

HEINONLINE

Citation: 15 Minn. J. Int'l L. 1 2006



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Wed Nov 11 19:40:29 2015

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1944-0294](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1944-0294)

Essays

Around the World in Eighty Centiliters

Jim Chen*

The conversion of the *Minnesota Journal of Global Trade* into the *Minnesota Journal of International Law* marks a transformative moment in the history of the University of Minnesota Law School. This journal's student editors have elected to tackle the larger world of issues in international law, including but not limited to the law of international trade. On this happy occasion, those of us who have watched the newly reformulated journal since its founding greet the *Minnesota Journal of International Law* with best wishes for its future. To this journal's editors, its contributors, and its readers, genuine friends of the old *Minnesota Journal of Global Trade* and the new *Minnesota Journal of International Law* raise a hearty toast.

One particular aspect of this transition warrants special praise. Only rarely, after all, does tradition for its own sake coincide with forward-looking wisdom. The *Minnesota Journal of International Law* has pledged never to forget the intellectual roots of the *Minnesota Journal of Global Trade* in the law of international trade. By virtue of its specialized focus throughout its first fourteen years, the *Minnesota Journal of Global Trade* advanced an implicit mission of alleviating human misery and advancing the human condition whenever feasible.¹ Undoubtedly the new *Minnesota Journal of International Law* will retain its predecessor's ethically laudable commitment. Therefore, even as we honor this journal's past accomplishments and anticipate its future triumphs, "[l]et us pause in life's pleasures and count its many tears / While we all sup sorrow with the poor."²

* Associate Dean for Faculty and James L. Krusemark Professor of Law, University of Minnesota Law School. Gil Grantmore, Y.S. Lee, and Chantal Thomas provided helpful comments. Marci Windsheimer and Suzanne Thorpe made very valuable contributions to the research underlying this essay. Special thanks to Kathleen Chen.

1. See generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).

2. Stephen Collins Foster, *Hard Times (Come Again No More)* (1855). For

The sorry truth is that the blessings of economic and political liberty have not fallen equally on all members of the human family. International law faces no greater challenge. For the privileged of this earth, those fortunate enough to live in wealthy countries enjoying democracy and political stability, "[b]liss [is] it in [this] dawn to be alive" and "to be young [is] very heaven."³ The modal condition of humanity, however, leaves much to be desired. What C.P. Snow said two generations ago unfortunately still holds sway: "Most of our fellow human beings . . . are underfed and die before their time. In the crudest terms, *that* is the social condition."⁴ Relieving such stark inequities represents the highest calling for those of us who call ourselves social progressives, those "whose implicit social welfare functions . . . weigh gains for the relatively disadvantaged quite heavily, while believing that gains for the relatively prosperous have few real utility effects."⁵ International law, particularly the law of trade and development, plays a vital role in the "new era of global interdependence" that heralded the "turning point in [human] history" that has been reached and passed "in the aftermath of two world wars."⁶ That all of us who "inhabit[] . . . Planet Earth share a common destiny, is a historical fact, a political fact, an economic fact, a sociological fact, that has finally penetrated the [global] consciousness."⁷

The very act of raising a toast provides an ideal metaphor by which to assess the interplay of trade, taxation, and social justice. Throughout the world, a significant measure of legal history expresses itself through public controversies over beverages.⁸ In matters of legal scholarship, a glass of beer is worth a "page of

compelling versions of this classic American ballad, hear BOB DYLAN, GOOD AS I BEEN TO YOU (Sony 1992); EASTMOUNTAINSOUTH, EASTMOUNTAINSOUTH (Dreamworks 2003); Nanci Griffith, OTHER VOICES, TOO (A TRIP BACK TO BOUNTIFUL) (Elektra 1998); EMMYLOU HARRIS, AT THE RYMAN (Reprise 1992); JENNIFER WARNES, SHOT THROUGH THE HEART (BMG 1994).

3. WILLIAM WORDSWORTH, *The Prelude*, in THE MAJOR WORKS 375, 550 (Stephen Gill ed., 2000).

4. C.P. SNOW, THE TWO CULTURES: AND A SECOND LOOK 6-7 (2d ed. 1965); see also *id.* at 7 ("There is a moral trap which comes through th[is] insight into man's loneliness: it tempts one to sit back, complacent in one's unique tragedy, and let the others go without a meal.").

5. Mark Kelman, *Could Lawyers Stop Recessions? Speculations on Law and Macroeconomics*, 45 STAN. L. REV. 1215, 1224 (1993).

6. Harold J. Berman, *World Law*, 18 FORDHAM INT'L L.J. 1617, 1621 (1995).

7. *Id.*

8. See generally Jim Chen, *The Potable Constitution*, 15 CONST. COMMENT. 1 (1998); cf. *Aside, Don't Cry Over Filled Milk: The Neglected Footnote Three to Carolene Products*, 136 U. PA. L. REV. 1553 (1988).

history” and “a volume of logic.”⁹ The United States’ nation-founding revolution arguably began with the Boston Tea Party, and stiff excise taxes on whiskey sparked a western uprising in 1794 against the infant Republic merely seven years after the framing of its current Constitution.¹⁰ Only a wealthy society blinded by its “intellectual hostility . . . to the study of ‘farm’ law”¹¹ would fail to understand that whiskey is nothing less than wheat in liquid, portable, and durable form. Ah, “*wheat*, the king of all grains,”¹² made at once portable and potable. Ours is a potable Constitution, a legal tradition in which many generations of lawyers have floated to wisdom on a stream of milk.¹³ Twice the United States has amended its Constitution on the subject of “intoxicating liquors,”¹⁴ and to this day “[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof,” is the only private activity besides slavery that directly violates the Constitution.¹⁵ Suffice it to say that few things have “provok[ed] as much human strife and nastiness as strong alcoholic beverages” and milk.¹⁶

The production, marketing, and delivery of beverages—from grain, vine, or cow to the mug, glass, or cup—are enterprises “so

9. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921); cf. A.E. HOUSMAN, *Terence, This Is Stupid Stuff*, in *THE COLLECTED POEMS OF A.E. HOUSMAN* 88, 88 (Owl Books, rev. ed. 1971) (“And malt does more than Milton can / To justify God’s ways to man.”).

10. See 1 SAMUEL ELIOT MORRISON, *THE OXFORD HISTORY OF THE UNITED STATES* 182 (1927).

11. Neil D. Hamilton, *The Study of Agricultural Law in the United States*, 43 *ARK. L. REV.* 503, 511 (1990); see also Neil D. Hamilton, *Agriculture Without Farmers? Is Industrialization Restructuring American Food Production and Threatening the Future of Sustainable Agriculture?*, 14 *N. ILL. U. L. REV.* 613, 619 (1994) (documenting the “gulf between our apparent concerns for health and our understanding of the scientific and economic processes of agriculture”); cf. RICHARD HOFSTADTER, *THE AGE OF REFORM: BRYAN TO FDR* 23 (1955) (“America grew up on the farm and moved to the city.”).

12. O.E. RÖLVAAG, *GIANTS IN THE EARTH* 110 (Lincoln Colcord & O.E. Rölvaag trans., 1927). See generally Jim Chen, *Filburn’s Legacy*, 52 *EMORY L.J.* 1719 (2003) (describing the impact of wheat cultivation and its regulation, as resolved in *Wickard v. Filburn*, 317 U.S. 111 (1942), on American constitutional law).

13. Cf. Jim Chen, *Get Green or Get Out: Decoupling Environmental from Economic Objectives in Agricultural Regulation*, 48 *OKLA. L. REV.* 333, 346 (1995) (“[T]he Supreme Court’s dormant commerce clause jurisprudence can be written in milk.”).

14. See U.S. CONST. amend. XVIII, *repealed* by U.S. CONST. amend. XXI.

15. *Id.* amend. XXI, § 2; see Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 *CONST. COMMENT.* 217, 219 (1995).

16. *Queensboro Farms Prods., Inc. v. Wickard*, 137 F.2d 969, 974 (2d Cir. 1943).

vast that fully to comprehend [them] would require an almost universal knowledge ranging from geology, biology, chemistry and medicine to the niceties of the legislative, judicial and administrative processes of government."¹⁷ So extensive are the legal complexities at issue that the typical North American coffee service, standing alone, can traverse nearly the entire range of allocative and redistributive considerations within the law of domestic and international trade.¹⁸ A simple carafe of coffee, with cream and sugar on the side, vividly illustrates the tradeoff between comparative advantage and redistributive goals in the formation of trade policies.

The three items on the coffee table—coffee, cream, and sugar—represent not only two of the leading plant species in humanity's collective larder¹⁹ but also the leading species in humanity's strikingly narrow collection of domesticated animals.²⁰ Thanks to their prominence within global agricultural markets, the items in the traditional coffee service embody great legal significance. Each of these three commodities strikes a different balance between trade, taxation, redistribution, and justice. Coffee itself is a largely unregulated global commodity, while dairy products are subject to intensive forms of domestic regulation that shift wealth from poorer consumers toward richer producers.²¹ The wealthy countries of North America and Europe, with some of the highest labor costs in the world, might be expected to import most or all of their sugar. These countries' contrary propensity to produce their own sugar conceals an obnoxious transnational wealth transfer from poor to rich.

Among the ingredients of the coffee service, the coffee itself is the likeliest target for a direct excise tax. Although most

17. *Id.* at 975.

18. For distinct analyses of the similarities and differences between the law of free trade within the United States and in the international community, see Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401 (1994); John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511 (2000).

19. See generally Robert Prescott-Allen & Christine Prescott-Allen, *How Many Plants Feed the World?*, 4 CONSERVATION BIOLOGY 365 (1990).

20. See JARED DIAMOND, GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES 159–61, 168 (1997) (identifying no more than fourteen successful "candidates for domestication"—cow, sheep, goat, pig, horse, the one-humped Arabian camel, the two-humped Bactrian camel, llama and alpaca, donkey, reindeer, water buffalo, yak, banteng, and gaur—among "the world's 148 big wild terrestrial herbivorous mammals").

21. See Daniel A. Farber, *Positive Theory as Normative Critique*, 68 S. CAL. L. REV. 1565, 1571 (1995).

American jurisdictions exempt food from otherwise generally applicable sales taxes,²² states and localities often do tax coffee on the theory that coffee, tea, and carbonated beverages are not essential commodities.²³ There is, however, little or no official control over the price of coffee. Producers have often tried, without much success, to control wholesale coffee prices through an OPEC-style cartel of coffee-exporting countries.²⁴ As a result, the primary institution that modulates coffee prices is the trading pit of the Coffee, Sugar, and Cocoa Exchange in New York City.

The United States' closest approach to any sort of comprehensive regulation of the coffee trade came in November 2002, when Berkeley, California, considered an initiative to restrict all brewed coffee sales in the city to beverages brewed from beans that are certified organic, "fair-trade," shade-grown, or some combination thereof.²⁵ Although the cluster of interests embraced by the movement for "Socially and/or Environmentally Consciously Cultivated Coffee" is quite complex, advocates for the "SEC-C coffee" movement seek generally to transfer the wealth of bourgeois coffee sippers in North America to preferred growers in the global south.²⁶ The voters of the famously liberal city of Berkeley rejected the measure by a margin of 70% to 30%, 26,712 votes to 11,172.²⁷ The failure of the Berkeley coffee referendum consigns coffee to the relatively unregulated realm in which market forces play the greatest role in shaping prices, market structures, and consumer preferences.

Unlike coffee, milk and sugar will probably escape direct taxation. Courts have acknowledged, albeit begrudgingly at

22. See, e.g., CAL. CONST. art. XIII, § 34; ARIZ. REV. STAT. ANN. § 42-5102 (2004); CAL. REV. & TAX. CODE § 6359 (2005); COLO. REV. STAT. § 39-26-707 (2005); MICH. COMP. LAWS § 205.94d(1) (2004).

23. See, e.g., N.D. CENT. CODE § 57-39.2-.04.1 (2005).

24. See generally Matthew J. Foli, Note, *International Coffee Agreements and the Elusive Goal of Price Stability*, 4 MINN. J. GLOBAL TRADE 79 (1995).

25. See City of Berkeley Election Information, 2002 Ballot Measure Info: Ballot Measures: Measure O, <http://www.ci.berkeley.ca.us/elections/measures/2002/Ocoffee.htm> (last visited Sept. 26, 2005).

26. See SEC-C Coffee for Berkeley, <http://www.geocities.com/coffeelawinfo> (last visited Sept. 26, 2005). According to this movement's adherents, the acronym "SEC-C coffee" is supposed to be pronounced "sexy coffee." The humor of having such a politically incorrect name for a politically correct movement somehow got lost in the defeat of the Berkeley coffee initiative.

27. See Charles Burress, *Back to the Same Old Grind: Mandating a Politically Correct Cup of Coffee Fails in Berkeley*, SAN FRANCISCO CHRON., Nov. 6, 2002, at A28; City of Berkeley Election Information, General Info: 2002 Election Results, http://www.ci.berkeley.ca.us/elections/general/results/2002_Nov/final.htm (last visited Sept. 26, 2005).

times, that these commodities are well-nigh essential to bourgeois life in America.²⁸ Yet both milk and sugar are “taxed” in any realistic sense of the word. Indeed, to argue that neither milk nor sugar is taxed by the federal government insults the intelligent observer.²⁹ Since its Depression-era inception in the Agricultural Marketing Agreement Act of 1937,³⁰ the federal scheme of “dairy regulation [has] levie[d] the heaviest taxes against poorer people to subsidize mainly richer farmers.”³¹ The federal milk marketing order system is outlandishly complex: “Milk is sort of like the international gold system . . . Only a handful of people claim to understand it, and most of them are lying.”³²

Reduced to their essentials, federal milk marketing orders attempt simultaneously to rationalize dairy markets and to raise prices received by farmers.³³ Milk marketing orders address the “two distinctive and essential phenomena of the milk industry” that have historically brought chaos to dairy marketing and depressed prices: “a basic two-price structure that permits a higher return for the same product, depending on its ultimate use, and the cyclical characteristic of production.”³⁴ Cows produce significantly more milk in the spring and summer than in the fall and winter.³⁵ Demand, on the other hand, is relatively steady year-

28. See, e.g., *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 377–78 (1964); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 585 (1961); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951); *Carolene Prods. Co. v. United States*, 323 U.S. 18 (1944); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 149–50 & n.3 (1938); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522–23 (1935); *United States v. E.C. Knight Co.*, 156 U.S. 1, 10, 12 (1895). See generally *Aside*, *supra* note 8.

29. Cf. Jim Chen & Daniel J. Gifford, *Law as Industrial Policy: Economic Analysis of Law in a New Key*, 25 U. MEM. L. REV. 1315, 1358 (1995) (“[N]o-net-cost’ to the federal fisc assuredly does not mean ‘no-tax.’”).

30. Act of June 3, 1937, ch. 296, 50 Stat. 246 (codified as amended at 7 U.S.C. §§ 601–24, 671–74 (2000)).

31. Robert Tempest Masson & Philip M. Eisenstat, *The Pricing Policies and Goals of Federal Milk Order Regulations: Time for Reevaluation*, 23 S.D. L. REV. 662, 663 (1978).

32. Scotti Kilman, *Why the Price of Milk Depends on the Distance from Eau Claire, Wisconsin*, WALL ST. J., May 20, 1991, at A1.

33. This effort to “traverse the labyrinth of the federal milk marketing regulation provisions,” *Smyser v. Block*, 760 F.2d 514, 515–16 (3d Cir. 1985), is derived from *Zuber v. Allen*, 396 U.S. 168, 172 (1969). See generally Neil Brooks, *The Pricing of Milk Under Federal Marketing Orders*, 26 GEO. WASH. L. REV. 181 (1958); Reuben A. Kessel, *Economic Effects of Federal Regulation of Milk Markets*, 10 J.L. & ECON. 51 (1967).

34. *Zuber*, 396 U.S. at 172.

35. See *Smyser*, 760 F.2d at 515.

round and reaches its minimum when schools are out of session.³⁶ As a result, dairy farmers must maintain herds sufficient to meet the fall and winter demand for fluid milk products that cannot be stored for long periods of time. As a result, peak production creates an inevitable surplus known as the "spring flush."³⁷ Surplus milk is directed to nonfluid products such as cheese and butter, which enables milk to be stored and transported in less perishable form.³⁸ Milk that is ultimately used for fluid purposes has traditionally commanded a higher price than milk of the same grade and quality used for manufactured products.³⁹ "Cutthroat" competition among producers for more profitable fluid milk sales can reduce prices overall.⁴⁰

Federal milk marketing orders are designed to distribute the economic burden of surplus milk among all producers in a regional market. The orders classify milk according to its ultimate use—fluid (class I) or nonfluid (classes II and III)—and fix uniform minimum prices that all "handlers"—the statutory term for the middlemen who process and market milk—must pay for each class, "subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers."⁴¹ Although handlers pay a higher uniform minimum price for class I milk, producers receive one uniform price—the "blended" price—for all their milk regardless of its ultimate use. Additional adjustments encourage farmers to stabilize their production year-round.⁴²

The blended price is approximately the weighted average price of all milk of all use classifications sold under the order during a given period.⁴³ Paying each farmer according to the marketwide utilization of milk rather than the utilization of milk from a particular farm eliminates competition among farmers to sell their milk for fluid use.⁴⁴ A so-called "Producer Settlement Fund" resolves the discrepancy between prices paid by handlers

36. *See id.* at 515–16.

37. *Id.* at 516.

38. *See id.*

39. *Id.*

40. *See id.*; Brooks, *supra* note 33, at 181–83.

41. 7 U.S.C. § 608c(5)(A) (2000).

42. *See Smyser*, 760 F.2d at 516.

43. *Id.*

44. *Id.*

and prices received by producers.⁴⁵ Handlers whose "use value" (the weighted average uniform price of the milk they purchased) exceeds the blended price must contribute the difference to the fund, and handlers whose use value was less than the blended price may withdraw the difference from the fund.⁴⁶

Quite notably, Congress aggressively defends the federal dairy program against even remote threats.⁴⁷ In apparent response to the 1994 Supreme Court decision in *West Lynn Creamery, Inc. v. Healy*,⁴⁸ which invalidated a Massachusetts scheme to raise wholesale prices received by in-state dairy farmers, Congress ratified the Northeast Interstate Dairy Compact in 1996.⁴⁹ Over objections that the compact would insulate the New England milkshed from fierce competition by other dairy-producing regions, Congress ratified the compact in order to deliver income support to dairy farmers throughout New England.⁵⁰ The Northeast Interstate Dairy Compact thus became part of the 1996 "farm bill," the federal government's periodic overhaul of its agricultural legislation.⁵¹ This episode represents only one of two instances since 1987 in which the United States Congress has overridden a Supreme Court decision vindicating freedom of interstate trade under the so-called Dormant Commerce Clause of the U.S. Constitution.⁵²

Laws regulating the production and pricing of dairy products in the United States cannot be rationalized on grounds of national food security. The United States emerged from World War II with so much surplus agricultural capacity that it has been feeding the rest of the world ever since. Congressional "findings" that under-

45. *Id.*

46. *Id.*; Kessel, *supra* note 33, at 54-55.

47. *Cf. Carter v. Carter Coal Co.*, 298 U.S. 238, 327 (1936) (Cardozo, J., dissenting) ("At times, . . . the waves of causation will have radiated so far that their undulatory motion, if discernible at all, will be too faint or obscure, too broken by cross-currents, to be heeded by the law.").

48. 512 U.S. 186 (1994).

49. For the text of the compact, see S.J. Res. 28, 104th Cong. (1995).

50. See S. REP. NO. 103-333, at 33-34 (1994) (accompanying S. 2069, 103d Cong. (1994)) (additional views of Sen. Hatch). For further discussion of the dairy compact, see generally *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1471 (D.C. Cir. 1998); *Milk Indus. Found. v. Glickman*, 949 F. Supp. 882, 885-88 (D.D.C. 1996).

51. See Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 147, 110 Stat. 888, 919-20 (codified at 7 U.S.C. § 7256 (2000)); see also Announcement of Implementation of the Northeast Interstate Dairy Compact, 61 Fed. Reg. 44,290 (Aug. 28, 1996) (announcing the authorization and implementation of the compact by Secretary of Agriculture Dan Glickman).

52. See Jim Chen, *A Vision Softly Creeping: Congressional Acquiescence and the Dormant Commerce Clause*, 88 MINN. L. REV. 1764, 1786 (2004).

state "the ability of the United States to produce food and fiber in sufficient quantities"⁵³ defy credibility. Rather, perennial agricultural surpluses give the United States a regulatory challenge at home and political opportunities abroad.⁵⁴ Public Law 480,⁵⁵ America's premier food aid statute, was intended not only to relieve pressure on federal price and income support programs, but also to export prosperity and capitalism.⁵⁶ Though this aid conferred relatively little on its foreign recipients,⁵⁷ Public Law 480 converted domestic agricultural surpluses into one of the leading foreign policy instruments of the Cold War.⁵⁸ The superficially charitable slogan "food for peace" obscured fiscal waste and collateral damage to agricultural self-sufficiency in recipient countries.⁵⁹ (Those problems, of course, are the very albatrosses that globalization's most vocal critics have tried to hang from the necks of contemporary aid agencies, particularly the International Monetary Fund and the World Bank.)⁶⁰ The upshot is simple: "Only a nation that is obscenely rich by the West's historical standards and the larger world's contemporary standards can indulge in food aid either as a means of suppressing domestic supplies or as a tool for shaping foreign relations, much less both."⁶¹ From the perspective of the First World, where nuclear

53. Farmland Protection Policy Act § 1(a)(3), 7 U.S.C. § 4201(a)(3) (2000).

54. See generally Vernon W. Ruttan, *The Politics of U.S. Food Aid Policy: A Historical Review*, in *WHY FOOD AID?* 2 (Vernon W. Ruttan ed., 1993).

55. Agricultural Trade Development and Assistance Act of 1954, Pub. L. No. 83-480, 68 Stat. 454 (codified as amended in scattered sections of 7 U.S.C.).

56. See Willard W. Cochrane, *Farm Technology, Foreign Surplus Disposal, and Domestic Supply Control*, 41 J. FARM ECON. 885 (1959), reprinted in *WHY FOOD AID?*, supra note 54, at 39; Mordecai Ezekiel, *Apparent Results in Using Surplus Food for Financing Economic Development*, 40 J. FARM ECON. 915, 915 (1958).

57. See Theodore W. Schultz, *Value of U.S. Farm Surpluses to Underdeveloped Countries*, 42 J. FARM ECON. 1019 (1960), reprinted in *WHY FOOD AID?*, supra note 54, at 53.

58. See Food for Peace Act of 1966, Pub L. No. 89-808, § 2(A), (B), 80 Stat. 1526, 1526-28 (declaring a policy of "us[ing] the abundant agricultural productivity of the United States . . . to promote . . . the foreign policy of the United States," including a condition that countries receiving American food aid be "friendly" and "independent of domination or control by any world Communist movement") (codified as amended at 7 U.S.C. §§ 1691, 1701, 1703). See generally Ruttan, supra note 54, at 9-26.

59. See Emma Rothschild, *Is It Time to End Food for Peace?*, N.Y. TIMES MAG., Mar. 13, 1977, at 15, reprinted in *WHY FOOD AID?*, supra note 54, at 84.

60. See, e.g., Michael H. Shuman, *GATTzilla v. Communities*, 27 CORNELL INT'L L.J. 527, 537-39 (1994); Robert Wolf, *The Regionalist Answer*, 9 MINN. J. GLOBAL TRADE 610, 613-14 & n.7 (2000).

61. Jim Chen, *Epiphytic Economics and the Politics of Place*, 10 MINN. J. GLOBAL TRADE 1, 34 (2001). See generally Symposium, *Malthus, Mendel, and Monsanto: Intellectual Property and the Law and Politics of Global Food Supply*, 19 J. ENVTL. L. & LITIG. 397 (2004). For a summary of the United States' current food aid policy, see

war is a more salient threat than mass starvation, food security contributes less to trade policy than to military strategy.⁶²

This leaves sugar. Universal in its allure across human cultures and animal species,⁶³ sweetness may be "the prototype of *all* desire."⁶⁴ At the very least, sweetness historically commanded a special cultural status before mass production of cane sugar via slave labor and, eventually, the advent of synthetic sweeteners cheapened sweetness as sensation and as metaphor.⁶⁵ Under the law of the United States, sugar also differs in one key respect. Whereas most federal agricultural programs seek to suppress perennial surpluses of supported commodities, the United States is not and probably never will be self-sufficient in sugar. Therefore, American sugar policy since its inception has relied on aggressive import management and protection of domestic producers.⁶⁶

This program succeeds like no other in transferring wealth from the poor to the rich.⁶⁷ Like many other programs, the sugar program relies on nonrecourse loans as its primary price support mechanism.⁶⁸ If a participating producer defaults on a non-recourse loan, the government's sole remedy lies in collecting the commodities that underlie the loan. Nonrecourse loans thus guarantee an effective minimum price to participating producers.⁶⁹ Congress has set the presumptive loan rate at \$0.18 a pound for

Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, §§ 201, 203, 110 Stat. 888, 951-953 (amending 7 U.S.C. §§ 1691a, 1702); Vernon W. Ruttan, *Does Food Aid Have a Future?*, 80 AM. J. AGRIC. ECON. 572 (1998). On domestic food supply policy during the last period of serious food insecurity in American history, see generally Guadalupe T. Luna, *The New Deal and Food Insecurity in the "Midst of Plenty,"* 9 DRAKE J. AGRIC. L. 213 (2004).

62. See generally PAUL B. THOMPSON, *THE ETHICS OF AID AND TRADE: U.S. FOOD POLICY, FOREIGN COMPETITION, AND THE SOCIAL CONTRACT 20-40* (1992) (analyzing the United States' geopolitical use of the "food weapon" during the Cold War).

63. See MICHAEL POLLAN, *THE BOTANY OF DESIRE: A PLANT'S-EYE VIEW OF THE WORLD* 19 (2001).

64. *Id.* at 18.

65. See *id.*

66. See Jones-Costigan Act of 1934, ch. 263, 48 Stat. 670; Sugar Act of 1937, ch. 898, 50 Stat. 903; Sugar Act of 1948, ch. 519, 61 Stat. 922; *Secretary of Agriculture v. Central Roig Ref. Co.*, 338 U.S. 604 (1950).

67. See generally Katherine E. Monahan, *U.S. Sugar Policy: Domestic and International Repercussions of Sour Law*, 15 HASTINGS INT'L & COMP. L. REV. 325, 338-45 (1992).

68. See 7 U.S.C. § 7272 (2000). See generally REMY JURENAS, *CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF: SUGAR POLICY ISSUES* (Mar. 23, 2005), available at <http://www.ncseonline.org/nle/crsreports/05mar/IB95117.pdf>.

69. See, e.g., *St. Paul Fire & Marine Ins. Co. v. Commodity Credit Corp.*, 646 F.2d 1064, 1067 (5th Cir. 1981).

raw cane sugar⁷⁰ and \$0.229 a pound for refined beet sugar.⁷¹ These rates are substantially higher than the usual price for sugar on the global market.⁷² On the surface, such a high loan rate would result in huge forfeitures; sugar imports would drive the domestic price down toward the prevailing world price. Domestic cane and beet producers would default on their nonrecourse loans, and the Commodity Credit Corporation, the arm of the United States Department of Agriculture that ordinarily impounds commodities surrendered to the government in lieu of payments on nonrecourse loans, would effectively own every pound of domestically produced sugar. The Department of Agriculture, however, operates under a mandate to manage the sugar program “at no cost to the Federal Government by avoiding the forfeiture of sugar to the Commodity Credit Corporation.”⁷³

The only way to prevent the federal government from accumulating sugar stocks is to exclude cheap imports. For decades the United States relied on strict quantitative import quotas for sugar.⁷⁴ Article XI of the General Agreement on Tariffs and Trade (GATT), however, prohibits undisguised import quotas.⁷⁵ The “General Elimination of Quantitative Restrictions,” after all, is a bedrock principle of international economic law. GATT rests on a surprisingly simple and elegantly appealing set of golden rules: do unto others as you do unto others (Article I), and do unto others as you do unto yourself (Article III), mindful that tariffs are the least objectionable of trade barriers and that the community of nations can negotiate tariffs downward over time (Article II). In 1989, an international arbitral panel constituted at Australia’s request held that the former American import quota violated GATT.⁷⁶ In response, the United States established a two-tiered tariff on sugar imports. The Tariff Rate Quota adopted in 1990 imposed a relatively modest tariff of .625¢ a pound on the first 2.315 million

70. See 7 U.S.C. § 7272(a) (2000).

71. See *id.* § 7272(b).

72. The New York Board of Trade reports daily spot prices of sugar and other market data at <http://www.nybot.com>. Brazil’s Center for Advanced Studies in Applied Economics (Centro de Estudos Avançados em Economia Aplicada) reports Brazilian prices at <http://cepea.esalq.usp.br>; the visitor should click on “Indicadores de Preços” and then “Açúcar.”

73. 7 U.S.C. § 7272(g)(1) (2000).

74. See generally, *e.g.*, *United States Cane Sugar Refiners’ Ass’n v. Block*, 683 F.2d 399 (C.C.P.A. 1982) (describing the President’s power to limit imports under § 201(a) of the Trade Expansion Act of 1962, 19 U.S.C. § 1821(a)).

75. Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

76. See Report of the Panel, *United States—Restrictions on Imports of Sugar*, L/6514 (June 22, 1989), GATT B.I.S.D. (36th Supp.) at 331 (1989).

tons of sugar imported into the United States each year.⁷⁷ Additional imports faced a stiff tariff of \$0.16 a pound, more than enough to raise the domestic price of sugar above the statutory minimum loan rate.⁷⁸

Nearly two decades later, the two-tiered sugar tariff has remained effectively intact. The 1996 farm bill,⁷⁹ widely regarded as the most market-oriented agricultural statute ever adopted by the federal government,⁸⁰ left the sugar program practically untouched.⁸¹ Under the Harmonized Tariff Schedule of the United States as of July 1, 2004, the first 1.117 metric tons (roughly 1.231 short tons) of sugar entering the United States each year—an amount contingent upon the Secretary of Agriculture's estimates regarding the adequacy of "domestic supplies of sugars" needed "to meet domestic demand at reasonable prices"—face a tariff of 1.4606¢ a kilogram, or .6626¢ a pound.⁸² All subsequent imports are taxed at 33.87¢ a kilogram, or 15.36¢ a pound.⁸³

This program, putatively run at "no cost" to the American taxpayer, imposes billions of dollars every year in higher consumer prices for sugar.⁸⁴ The legendary political strength of the

77. See Proclamation No. 6179: Modification of Tariffs and Quota on Certain Sugars, Syrups, and Molasses, 55 Fed. Reg. 38,293 (Sept. 13, 1990).

78. See *id.*

79. See Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (codified in scattered sections of 7, 16, 20, and 21 U.S.C.).

80. See generally William D. Coleman, Michael M. Atkinson & Eric Montpetit, *Against the Odds: Retrenchment in Agriculture in France and the United States*, 49 WORLD POL. 453 (1997); David Orden, *The 1996 Farm Bill: How Much Change and How Permanent?*, in THE AMERICAN FARM BILL: IMPLICATIONS FOR CAP REFORM 23 (David Colman ed., 1997); C. Edwin Young & Paul C. Westcott, *The 1996 U.S. Farm Act Increases Market Orientation*, U.S. DEPT OF AGRIC., ECON. RES. SERV., AGRIC. INFO. BULL. NO. 726 (1996).

81. See H.R. REP. NO. 104-462, at 46, 65-66 (1996), as reprinted in 1996 U.S.C.C.A.N. 611, 618, 638-39; Christopher R. Kelley, *Recent Farm Program Developments*, 4 DRAKE J. AGRIC. L. 93, 117 (1999) (describing the 1996 farm bill as replacing previous authorizations for nonrecourse loans and marketing assessments in the sugar program).

82. For chapter 17 of the Harmonized Tariff Schedule of the United States as of July 1, 2004, see http://hotdocs.usitc.gov/tariff_chapters_current/0410C17.pdf. The Harmonized Tariff Schedule of the United States is not published in the *United States Code*, but it is incorporated by reference into the laws of the United States via 19 U.S.C. § 1202 (2000).

83. See 9 U.S.C. § 1202 (2000); chapter 17 of the Harmonized Tariff Schedule of the United States as of July 1, 2004, available at http://hotdocs.usitc.gov/tariff_chapters_current/0410C17.pdf.

84. Consumer losses from the American sugar program have been pegged between \$1 billion and \$2 billion for decades. See U.S. DEPT OF COMMERCE, INT'L TRADE ADMIN., UNITED STATES SUGAR POLICY: AN ANALYSIS 10 (Ralph Ives & John Hurley eds., 1988) (estimating \$1.9 billion in lost consumer welfare every year); MARK

sugar lobby stems from the extreme concentration of benefits under the program. Legislators from the four states that produce sugar cane (Florida, Louisiana, Hawaii, and Texas) and the four that produce the bulk of sugar beets (Minnesota, California, North Dakota, and Idaho) bear primary responsibility for the sugar program and the egregiously regressive wealth transfers performed under the program's aegis.⁸⁵ Political support for the sugar program, however, is by no means limited to these cane- and beet-producing states. Because high-fructose corn sweeteners provide a workable (albeit inferior) substitute for sucrose from cane or beet, the price umbrella erected by the sugar program incidentally shelters a substantial agribusiness market for American corn growers.⁸⁶ Higher prices for sugar undoubtedly also enhance the profitability of artificial sweeteners such as aspartame and saccharin; although some "[p]urchasers of diet products are . . . 'pathetically eager' to obtain a more slender figure,"⁸⁷ price also affects the choice between sugar and non-nutritive sweeteners. By far the biggest losers are the cane growers in the tropical sugar-exporting nations who lose access to the world's single largest market of sugar consumers.⁸⁸ For what it may be worth—apparently, not much—many of these nations (except Cuba) are either allies of the United States, frequent recipients of foreign assistance financed by American taxpayers, or countries whose economic and political stability is vital to American national

GROOMBRIDGE, AMERICA'S BITTERSWEET SUGAR POLICY 1 (2001) (estimating losses of up to \$1.7 billion); OXFAM, THE GREAT EU SUGAR SCAM 11 (2002) (Oxfam Briefing Paper No. 27) (valuing foreclosed sugar markets in the United States at approximately \$1.5 billion); Rekha Mehra, *Winners and Losers in the U.S. Sugar Program*, RESOURCES, Winter 1989, at 5 (reporting \$1 to \$1.5 billion in lost consumer welfare every year).

85. See Monahan, *supra* note 67, at 338 & nn.114–15; cf. Sara Fisher Ellison & Wallace P. Mullin, *Economics and Politics: The Case of the Sugar Tariff*, 38 J.L. & ECON. 335 (1995) (reviewing congressional votes on sugar tariff reform in 1912).

86. See *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988) (conceding that "sugar and HFCS [high fructose corn syrup] are functionally interchangeable for all uses for which HFCS is suitable"); Monahan, *supra* note 67, at 342; Daniel A. Sumner, *Targeting Farm Programs*, 9 CONTEMP. POL'Y ISSUES 93, 101 (1991).

87. *United States v. An Article of Food . . . "Manischewitz . . . Diet Thins,"* 377 F. Supp. 746, 749 (E.D.N.Y. 1974).

88. See United States Department of Agriculture, World Centrifugal Sugar Production, Supply and Distribution, http://www.fas.usda.gov/psd/complete_tables/HTP-table10-91.htm (last visited Sept. 30, 2005); United States Department of Agriculture, Centrifugal Sugar, <http://www.fas.usda.gov/http/sugar/2005/May%202005%20PSD.pdf> (last visited Sept. 30, 2005); United States Department of Agriculture, World Sugar Situation, <http://www.fas.usda.gov/http/sugar/2005/World%20Sugar%20Situation%20May%202005.pdf> (last visited Sept. 30, 2005).

security.⁸⁹

The federal definition of “major sugar growing, producing, and exporting countries”⁹⁰ provides another hint that trade and tax policies on sugar have become absurd. The sugar program allows the Secretary of Agriculture to reduce the nonrecourse loan rate—and thereby to lower the de facto minimum price received by domestic cane and beet producers—“if the Secretary determines that negotiated reductions in export subsidies and domestic subsidies provided for sugar of other major sugar growing, producing, and exporting countries in the aggregate exceed the commitments made” by these countries under the World Trade Organization’s Agreement on Agriculture.⁹¹ Chief among the countries designated as “major sugar growing, producing, and exporting countries” are “the countries of the European Union.”⁹² Historically a massive importer of sugar, molasses, and rum—merely three ways of storing, transporting, and ultimately consuming highly perishable sugar cane⁹³—modern Europe has transformed itself into a leading exporter of beet sugar through an extremely aggressive program of import barriers and export subsidies.⁹⁴ So much for the peculiar historical establishment of triangular trade.⁹⁵ To exclude cheaper sources of sugar, European tariffs on imported sugar reach 140%.⁹⁶ Export subsidies then push large amounts of European production overseas. One-fourth of French and British production leaves Europe.⁹⁷ The European Union’s complex measures on sugar raise consumer prices within the Union by

89. Cf. Jon Lauck, Note, *Against the Grain: The North Dakota Wheat Pooling Plan and the Liberalization Trend in World Agricultural Markets*, 8 MINN. J. GLOBAL TRADE 289, 293–94 (1999) (describing the United States’ concern with the stability of its sugar supplies during the 1920s).

90. 7 U.S.C. § 7272(c)(4)(B) (2000).

91. *Id.* § 7272(c)(1); see also 19 U.S.C. § 3511(d)(2) (2000).

92. 7 U.S.C. § 7272(c)(4)(B)(i) (2000).

93. Cf. *Maneja v. Waiialua Agric. Co.*, 349 U.S. 254, 257 (1955) (“Freshly cut sugar cane is extremely perishable and must be processed within a few days of harvesting or serious spoilage will result.”).

94. See generally OXFAM, *supra* note 84, at 4–11.

95. See generally, e.g., ROBERT FINDLAY, *TRIANGULAR TRADE AND THE ATLANTIC ECONOMY OF THE EIGHTEENTH CENTURY: A SIMPLE GENERAL-EQUILIBRIUM MODEL* (1990).

96. See A.C. Hannah, *Consumer Response to Low Prices—Why So Sluggish?* 1 (2000), <http://www.isosugar.org/publicdownloads/speeches/Tony/ACHSEMINAR1100.pdf> (last visited Sept. 24, 2005).

97. See European Commission, *Agriculture in the European Union—Statistical and Economic Information*, available at http://europa.eu.int/comm/agriculture/agrista/2000/table_en/en43.htm (last visited Sept. 24, 2005).

roughly €800 million each year.⁹⁸ In all, European sugar costs three times the world market price, and European farmers and processors are the world's biggest beneficiaries of sugar subsidies.⁹⁹ These First World farmers are hardly "the wretched of the earth," certainly not by the standards of a larger world in which disgracefully large numbers of men, women, and most of all children "live in the streets and beg for scraps of garbage to eat."¹⁰⁰

Sugar support programs in America and in Europe ensure that rampant inequality remains an essential part of "the price of the sugar [we] eat."¹⁰¹ The American program alone delivers up to \$60,000 per year in benefits to the average beet or cane farmer in the United States.¹⁰² Owners of American sugar plantations, it bears repeating, are not "the wretched of the earth." Why indeed should a prosperous entrepreneurial class in the world's wealthiest and mightiest nation benefit at the expense of the poor at home and overseas? Even if its beneficiaries were worthy recipients of public largess, the American sugar program "is a highly inefficient means of achieving its stated goal of domestic producer support."¹⁰³ "For every dollar transferred to U.S. sugar producers, U.S. consumers pay [\$]2.56 to [\$]2.62 . . ."¹⁰⁴ Without drawing a single dime from the budget of the United States, the sugar program would approach the economic impact of the fiscally intense farm support programs that historically committed the federal government to spend \$80,000 per year for each farm job saved.¹⁰⁵

Indeed, putative "independence" from the federal budget provides further reason to despise the sugar program. Other farm programs at least have the decency to draw from the federal budget. The practical effect of the sugar program—or, for that

98. See Court of Auditors, *Special Report No. 20/2000 concerning the management of the common organisation of the market for sugar, together with the Commission replies*, 2001 O.J. (C 50) 1, at ¶ 80.

99. See BRENT BORRELL & DAVID PEARCE, *SUGAR: THE TASTE TEST OF TRADE LIBERALISATION* 6 (1999).

100. Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 OHIO ST. L.J. 731, 818 (1997).

101. VOLTAIRE, *CANDIDE, OR OPTIMISM* 40 (Robert M. Adams trans., 2d ed. 1991).

102. See Monahan, *supra* note 67, at 341.

103. *Id.* at 344.

104. *Id.*

105. See Thomas W. Hertzel et al., *Economywide Effects of Unilateral Trade and Policy Liberalization in U.S. Agriculture*, in *MACROECONOMIC CONSEQUENCES OF FARM SUPPORT POLICIES* 260, 261 (Andrew B. Stoeckel et al. eds., 1989); Jeffrey J. Steinle, Note, *The Problem Child of World Trade: Reform School for Agriculture*, 4 MINN. J. GLOBAL TRADE 333, 340–41 (1995).

matter, of any other legal scheme that raises consumer prices by erecting barriers to trade—is identical to that of an excise tax.¹⁰⁶ Engel's law describes an inverse relationship between income and food consumption: *ceteris paribus*, as a consumer's income increases, the proportion spent on food decreases.¹⁰⁷ Because the poor spend a disproportionately higher percentage of their limited incomes on food, the de facto tax on sugar is overtly regressive.

In 2004, a panel of the World Trade Organization (WTO) ruled, in a petition brought by Brazil, Australia, and Thailand, that the European Union's sugar program was illegal.¹⁰⁸ In April 2005, the Appellate Body of the WTO issued a final ruling ordering Europe to stop dumping subsidized sugar on global markets.¹⁰⁹ As of this writing, the opposing parties continue to contest the precise terms by which the European Union must finally concede defeat in this long-running dispute.¹¹⁰ Whatever the timetable for European compliance, some stark facts are now settled. The European Union exported roughly four million metric tons of sugar in 2001, or three times the Union's limit for that period. The three victorious parties in the European sugar dispute—Brazil, Australia, and Thailand—are countries that once fell within European spheres of colonial influence and are on balance

106. See, e.g., A.B. ATKINSON & J.E. STIGLITZ, LECTURES ON PUBLIC ECONOMICS 20 (1980).

107. See MARGUERITE C. BURK, CONSUMPTION ECONOMICS: A MULTIDISCIPLINARY APPROACH 87 (1968); BENJAMIN SENAUER, ELAINE ASP & JEAN KINSEY, FOOD TRENDS AND THE CHANGING CONSUMER 134 (1991); cf. Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1647 (1998) (“[W]e do know, with all but metaphysical certainty, . . . that no human being has ever eaten an adult hippopotamus in one sitting . . .”).

108. See Panel Report, *European Communities—Export Subsidies on Sugar, Complaint by Australia*, WT/DS265/R (Oct. 15, 2004); Panel Report, *European Communities—Export Subsidies on Sugar, Complaint by Brazil*, WT/DS266/R (Oct. 15, 2004); Panel Report, *European Communities—Export Subsidies on Sugar, Complaint by Thailand*, WT/DS283/R (Oct. 15, 2004).

109. See Appellate Body Report, *European Communities—Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (Apr. 28, 2005).

110. See *European Communities—Export Subsidies on Sugar* (Aug. 11, 2005), <http://docsonline.wto.org/DDFDocuments/t/WT/DS/283-11.doc> (request for arbitration under Article 21.3(c) of the Dispute Settlement Understanding to establish a reasonable period of time for the implementation of the Dispute Settlement Body's resolution of the European sugar subsidy controversy). For further background, see generally Mark Clough, *Sugar, Agricultural Subsidies and the WTO Dispute*, 9 INT'L TRADE L. & REG. 126 (2003); Chris Milner et al., *Would All ACP Sugar Protocol Exporters Lose from Sugar Liberalization*, 16 EUR. J. DEV. & RES. 790 (2004); Food & Agriculture Organization of the United Nations, *Effects of Trade Liberalization on the World Sugar Market* (1999), available at http://www.fao.org/es/ESC/en/20953/21032/21661/highlight_26367en.html.

less prosperous than the member states of the European Union. Europe nevertheless bears the embarrassing task of defending subsidies to a class of rich entrepreneurs against a legal challenge posed by a modestly wealthy trio of postcolonial countries. All the while, the truly wretched countries of the developing world, which have a proportionally far greater stake in this dispute, await the eventual resolution of the European sugar war.

Back in the United States, the unhappy persistence of the two-tiered sugar tariff is reminiscent of an older episode in American trade policy. During the early 1980s, the United States government pressured the Japanese automobile industry to adopt a set of socially and politically expensive voluntary export restraints (VERs).¹¹¹ American *taxpayers* could have paid \$37,000 during 1984 alone for each of the 23,800 autoworking jobs that would have been lost but for the imposition of VERs.¹¹² The resulting \$881 million welfare program—designed according to the average 1984 American autoworker's wages—would have been far cheaper than the \$3 billion that American consumers absorbed that year in higher car prices.¹¹³ That figure does not include additional savings attributable to the correction of spending patterns that were otherwise distorted by the VERs. The malicious distributional impact of this protectionist scheme also bears noting. During the VERs' heyday, the average autoworker earned \$15,000 more than the average American worker.¹¹⁴ Yet the political debate over public support for the American auto industry in the 1980s never considered a direct, "Chrysler-style" bailout of the United Auto Workers.

Coffee, cream, and sugar tell three starkly different tales within the law of trade and development. These three commodities span the full spectrum of domestic and international legal policies that can be manipulated to yield different distributions of wealth among and within nations. Coffee is a freely traded commodity, a market whose relatively modest inequities lend

111. See CLYDE V. PRESTOWITZ, JR., *TRADING PLACES* 421–23 (1989) (documenting the international and domestic maneuvering that led to the negotiation of the VERs); cf. JUNICHI GOTO, *LABOR IN INTERNATIONAL TRADE THEORY: A NEW PERSPECTIVE ON JAPANESE-AMERICAN ISSUES* 48–74 (1990) (describing the impact of labor relations within the American automobile industry on Japanese-American trade relations at large).

112. See Junichi Goto, *Imperfect Competition and the Japan-US Automobile Trade*, in *INTERNATIONAL TRADE MODELING* 107, 125–26 (M.G. Dagenais & P.A. Muet eds., 1992).

113. See *id.*

114. See *id.* at 126.

themselves to voluntary correction through socially conscious labeling and marketing practices. At the other extreme, the traditional approach to sugar in American, European, and international law has effected systematic and substantial transfers of wealth from hapless consumers and downtrodden farmers to sheltered First World producers. On a domestic basis and a more modest scale, the American dairy program achieves what the sugar program accomplishes on a global basis. The operative constraint is not Congress's "underdeveloped capacity for self-restraint,"¹¹⁵ but the weight and perishability of dairy products vis-à-vis processed sugar.

If history's various economic wars have taught us anything, it is the enduring value of free trade. In the United States, the common market established by the Dormant Commerce Clause is one of the Constitution's most important economic, political, and social baselines.¹¹⁶ At the global level, the Bretton Woods treaties form a comparably powerful foundation.¹¹⁷ At home and abroad, antitrust law and competition policy unequivocally recognize competition as the fuel of progress.¹¹⁸ The same wisdom, however, has yet to persuade many commentators on the law of trade and development.

"Some truths are so basic that, like the air around us, they are easily overlooked."¹¹⁹ Free trade is an essential and effective instrument of redistribution, typically in favor of downtrodden consumers at the expense of fat, sheltered producers. Precisely because trade erodes domestic producers' well-being for the benefit of consumers not only at home but also abroad, many domestic legislators oppose trade.¹²⁰ As a result, although free trade should command a firm commitment within the political agenda of redistribution-minded progressives in the United States and in the world at large, it does not. In fact, the opposite is true. "If patriotism is . . . the last refuge of the scoundrel, wrapping out-

115. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting).

116. *See, e.g., Associated Indus. v. Lohman*, 511 U.S. 641, 650 (1994) (describing the "securing [of] a national area of free trade" as the "central objective" of the dormant commerce clause (internal quotation marks omitted)); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) (same); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944) (same).

117. *See generally* Jim Chen, *Pax Mercatoria: Globalization as a Second Chance at "Peace for Our Time,"* 24 *FORDHAM INT'L L.J.* 217 (2001).

118. *See* Jim Chen, *The Vertical Dimension of Cooperative Competition Policy*, 48 *ANTITRUST BULL.* 1005, 1034 (2003).

119. *New York v. United States*, 505 U.S. 144, 187 (1992).

120. *See* Farber, *supra* note 21, at 1572; Farber & Hudec, *supra* note 18, at 1406.

dated industry in the mantle of national interest is the last refuge of . . . economically dispossessed” producers.¹²¹ Opposition to free trade is as predictable as it is vicious. Organized interests (such as domestic producers) hold an overwhelming political advantage over “anonymous and diffuse” majorities, especially faceless consumers.¹²² Political leverage reaches its apex when competition hails from abroad.¹²³ Democracy should not have losers,¹²⁴ but it does. The price of electoral democracy in matters of politics is eternal vigilance within the law of international trade.

The task of the *Minnesota Journal of International Law* is likewise eternal. In a world that knows but despises the entrenchment of poverty,¹²⁵ the task of international law consists of improving the human condition not in “favored spots alone, but the whole Earth.”¹²⁶ Although a “science which hesitates to forget its founders is lost”¹²⁷ and “progress in a scientific discipline can be measured by how quickly its founders are forgotten,”¹²⁸ this journal would do well to heed its roots in the law of international trade. Few if any other uses of this journal’s pages would vindicate as thoroughly the interests of the world’s poorest. Economic development, after all, is also a human right.¹²⁹ Reconciling democracy with development fits squarely within the established legal framework for assessing and securing human rights. A sounder view of the developmental dynamic treats wealth as a precondition for rights, not a competitor or a substitute.¹³⁰ Development affects even environmental integrity, not least by

121. KENICHI OHMAE, *THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES* 62 (1995).

122. Bruce A. Ackerman, *Beyond Carolene Products*, 98 *HARV. L. REV.* 713, 723–24 (1985).

123. See ROBERT Z. LAWRENCE & ROBERT E. LITAN, *SAVING FREE TRADE: A PRAGMATIC APPROACH* 23–24 (1986).

124. See generally Elisabeth Lasch-Quinn, *Democracy Should Not Have Losers*, 9 *MINN. J. GLOBAL TRADE* 589 (2000).

125. Cf. *John* 12:8 (“The poor you always have with you . . .”) (Revised Standard Version).

126. WORDSWORTH, *supra* note 3, at 550.

127. The Wit and Wisdom of Alfred North Whitehead, <http://www.alfred.north.whitehead.com/witwiz/witwiz4.htm> (last visited Sept. 27, 2005).

128. EDWARD O. WILSON, *CONSCIENCE: THE UNITY OF KNOWLEDGE* 182–83 (1998).

129. See, e.g., Vienna Declaration and Programme of Action, Vienna, June 14–25, 1993, U.N. Doc. A/CONF.157/24; cf. Convention on Biological Diversity art. 20(4), June 5, 1992, 31 *I.L.M.* 818, 831 (1992) (declaring the “eradication of poverty” to be a paramount developmental objective under the Convention).

130. See generally, Daniel A. Farber, *Rights as Signals*, 31 *J. LEG. STUD.* 83 (2002).

paying a "green dividend" as rising incomes spur a taste for environmental amenities and the means with which to pay for them.¹³¹ Among the seemingly countless environmental problems in this mutually dependent world, "persistent poverty may turn out to be the most aggravating and destructive."¹³² We must remember "above all else" that "human degradation and deprivation . . . constitute the greatest threat not only to national, regional, and world security, but to essential life-supporting ecological systems."¹³³

Quite fortuitously, the transformation of this journal coincides with hints, however faint, that legal commitments to the free movement of goods, services, and labor do persist at home and abroad. In a world wracked with war and turmoil, two arms of the United States government in 2005 adopted modest measures that reflected some degree of hope in free trade and open markets. By the razor-thin margins of 5–4 and 217–215, respectively, the Supreme Court of the United States expanded the right to purchase wine without regard to state boundaries,¹³⁴ and the United States House of Representatives approved the Central American Free Trade Agreement (CAFTA).¹³⁵ This regional trade pact passed political muster despite the virtual certainty that wealthy American cane and beet farmers will lose a share of the sugar market to their poorer counterparts throughout the rest of the CAFTA region. Both of these landmark developments in favor of trade came to pass during the glorious summer of 2005, that *aestas mirabilis* when the *Minnesota Journal of Global Trade* became the *Minnesota Journal of International Law*. Happy days indeed are here again.

131. See, e.g., GENE M. GROSSMAN & ALAN D. KRUEGER, ENVIRONMENTAL IMPACTS OF A NORTH AMERICAN FREE TRADE AGREEMENT 5 (1991); PETER HUBER, HARD GREEN 151 (2000); OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, TRADE AND ENVIRONMENT: CONFLICTS AND OPPORTUNITIES 4–6, 22–24 (1992).

132. Patrick Low, *Trade and the Environment: What Worries the Developing Countries?*, 23 ENVTL. L. 705, 706 (1993).

133. James A. Lee, *Conservation in a World in Search of a Future*, in CONSERVATION FOR THE TWENTY-FIRST CENTURY 284, 287 (David Western & Mary C. Pearl eds., 1989).

134. See *Granholt v. Heald*, 125 S. Ct. 1885 (2005).

135. H.R. 3045, 109th Cong., 151 CONG. REC. H6884 (2005).