Smolin, *supra* note 146, at 425.

## ***B. Current state of International Law***

Article 38 of the International Court of Justice<sup>149</sup> (ICJ) specifies four sources of international law that the Court can consider when issuing a ruling. The first source includes applicable treaties, conventions, agreements, or other binding promises which the nations have entered [hereafter collectively called “treaties”].<sup>150</sup> Treaties provide easily discernible sources of international law, and create legal obligations. Treaties, like contracts, are generally in writing, signed by the parties, and are entered into with willing consent. Therefore, enforcement of treaties tends to be straightforward because all parties should know their obligations under the treaties. Since the 1970s, over 500 regional and global treaties have been signed, covering such diverse issues as pollution of rivers, lakes, seas, and air; wetlands protection; fisheries management; hazardous waste; and protection of endangered species.<sup>151</sup>

The second source of international law is custom.<sup>152</sup> Customary international law binds a nation just as do treaties and conventions to which a nation has signed. Customary law is determined according to four elements: 1) *Opinio Juris*, the belief that a certain practice is obligatory as a matter of law; 2) *Duration*, the length of time a practice has been followed; 3) *Uniformity*, an attempt at achieving consistency from nation to nation; and, 4) *Generality*, whether a practice is fairly widespread amongst nations. These four elements are viewed as

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<sup>149</sup> Statute of the International Court of Justice, June 26, 1945 (entered into force, Oct. 24, 1945.), 1976 Y.B.U.N. 1052, 59 Stat. 1031, T.S. No. 993; *Reprinted in* 1 WESTON I.A.2. [hereinafter ICJ].

<sup>150</sup> *See id.* at art 38(1)(a).

<sup>151</sup> *See* Stacy D. VanDeveer, *Green Fatigue*, THE WILSON QUARTERLY, autumn 2003, at 55.

<sup>152</sup> *See* ICJ, *supra* note 149, at art. 38(1)(b).

factors to determine whether a practice should be given the status of law. It is not necessary to satisfy all four elements to qualify as customary international law.

A practice amongst states can become customary international law, thus binding on all nations, even if some of those nations have never yet exercised those practices. Likewise, treaties between several nations can become customary international law, thus binding other nations that were never signatories to the treaty. In sum, “Once a custom is established it becomes binding on all States, regardless of whether those States contributed to the formation of the custom. Even those States that did not follow the practice or express a belief that the practice was law will be bound by the rule.”<sup>153</sup> However, an important exception has been established for any nation which persistently objects to the practice. “A State may exclude itself from the obligations of a particular customary rule by persistent conduct exhibiting an unwillingness to be bound by the rule or a refusal to recognize it as law.”<sup>154</sup>

Third, the Court will consider general principles of law recognized by civilized nations.<sup>155</sup> “A general principle of law is some proposition of law so fundamental that it will be found in virtually every legal system.”<sup>156</sup> General principles appear to fill in any gaps in international law which have not been filled by treaties.<sup>157</sup> General principles of international law must resonate with an underlying sense of justice; the general principles must essentially approach “natural” law.

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<sup>153</sup> DAVID HUNTER ET AL, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 225 (1998).

<sup>154</sup> *Id.*

<sup>155</sup> *See* ICJ, *supra* note 149, at art. 38(1)(c).

<sup>156</sup> GURUSWAMY, *supra* note 73, at 126.

<sup>157</sup> *See* HUNTER, *supra* note 153, at 230.

Finally, the Court will apply any judicial decisions and/or teachings of the most highly qualified publicists of the various nations.<sup>158</sup> The English system of *stare decisis*, where past judicial decisions are binding on future cases, is not recognized in international law. However, judicial decisions can be cited for persuasiveness, and will therefore have value. Likewise, the teachings of scholars are not binding authority, but “are given a high, albeit ‘subsidiary,’ priority as an independent ‘source’ of international law.”<sup>159</sup>

## **V. International Law in Conflict with Globalization**

Free trade agreements may not be in the best interest of the nations that sign them. An inherent conflict exists between the underlying values of traditional international law and the rapid globalization of the world through free trade and multinational corporate growth. Are the benefits of globalization worth the long term loss of sovereignty, culture, and sustainability? Are member states selling their national soul in exchange for illusive, shining promises of profit and economic growth? Is corporate globalization another form of colonialism?

Nations may be racing into a globalized world faster than adequate safeguards can be put into place, and faster than either the people or the nation states are prepared for. The driving force behind high speed globalization is of course the business community, especially large multinational corporations. One underlying value drives the corporation forward: economic gain. This is because the typical corporation owes only one thing to its share holders: profits (unless the mission statement dictates otherwise). Generally, the corporation owes a legal duty to the owners (shareholders) to maximize profits. Therefore, profit and *not* human values are the

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<sup>158</sup> See ICJ, *supra* note 149, at art. 38(1)(d).

<sup>159</sup> GURUSWAMY, *supra* note 73, at 139.

underlying machinery that drives globalization forward. The human values which are pushed aside include those that most people espouse and cherish, and which are important to any civilized culture. These values include fair livable wages, environmental conservation (clean air and water, in perpetuity), equitable resource allocation and sustainable living, education, medical care, adequate housing, civil rights, cultural diversity, and a host of other human rights.

The days of true colonization, serfdom, and slavery have obviously waned, and hopefully soon will cease to exist altogether. These exploits that countries have routinely engaged in produced spoils, such as the right to the resources of a country (oil, minerals, trees, water, etc), taxation of the people, new markets for products, new work forces (cheap labor), and strategic locations for military bases (outside the contiguous fifty states, the U.S. has nearly 800 military bases).<sup>160</sup> Today's global village marketplace and spread of international corporate enterprises result in the same benefits as was achieved in the past by colonization, militarization, and serfdom. New names for the same gains! For example, one result from the U.S.' invasion of Iraq is the privatization of huge industries that very recently were in the ambit of the Iraqi government and people. The total cost of rebuilding Iraq may be as high as \$500 billion.<sup>161</sup> Iraq's Constitution makes privatization of state assets illegal; both the Hague regulations and the U.S. Army's own code of war dictate an imperative to respect the national laws of an occupied

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<sup>160</sup> See *U.S. Military Bases and Empire*, MONTHLY REVIEW, Mar. 2002, available at <http://monthlyreview.org/0302editr.htm> (last visited Mar. 2004). This figure does not include recent additions such as Saudi Arabia, Kosovo, Bosnia, and other newly acquired bases. For example, "[s]ince September 11, 2001, the United States has set up military bases housing sixty thousand troops in Afghanistan, Pakistan, Kyrgyzstan, Uzbekistan, and Tajikistan, along with Kuwait, Qatar, Turkey, and Bulgaria." *Id.*

<sup>161</sup> Michael Scherer, *K Street on the Tigris, Washington insiders and their corporate clients are lining up to cash in on the world's biggest reconstruction project*, MOTHER JONES, Nov.-Dec. 2003, at 17, 17.

territory.<sup>162</sup> Nevertheless, in the name of trade, economic growth, and the global expansion of democracy, the U.S. declared in September, 2003 “that 200 Iraqi state companies would be privatized; decreed that foreign firms can retain 100% ownership of Iraqi banks, mines and factories; and allowed these firms to move 100% of their profits out of Iraq. *The Economist* declared the new rules a ‘capitalist dream.’”<sup>163</sup>

Although globalization is not a new phenomenon, the current sudden leap toward world free trade is new in the sense of speedier change and more powerful moneyed interests behind it. Some corporations have more money than whole countries,<sup>164</sup> which provides a powerful lobby. Joining the trend are failed communist systems in Russia and China which are now moving rapidly toward capitalism, trying to follow Japan, Great Britain, Europe, and the U.S. in the hopes free trade will bring them up to these nations’ living standards. Globalization, via free trade agreements, fueled primarily by corporate pursuits of economic gain has now replaced the traditional precepts and priorities of international law to protect humanity and the environment. The goal of economic gains and corporate profits are justified by the dubious theory that the poor and weak of the world will ultimately benefit or otherwise be better off; but that has not proven to be the case.

The recent strengthened free trade agreements which support globalization fly in the face of years of careful development of international law. The WTO enforcement measures substantially change past weak enforcement abilities, and instead promulgate powerful mechanisms to monitor and mandate compliance. The motivation behind the WTO seems to

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<sup>162</sup> See Naomi Klein, *Bring Haliburton Home*, THE NATION, Nov. 4, 2003, at 3, 3.

<sup>163</sup> *Id.*

<sup>164</sup> See Kalle Lasn & Tom Liacas, *The Birth of the Corporate “I,”* ADBUSTERS, Aug.-Sept. 2000, at 39, 41. “By 1997, 51 of the world’s largest economies were not countries but corporations.” *Id.*

dramatically deviate from the motivation behind many prior conventions and treaties. Although the underlying goals of the WTO are rooted in a genuine belief that strong economic growth is important, the result is to place money and economy at the highest level of protection.

In contrast, international law is built upon relationships, common interests, goals, conciliation, mediation, good offices, recognition of universal humanity, and universal values that all humanity has in common. International law has strived to achieve balance so as not to allow one country to be too powerful, or another to be too oppressed. International organizations, and thus international law, have demonstrated a continual struggle to honor individual cultures and customs. International law nurtures strains of commonality, develops chords of hope, magnifies glimmers of progress, promotes (or strengthens) demise of inequity, and builds future through understanding history. International law has a mission statement of human triumph, pride, health, equality, peace, harmony with the earth, and noble living. Many treaties of the past were promulgated by such considerations, which benefits the nations and the people of the nations involved more directly. As such, traditional international law was forged out of crises such as avoidance of war, protection of human rights, meeting dire global needs, prevention of suffering and starvation, and reducing disease and death.

Stated in the simplest manner possible, traditional international law places human values first; the current trend of globalization, on the other hand, places monetary profit first. The concept of globalization, as promulgated by corporate management, shares few of the underlying values of traditional international law. Corporations seek to make money and promote their own interests. Where international law provides redress for evils done to people and the environment, corporations are anathema to those international law processes. Corporations are soul-less and oppose, even loathe international law protections. For example, public interest causes such as

food safety, privacy rights, health-care reform, air and water purity, minimum wage, and other issues are routinely fought by large multinational corporations.<sup>165</sup> If any such public interest proposal might cut into corporate profits, the corporation will spend millions of dollars to sink it; they will hire experts to support their stance; they will place op-eds and news stories far and wide to promulgate their position and to discredit the proposal.<sup>166</sup> Essentially, free trade and international law have become two opposing entities. Likewise, globalization and international law co-exist in dis-harmony; they have a fundamental conflict from the very beginning.

Perhaps recognizing the underlying conflict between traditional international law on the one hand, and globalization along with corporate enterprise on the other, in 1999 the United Nations announced a new global partnership with corporations.<sup>167</sup> The idea was to try and unify or harmonize some of their conflicting goals. Eyeing a good marketing opportunity and possibly a further way to win governmental support, many large, multinational corporations immediately signed on. Among the first participants were Nike, Shell, Novartis, Bayer, BASF, Dupont, and Daimler Chrysler.<sup>168</sup> On the current website for The United Nations Children's Fund (UNICEF), a "sampling of our corporate partners and sponsors" is delineated. Among such sponsors are some of the largest multinational corporations on the planet: AOL Time Warner, American Airlines, Exxon Mobil, Kimberly-Clark, Procter & Gamble, Nissan, Coca-Cola, McDonalds, Turner Broadcasting Systems, Sony, and many more.<sup>169</sup> This partnership has not moved the corporations in the direction of the underlying goals of the United Nations; instead the

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<sup>165</sup> See KORTEN, *supra* note 1, at 292.

<sup>166</sup> See *id.*

<sup>167</sup> See *id.* at 294.

<sup>168</sup> See *id.*

<sup>169</sup> Available at <http://www.unicefusa.org/partnerships/partners.html> (Last visited Mar. 2004).

reverse seems to be true—the UN has adopted globalization and free trade as the world’s panacea.

The United Nations was founded on principles of the noblest, highest human ideals. The current explosion of free trade agreements and globalization—backed by the WTO—operates as a renegade insurgent insider running amok; threatening the long established good that international law has built up over the past century.

## **VI. Solutions**

The speed of change currently taking place due to the effects of globalization is incomprehensible. In little more than a single generation millions of families have moved from subsistence and/or traditional living to working in globalized multinational factories. Countless communities worldwide have adopted western ideals such as driving automobiles and utilizing large scale machinery rather than human labor. Eating habits have changed, consumerism is flourishing, trade is expanding, cultures are mixing, and the power of the sovereign nation state is diminishing. Although there are benefits to many of these changes, there are serious drawbacks and unintended consequences. It is time to take stock, slow down and assess the advantages and disadvantages. By slowing down, we can adequately evaluate the consequences, and possibly create sustainable plans for the future. The disadvantages can be discussed in a roundtable format leading to the merging of the inevitable continuation of globalization with the long term evolution of international law in such a way as to create more winners than losers, happier people, a healthier environment, and sustainable living. This is possible and within our reach.

The people's voices are another method for restraining the disadvantageous aspects of a globalized world. Yet the people most likely to experience the negative aspects, namely people in the developing world, do not have the education, health-care services, economic welfare, money, and free governments to provide much hope for those people to unite and raise appropriate questions.

Perhaps a stronger hope lies in the system itself. I suggest the powers that be, such as free trade panels, shift their emphasis from unadulterated support for liberalization to an emphasis on protecting core human and environmental concerns. The language and legal machinery to establish such protection is already in place. For example, NAFTA has both an environmental and labor side agreement, which are routinely dismissed by legal scholars as toothless. However, the choice is ours to honor the intent of such side agreements, and find ways to elevate their language. The GATT, which is an underlying agreement incorporated into the WTO, has the Article XX exceptions which allows nations to place restrictions on trade to protect humans, animals, plants, community morals, and other considerations. These exceptions have thus far been fairly strictly interpreted. No revolution is necessary to make substantial changes—we merely must give the highest level of consideration to these already existing exceptions.

Finally, I suggest discovering the most threatening aspects of globalization, such as environmental destruction, cultural loss, or economic imperialism, and forming an international organization designed to regulate those aspects. Such an entity could be created and function on equal par, and in harmony with the WTO, and with pre-existing trade agreements. It would be empowered to scrutinize the globalization process, preventing current fears from coming to pass, and current negative aspects from worsening. In this way, the unavoidable and historically

evolutionary process of globalization can continue to safely advance. With appropriate empowered organizations, citizens and governments would be at the helm and not in a passenger seat.

## **VII. Conclusion**

Recent powerful occurrences and trends have led to an unprecedented world wide move in the direction of globalization. These occurrences and trends include the European Union (and the euro), the fall of the Berlin wall, an increased global awareness of other cultures, mass globalized media, international marketing creating a global market for homogenized goods, continued corporate movement toward expansion of both their market and work force, and a belief that globalization will produce a trickle down theory to benefit all sectors of a society.

Governments, citizens, businesses, and leaders have united behind the virtues and benefits of globalization, causing a simultaneous move toward free trade agreements. Globalization would be stifled without free trade agreements, and could not progress at the desired pace of the modern economy. Just as explorers of the past first had to cut their path through uncharted territory before boldly marching forward, today's free trade agreements pave the way for a forthcoming borderless, global society. Globalization follows where free trade agreements lead. The largest, most powerful free trade agreement currently in place, with nearly 150 member states, is the WTO (and underlying GATT). The WTO provides enforcement measures never before seen in international law, and permits any member nation to "sue" another member nation in a WTO panel. Decisions from these panels bind nations to its ruling, with a heavy hand of disciplinary measures for non-compliance. The judges of WTO panels are not elected, not necessarily aware of cultural ramifications of their decisions, not willing to consider prior domestic rulings or history, and are not subject to any form of sovereign review or appeal

beyond the WTO process. For example, in the U.S., even the Supreme Court could not revise, amend, overturn, or in any way alter the ruling of a WTO panel.

The rapid pace in which today's free trade agreements are forged, signed, and implemented defies nearly 100 years of careful development of international law. This new rapid fire expansion of free trade and thus of globalization, flies in the face of traditional precepts of international law, namely avoidance of war, conciliation, mediation, good offices, protection of fundamental human rights, and unanimity amongst nation states. Instead of traditional international law goals of encouraging, nurturing and fully respecting independent sovereignty, this era of globalization leans the other way, to homogenize, sterilize, and neutralize sovereignty. This negative effect occurs because globalization allows the biggest, most aggressive and well funded corporations to mass produce, globally market, and sell their products to a world wide village of consumers. As corporate products and styles replace whatever existed before, the world (in the aggregate) simply has fewer products and styles left. Thus, we begin to see the same products and styles all over the world. Perhaps the best known example is the existence of McDonald's hamburgers in 119 countries.<sup>170</sup>

Several results occur. Peoples of the world become employees and consumers of foreign, multinational corporations. In other words, people find themselves in service to foreign entities. Money and wealth transfer to those large corporations that are able to reach out successfully to the world market. International law becomes a police force for corporations, saving its strongest abilities for free trade agreements and the protection of the globalization process. In its severest form, this process creates a type of economic imperialism and cultural obliteration. Further,

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<sup>170</sup> See <http://www.mcdonalds.com/countries.html> (last visited Mar. 2004).

since only limited classes of people can truly benefit, the segregation widens between the working classes and the elite.

The solution is not to attempt to stop globalization, but only to stop the worst aspects of it. The WTO enforces the agreements between its member nations, many of which have language built in to help avert the worst fears of trade agreements. We must place that language on the highest level. To the extent possible, governments and citizens must help slow down the process, so that adequate protections can be put in place. Lastly, we must collectively realize that the planet and its resources belong to all of us—there is no shame in protecting those shared resources, the air and water, the plants and animals, and the open fields and undeveloped lands—even to the extent of losing advantage in the economic markets or losing pace in our perhaps innate desire to have a unified world. The last ninety years of international law has been sculpted over time, and incorporates deep human desires into its processes. Let us not lose that momentum in a few short decades of hasty, poorly thought-out courses of action. Such over zealous advancements could prove to be permanently damaging.