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**A Match Made in the Corporate and Public Interest: Marrying
Voluntary CSR Initiatives and the WTO**

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*A MATCH MADE IN THE CORPORATE AND PUBLIC
INTEREST:
MARRYING VOLUNTARY CSR INITIATIVES AND THE
WTO¹*

SUMMARY:

Critics of globalization often argue that the World Trade Organization (WTO) is in bed with multilateral corporations. But the WTO trade agreements regulate the behavior of governments, not corporations. Yet companies and their shareholders clearly benefit from access to new or larger markets. This article examines how trade and voluntary CSR have been linked by policymakers around the world, and discusses whether linking voluntary CSR initiatives (CSR) and the WTO would promote greater corporate social responsibility and trade. The author suggests such a step should be taken in a few rare circumstances. However, the author recommends that trade policymakers should examine whether some WTO rules, are, in effect, disincentives to firms to act responsibly in international markets.

KEY WORDS:

WTO

CSR

TRADE DISTORTING

MOST FAVORED NATION

TRADE

MULTINATIONAL CORPORATION

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A MATCH MADE IN THE CORPORATE AND PUBLIC INTEREST: MARRYING VOLUNTARY CSR INITIATIVES AND THE WTO

I. OVERVIEW

Critics of globalization often argue that the World Trade Organization (WTO) is in bed with multilateral corporations. They claim that WTO rules were written by and for multinationals, and that these rules benefit multinational corporations at the expense of the world's poor.² Moreover, many trade agreement critics allege that many of the WTO's rules actually provide incentives to corporations to act irresponsibly in the developing world, where governance is inadequate. But the WTO governs the behavior of governments, and has no direct authority over business. In addition, these critics often conflate the actions and decisions of WTO member government's policymakers with WTO "dictat." However, there is no such thing as WTO "dictat." The WTO system represents the consensus of the member states. The WTO has stated that its bureaucracy "and all its associated agreements and rules, is simply the expression of the will of its member governments."³

Nonetheless, these arguments became so influential that WTO staff has tried to persuade the public that it is not a tool of multinationals.⁴ In 2002, the director general of

² See an overview in Program on International Policy Attitudes, PIPA, "International Trade," at http://65.109.144.44/cgi-bin/perfect/search/search.pl?q=multinational%20corporations&showurl=http%3A//65.109.144.44/digest/global_issues/intertrade/tradepolicy.cfm, last searched 8/8/05. The site summarizes the views of many polls on trade.

³ http://www.wto.org/english/thewto_e/minist_e/min99_e/english/book_e/stak_e_6thm, last searched 1/04/2006.

⁴ World Trade Organization, "10 Common Misunderstandings about the WTO," 1999, available at www.wto.org. See in particular, misunderstanding # 3 and # 4. Also see Report by the Consultative Board to the Director-General Supachai Panitchpakdi, "The Future of the WTO: Addressing Institutional Challenges in the New Millennium," December 2004, p. 11, "Is freer trade driven by corporate interest only?"

the WTO became so concerned about this misperception that he said the Doha Round of trade talks (the ongoing round) should include negotiations on a code of conduct for multinationals explicitly linked to the WTO agreements. The idea gained no traction (Olson: 2002)

Despite these concerns, this article argues that the WTO should get closer to multinationals and examine how it can help global business act more responsibly around the world. The author contends that without new negotiations or radical changes to WTO rules or procedures, the members of the WTO can do more to help companies act responsibly in countries where governance is inadequate. The members of the WTO can act both directly and indirectly to help WTO member states promote global corporate social responsibility (CSR).

The WTO has already acted in one sector. In 2003, WTO members agreed to ban trade in so-called “conflict diamonds” and to trade only those diamonds that had received a certification (a CSR strategy) designed to ensure that human rights violations did not occur in their mining or production (Government of South Africa: 2005 and World Diamond Council: 2005).

The members of the WTO can provide guidance to market actors regarding whether other CSR initiatives are trade distorting. In addition, policymakers from the 149 WTO member states can examine whether its rules support, are neutral, or undermine global corporate social responsibility.

There are many reasons why the WTO should provide such clarity. First, the WTO could add momentum to corporate efforts to act responsibly by green lighting those strategies that do not distort trade. Secondly, a marriage of CSR and trade could

strengthen the limited ability of trade agreements to promote global standards by helping to create a greater demand and supply for these standards in developing countries around the world. When socially responsible multinational companies require and then assist their suppliers in implementing better business practices, these suppliers learn how to operate efficiently in a more sustainable and a more humane manner. As these suppliers will not want to be undercut by less responsible competitors, they will likely become advocates for stronger regulation (Kenan: 2004).

Thirdly, linking CSR initiatives and trade might also help create global market efficiencies. Several governments have worked with business and civil society to develop credible strategies for voluntary social or eco-labels. Social or eco-labels provide information and assurance about how people and the environment were treated as goods and services were produced. They may be affixed to products or their packaging or displayed on shelving or shop windows. Companies apply for these labels to prove to consumers that they act consistently in a socially responsible manner (Urminsky, ed. 1999). If, for example, WTO members issued a statement or a Ministerial Declaration that voluntary social and environmental labels do not inherently impede trade, more governments are likely to develop them, and more companies are likely to apply for such labels. Consumers would receive more of the information they need to make socially responsible purchasing decisions, and in turn, investors would have the information they need to reward responsible companies.

However, it is important to note that it is not easy to marry CSR initiatives to trade agreements. First CSR initiatives are strictly voluntary efforts undertaken by corporate executives of their own volition. As such, they are key elements of “soft law.”

(Kirton and Trebilcock, Eds.: 2004). Trade agreements, in contrast, bind the behavior of governments and are important components of international law. A successful link of trade agreements and CSR must not violate WTO norms of nondiscrimination and national treatment. Secondly, any links must be designed to preserve the voluntary nature of the CSR initiatives. Thus, a link between CSR initiatives and trade agreements can mandate government behavior, but at the firm level, executives must initiate changes in corporate practices.

Despite these hurdles, around the world, executives, activists, and policymakers are experimenting with links between voluntary CSR initiatives and trade policies or agreements (*See Appendix A*). This article will explore the impetus and rationale behind such links. It will then discuss what some governments are doing at the bilateral, regional, and global trade level. The third section of this article discusses how WTO rules set limits to the ability of governments to directly link trade policies and voluntary CSR initiatives. The next section of this article discusses how WTO rules, without deliberate intent, may undermine global CSR. The author suggests that trade policymakers should examine whether some WTO rules act, in effect, as a disincentive for firms to act responsibly in international markets. Finally, the author makes some suggestions as to how WTO members might provide clarity to member states that seek to promote global CSR.

The WTO includes many agreements which govern trade in goods and services, special arrangements for special sectors, and related agreements such as the Agreement on Sanitary and Phytosanitary Measures. For the purposes of simplicity, we limit our discussion in this chapter to GATT 1994, Annex 2 (the Dispute Settlement Understanding), Annex 3 (the Trade Policy Review Mechanism) and the Agreement on Agriculture. We focus on GATT 1994 which delineate the basic norms and obligations

of the world trading system. We do not discuss services and trade related aspects of intellectual property agreements in this chapter.⁵

II. The Roots of CSR Initiatives and the Role of Public Policy

Global CSR practices are based on ethical values and respect for employees, communities and the environment. There is no internationally accepted approach to CSR, and there is no one right way for firms incorporate CSR into their global business practices. Companies chose to adopt one or several CSR initiatives depending on several factors, such as the nature of their business; the diversity and dispersion of their supply chain; or how they sell to customers. Today there are three primary means by which executives formally incorporate CSR considerations into their business operations: written codes of conduct; certification strategies; and disclosure or reporting. Many companies employ a combination of these measures. Codes of conduct are formal statements of the values and business practices for companies or business sectors designed to guide the business and its employees as they operate in diverse nations. Codes can be firm specific or sector-specific. However, some codes, such as the OECD Guidelines for Multinational Enterprises or the Global Sullivan Principles are designed to apply to all firms across sectors and countries. Certification strategies allow firms to use

⁵ General Agreement on Tariffs and Trade 1994 includes: **(a)** Understanding on the Interpretation of Article II: 1 **(b)** Understanding on the Interpretation of Article XVII; **(c)** Understanding on Balance-of-Payments Provisions **(d)** Understanding on the Interpretation of Article XXIV **(e)** Understanding on the Interpretation of Article XXV **(f)** Understanding on the Interpretation of Article XXVIII **(g)** Understanding on the Interpretation of Article XXX. GATT 1994 incorporates the GATT 1947 provisions (except for the Protocol on Provisional Application). We do not discuss the Agreement on Sanitary and Phytosanitary Measures; Agreement on Textiles and Clothing; Agreement on Technical Barriers to Trade; Agreement on Trade-Related Investment Measures; Agreement on Implementation of Article VI; Agreement on Implementation of Article VII; Agreement on Preshipment Inspection; Agreement on Rules of Origin; Agreement on Import Licensing Procedures; the Agreement on Subsidies and Countervailing Measures; or the Agreement on Safeguards. usinfo.org/law/gatt/toc.html last searched 8/10/2006.

third-party or self-initiated audits to reassure their stakeholders that their factories meet internationally accepted standards. Reporting strategies are strategies that firms can use to analyze their own performance and explain to their stakeholders how well the firm has progressed towards meeting social and environmental norms. Often these reporting standards are verified and or certified by independent accredited auditors. The Global Reporting Initiative and SA 8000 are the most widely used reporting standards.

(Aaronson and Reeves: 2002)

In the past decade, CSR has become “normal” business practices for most firms operating internationally (KPMG: 2005). In 2001, the OECD found 246 codes of conduct alone designed to promote global corporate responsibility. Almost every European, U.S., and Canadian multinational has adopted some form of CSR initiative. (Aaronson and Reeves: 2002 and Vogel: 2005) There are national, international, and regional CSR associations/organizations in every corner of the globe and in countries as diverse as Argentina, China and Zambia.⁶ CSR is not just a wealthy country phenomenon.

Companies initiate global corporate social responsibility initiatives in response to both home country demands (from employees, consumers, and investors) and to adverse conditions in the developing world. Most executives want to ensure that their firms behave responsibly everywhere they operate (Wirthlin: 2004.) However, they find that in many developing and even middle income countries, government implementation of the

⁶ On Argentina, see links at http://www.iadb.org/Etica/Documentos/Blt_14Nov2005-1.cfmsee; and <http://www.pwc.com/extweb/service.nsf/docid/BBBCFC35AD3B1BF8852570D800043B32>. On China, <http://www.chinacsr.com/> and China CSR Map at http://www.chinacsrmap.org/E_index.asp Kenan Study Group on CSR in China: 2004. On Zambia, see Kivuitu et al, “How Can Corporate Social Responsibility Deliver in Africa? Insights from Kenya and Zambia,” <http://www.iied.org/pubs/display.php?o=16006IIED>

law is uneven or inadequate. When multinationals operate in these countries, they may encounter a business environment where bad actors set the norm. In these situations, executives often find themselves torn between the values and norms of their home country and that of the host country where they now operate. Moreover, executives often must respond to demands from the local populace to provide public goods (such as medicine or housing) that governments can't or won't provide. Thus these firms struggle to balance provision of these public goods with their traditional objective of producing goods and services and expanding shareholder value (Starbucks: 2004; Gap Inc. 2004, and CBC: 2005).

Since CSR is “voluntary,” some readers might ask why governments or international institutions such as the WTO should play any role in promoting CSR in global markets. They may argue that market forces (consumers, producers and other stakeholders) are clearly demanding ethical behavior. In this view, it is up to managers to respond to these market signals or risk the consequences. But markets fail. Although market forces are increasingly pressing companies to act responsibly, markets have not succeeded in prodding **all** corporations to “do the right thing” **everywhere** they operate **all of the time**. Governments have a responsibility to address such market failures especially in nations where the rule of law is inadequate.

Moreover, market forces have not yet rationalized the plethora of voluntary approaches to promote CSR around the world. Executives and citizens find it hard to sort out these many different approaches. Many of these codes are incompatible. (OECD: 2001) Moreover, the inconsistent interpretation and application of codes creates inefficiencies for suppliers in developing countries, including multiple audits by different

buyers with different auditing methodologies, conflicting approaches to remediation, and different timetables and documentation.(Ward: 2004) Executives in the developed and developing world alike have called for government and sector-specific partnerships to help order these many different approaches.

Meanwhile, citizens are increasingly demanding that business act responsibly. Polls reveal that citizens around the world are concerned about the behavior of corporations that operate in politically and environmentally sensitive regions.³ Trust of multinational corporations is declining. For example, a 2004 study of 1000 consumers conducted by DDB worldwide in 30 countries found that US companies in particular, are seen as exploitive, inhumane, and arrogant. (US Chamber: 2004) A 2004 poll by Industry Canada found that global companies are among the least trusted institutions of the countries surveyed, particularly in Europe, Latin America and Eurasia. Indeed, majorities in 11 of the 20 countries surveyed express a distrust of such international firms. Interestingly, the Industry Canada poll reports that in the developing world, citizens trust domestic companies more than multinationals. (Industry Canada: 2005)

Despite these concerns, national and international policymakers have yet to clarify what global corporate responsibility entails for their multinational enterprises. Although the prominent economist Jagdish Bhagwati once suggested “when in Rome, do as in New York,” no government demands that its firms adhere to its national social and

³ Environomics International of Toronto Canada, “Global Public Opinion on Globalization,” February 2002, a poll of 20,000 citizens in 20 countries at www.environicsinternational.com/global/pdfs/executive.pdf; Price Waterhouse Coopers in conjunction with the World Economic Forum, fifth annual Global CEO Survey, February 2002, pp. 16-19; Chicago Council on Foreign Relations 2002 poll at globalization.about.com/library/weekly/aa100302e.htm and Wirthlin Group, Social Responsibility: Key to Building Reputation and Regaining Trust,” Vol. 13, #2, April 2004.

environmental regulations everywhere it operates. Moreover, there is little international guidance for executive from the global governance system. The world has tried and failed three times (most recently as part of the current round of global trade talks-the Doha Round) to develop an international investment agreement (Aaronson: 2002). Thus, the social and environmental responsibilities of global investors are not clearly defined under international law. Today investment is regulated by a series of bilateral agreements which also do not specify the social and environmental responsibilities of firms. Firms are required to adhere to host country laws, but sometimes those laws (or host governments' failure to enforce them) conflict with a company's CSR initiatives and values.

Despite this lack of clarity, both foreign investment and trade have grown dramatically in the last few years. In its 2005 report on investment, the OECD (a think tank for 38 industrialized and middle income nations) reported that inflows to OECD nations fell from USD 459 billion in 2003 to USD 407 billion in 2004. Outflows, on the other hand, rose from USD 593 billion in 2003 to USD 668 billion in 2004. Thus, the OECD area was a net contributor of USD 261 billion worth of direct investment – most of which went to a few middle income or developing countries. The largest beneficiary of such investment was China, followed by India. Investment grew from \$47 billion in 2003 to a record \$55 billion in 2004. (OECD: 2005) As investment expanded, trade also grew. According to the IMF, world trade grew 4.9% in volume from 2003-2005, and 7.4 %in 2004-2005. Some developing and middle income countries (such as China, Brazil, Mexico, Taiwan) are receiving a larger share of this trade at the expense of many countries in Africa and Central America. (IMF: 2005) As trade and investment has

increased in countries such as China, the European, Canadian and US public has become increasingly cognizant that the goods and services they purchase are often made in countries where human rights and the environment are inadequately protected. Consumers, investors and other stakeholders have begun to pressure executives to monitor their behavior in these developing countries and make sure they produce goods and services in a socially responsible manner. They want executives to go beyond simply complying with host country laws and regulations. Most executives have responded to these demands with a wide range of CSR initiatives. But in recent years, some executives have also begun to publicly acknowledge the inadequacies of such CSR initiatives to really improve conditions in many developing countries. First, these executives recognize that while they can use their market clout to change the behavior of their first tier suppliers, they struggle to get their second tier suppliers to put these CSR initiatives in place. . Responsible multinationals increasingly acknowledge that they can't influence those suppliers from whom they procure small amounts unless they partner with other firms sourcing from the same suppliers. Finally, increasingly executives from multinationals are finding that not only are CSR initiatives inadequate to change the behavior of their panoply of suppliers, these CSR initiatives often cannot address the root causes of human rights or environmental violations or automatically lead to successful remediation. (Kenan: 2003, 2004, Vogel, 2005, Sethi, 2004). In many developing countries, there is no culture of compliance. Governance is inadequate, often because officials lack the will, funds, and/or expertise to enforce social and environmental rules. At the same time, many unbranded producers are not subject to CSR pressures. According to political scientist David Vogel, "at the same time that the

global marketplace has become more competitive, “responsible producers must compete...with firms who face lower costs because they have not been targeted by activists.” Vogel concludes that although CSR has led to some improvements, corporate responsibility must be redefined to being about more than going *beyond compliance*; it must also include efforts to *raise compliance standards* for human rights, worker rights and the environment. (Vogel: 2005). In short, CSR strategies must be complemented by political strategies that help local governments improve their adherence to internationally accepted social or environmental standards or activists will demand that these standards become part of the WTO and other trade agreements (Aaronson: 2001 and Elliott and Freeman: 2003).

Many firms initially responded to the deficiencies of their CSR initiatives problems by developing multi-firm or sector-wide CSR partnerships. One very successful example is the Ethical Trade Initiative (ETI), which was developed in concert with British government officials. This initiative is directed towards the agricultural as well as clothing sectors and is an attempt to ensure partnerships of workers, communities, and producers throughout the supply chain. The ETI requires firms to monitor their operations to ensure compliance with ETI’s code; if they won’t, these firms may lose their membership in the ETI. The Initiative has not been per se linked to trade policies or agreements. (Ethical Trade Initiative: 2004). But a growing number of CSR leaders have come to realize that monitoring, disclosure, certification, or audit strategies are not sufficient to foster lasting change in international conditions or change business culture. For example, as GAP Inc. (one of the world’s largest clothing manufacturers and retailers) wrote in its CSR report in 2004, “Factory inspections make it possible for us to

identify problems and measure progress against goals. But ultimately driving lasting meaningful change across the industry as a whole requires a broader more integrated approach...Underlying everything are systemic problems – like economic underdevelopment and a lack of law enforcement - that put constant pressure on wages and chronically undermine efforts to protect the rights of workers.”(GAP Inc: 2004, 8-9) This broader perspective was echoed by firms such as Nike and Hewlett Packard, which operate in vastly different sectors, and collaborate or fight with other monitoring organizations and NGOs.⁷

As executives have come to acknowledge the inadequacies of their voluntary CSR initiatives to perpetuate broad and lasting improvements, they have begun to focus on how they might partner, not just with other firms and civil society groups, but with national and international government entities, particularly those working on trade policies or agreements. In the EU, firms have partnered with civil society groups to critique trade policy and help make it more focused on sustainability. In the U.S., some firms have used their CSR strategies to help their suppliers avoid the withdrawal of trade privileges. For example, at the behest of Senator Tom Harkin and Representative Eliot

⁷ Phil Knight, Chair, Nike, in forward to Nike’s 2004 CSR report at <http://www.nike.com/nikebiz/nikebiz.jhtml?page=29&item=fy04>. Debra Dunn, Senior Vice President of Corporate Affairs and Global Citizenship, HP, also notes that the company must work with governments peer companies and other sectors to improve human rights (and push these rights down the supply chain) at www.hp.com/hpinfo/globalcitizenship/commitment.html The Fair Labor Association combines the efforts of participating companies, licensees, universities, and consumer, labor and human rights groups to promote adherence to international labor standards and improve working conditions worldwide. The FLA works to increase and sustain factory compliance with its Workplace Code of Conduct, which is based on the core labor standards of the International Labor Organization (ILO). The FLA Process is a system that enables companies to effectively implement the Code, and includes the means by which to verify and report on compliance. www.fairlabor.org/2004report/process/index.html, all last searched 8/05/05. Also see, Aaron Bernstein, “Do It Yourself Labor Standards,” *Business Week*, 11/19/2001.

Engel, in September 2001, each of the world's major cocoa brands and processors, along with the International Cocoa Organization, signed the cocoa industry protocol. It is intended to work towards eliminating the worst form of child labor in the growing and processing of cocoa beans.⁸ Some companies have lobbied for trade capacity building funds, where the US government provides foreign aid to improve both the demand for (from business and civil society) and supply of the rule of law. In this regard, the US and the EU help its trade partners improve their capacity to monitor and enforce social and environmental laws (BCCB: 2005; and Deere: 2005). Other companies have lobbied for changes to trade policies. Levi Strauss, the first multinational to adopt a comprehensive code of conduct including worker rights, became the only American company to call for the inclusion of labor standards within the WTO rules (Levi Strauss & Co, 2001, 2003). Some companies have even supported a ban on trade with Burma. The US has had this ban in place since 1997, while Europe relied on more limited trade sanctions (American Apparel and Footwear Association-AAFA: 2003, 2005 and Voice of America: 2005). Corporate affiliates of the World Tourism Organization (WTO/OMT), a specialized agency of the United Nations, set up a code of ethics to help make world tourism responsible and sustainable. The UN Commission on Sustainable Development endorsed the concept of the code in 1999. In September 2003, the World Tourism Organization called on the WTO "to negotiate fair liberalization in trade in tourism... in the interest of

⁸ The protocol was signed by governments as well as firms. Forty two countries in the chocolate supply chain endorsed it. The Protocol is a six-point action plan for the voluntary public certification of child slave free cocoa in chocolate by the year 2005. The Protocol is not a legally binding commitment. <http://www.savethechildren.ca/whatwedo/advocate/traffick/harkin.html#developments>. According to Senator Tom Harkin, the Protocol has not eliminated the worst form of child labor on cocoa plantations. The signatories did not meet the deadlines./harkin.senate.gov/news.cfm?id=240245. Also see International Cocoa Organization, "Protocole for the Growing and Processing," www.worldcocoafoundation.org/labour/child/initiative/pr_06_04.asp.

poverty alleviation, job creation and social harmony.” (World Tourism Organization: 2003).

Collectively, these approaches reveal a growing corporate interest in linking CSR standards to trade agreements. That has been matched by interest from civil society groups. Nongovernmental organizations such as Oxfam, WWF, and Global Witness have also become more supportive of CSR initiatives linked to trade policies and agreements (Aaronson:2005; Vogel:2005). Not surprisingly, policymakers in industrialized and developing countries have responded to this demand (Aaronson and Reeves: 2002, Fox, et al., 2002)

III. What National Policymakers Are Doing to Link CSR to Trade Policies and Agreements

Public policy sets the context in which firms manage their operations and compete. Thus, policymakers must develop incentives and when appropriate, disincentives to ensure that do not act unethically. In this way, public policy will send clear signals to global market actors regarding socially responsible practices. This means government officials must clearly and consistently emphasize the meaning of CSR, and use the wide range of tools at their disposal to encourage global CSR. (GAO: 2005, Aaronson: 2005) Trade policies and in particular, trade agreements are one of the most important of the tools policymakers can use to communicate why they think responsible behavior is important. *Appendix B provides an overview of some of the many approaches taken by governments around the world to promote social responsibility at home and abroad.*

Policymakers first began to link trade and CSR initiatives in 2001. The first such links were mainly exhortative: policymakers called on firms to act responsibly when they traded and invested overseas. The European Community issued a Green paper,⁹ on Promoting a European framework for corporate social responsibility. In 2002, the European Trade Minister, Pascal Lamy announced he was trying to find ways to help Europe strengthen the links between public policies designed to stimulate the competitiveness of European firms and those designed to stimulate greater global corporate responsibility.⁹ Lamy wanted to signal that he believed that European companies could obtain new markets and or greater market share by making social responsibility their market niche.

Across the pond, in 2001 Canada hosted the third summit of the Americas in Quebec City, to encourage progress towards the Free Trade Agreement of the Americas. Reflecting its commitment to CSR as a way of building public support for trade policy, Canada inserted language promoting CSR into the Summit's Plan of Action. This constituted the first time that CSR objectives were explicitly linked to a trade agreement. The Plan was historic, but received little notice or further elaboration (Declaration of Quebec City Plan of Action: 2001) Canadian officials did not clarify how the government might use language inside or outside the actual agreement to promote CSR. Nonetheless, in the years that followed Canadian agencies began to provide technical assistance on projects to promote CSR in the Americas and sponsored studies and conferences to promote CSR in the Americas In addition, the government of Canada published a book

⁹ www.europa.eu.int/scadplus/leg/en/lvb/n26039.htm and www.europa.eu.int/scadplus/leg/en/lvb/n26034.htm. For a British perspective on this, see <http://www.csr.gov.uk/international.shtml>

for Canadian companies, “Corporate Social Responsibility: Your Key to Competitive Advantage in the Global Market Place” (International Trade Canada and CSR: 2005).

The US took a different approach. Following the lead of the Clinton Administration, the Bush Administration has placed exhortative language designed to encourage CSR in the Singapore, Chile and CAFTA-DR free trade agreements. These free trade agreements are outside of the scope of the WTO, and thus they do not undermine the nondiscriminatory principle on which it is based. Nor does the trade agreement mandate whether home or host countries should adopt such CSR initiatives, leaving this decision with company management and stakeholders. But this language, delineated in the environmental chapters of the recent FTAs, calls upon each party to encourage the development and use of incentives and voluntary mechanisms to protect or enhance the environment.¹⁰

Many European governments, in particular the Dutch, Belgian, and British governments concluded that trade agreements should promote one particular code of conduct, the OECD (Organization for Economic Cooperation and Development) Guidelines. The Guidelines are the only multilaterally endorsed comprehensive set of rules governing the activities of multinational enterprises as well as domestic firms. They cover general policies for good corporate behavior including contributing to sustainable development, respecting human rights, employment; the environment; information disclosure, consumer interests, and taxation. Almost 40 governments including OECD members and non OECD nations such as Argentina, Brazil, Chile, Venezuela, Estonia.

¹⁰ For example, Article 16.7 of the Bahrain FTA or 18.4 of the U.S. Peru FTA, all available at http://www.ustr.gov/Trade_Agreements/Section_Index.html.

Latvia, Lithuania, Singapore and Slovenia say they adhere to and will promote these Guidelines (OECD: 2005).

Taking a page from the U.S. approach, the European Commission, which directs trade policies for EU member states, began to put CSR language in its cooperation agreements (European bilateral free trade agreements). The EC language states that the signatories, “jointly remind their multinational enterprises of their recommendation to observe the OECD Guidelines wherever they operate.”¹¹

The Dutch government acted on an additional front. It requires companies that want export credit guarantees to declare in writing that they are familiar with the OECD Guidelines. (Although other European governments such as France and Germany also try to inform firms seeking export credits about the OECD guidelines, these countries don’t require corporations to acknowledge receipt of the guidelines. (The Dutch government does not monitor compliance and has no sanctions. As no company is forced to apply for government sanctions or guarantees, the Guidelines remain voluntary (Europa: 2004).

But that is not all that the Dutch government has done. It has taken a leadership in role in trying to foster a market based approach to linking CSR and trade in the interest of informing consumers. It prodded the OECD Trade Committee to examine these issues,

¹¹ The association agreement between the EU and Chile refers to the Guidelines. According to the EU, they plan to “insert CSR issues and the promotion of OECD Guidelines in our external trade relations.” See European Multi-Stakeholder Forum on Corporate Social Responsibility: Roundtable on the Development Aspects of CSR,” at April 14, 2003 at www.europea.eu.int/comm/trade/csr/index_en.htm. The Guidelines have been signed by all 30 OECD members (EU; Canada; Australia; Mexico; Japan; the United States; Korea) and a growing number of non-OECD nations, including Argentina, Brazil, Chile, Venezuela, Estonia, Israel, Latvia, Lithuania, Singapore and Slovenia. Thus, the bulk of the world’s trading and investment firms will already be covered under nations that have agreed to adhere to the Guidelines. This will be an incentive for other nations to adhere as well.
www.oecd.org/daf/investment/guidelines/mnetext.htm

and on October 24, 2005 and September 26, 2006, it sponsored conferences to discuss such links. In its paper submitted to an OECD Trade Committee, the Dutch government noted, “trade policymakers should contribute in the search for new initiatives to cope with consumer concerns...In the past, proposals for a WTO role in the enforcement of international environmental and social standards have proven to be contentious. Lack of addressing the aforementioned concerns will lead to a debate where trade policymakers will be considered as co-responsible...The support for further trade liberalization may erode.” The Dutch government recommended that “trade policymakers should review how to promote and enhance freedom of choice for consumers.” They proposed that the OECD do a study to address how to promote such freedom of choice. A Preliminary Draft, “Informing Consumers of CSR in international Trade,” was published in June 2006. (OECD:2006). Meanwhile in the hopes of encouraging more countries to examine how to provide consumers with such information about how goods and services were produced for trade, the Dutch government also sponsored courses at the WTO on linking CSR and trade.¹²(Netherlands: 2005).

But industrialized countries are not the only countries working to link trade agreements and voluntary CSR initiatives. In some countries such as Costa Rica or South Africa, policymakers are determined to promote trade, while they incorporate policies that can protect human rights, improve workplace conditions, and/or preserve the environment without direct national mandates (Fox et al: 2002). CSR allows developing country policymakers to encourage a greater demand for better regulation and enforcement of regulations.

¹² Trade Capacity Building Data Base, CSR and Trade,
http://tcdb.wto.org/trta_project.asp?prjcd=6924&ctry=998

Several African and Central American countries have also linked trade and CSR initiatives through their support of social and eco labels in the 1990. Many of these labeling programs include highly traded products such as wood, pulp and paper, footwear and textiles. For example, the South African government partnered with organized labor, business, government and community organizations, to support job creation and socially responsible business in South Africa. To use the “Proudly South Africa Label, a company's products or services must incur at least 50% of their production costs, including labor, in South Africa, and be "substantially transformed" (in other words a product that is merely imported and re-packaged would not be eligible) in South Africa, and meet high quality standards. A company must also be committed to fair labor, employment and sound environmental standards. By meeting these standards, consumers can be assured that companies and their products carrying the *Proudly South African* symbol are of a high quality, are socially responsible and are supporting the local economy (Proudly South Africa: 2005). While the *Proudly South African* label can be viewed as an incentive to attract and maintain production in South Africa through higher social standards, it can also be perceived as a potential trade barrier.¹³ The jury is still out as to whether this strategy expands or distorts trade.

The Costa Rican government took a different approach. The government has made sustainable tourism a key part of its development strategy. The Costa Rican Environment and Energy Ministry worked with the Costa Rican Tourist Institute to develop a certification program to reassure travelers that their hotel has met performance

¹³ Wakabi W. (2005) “Not a Level Playing Field,” *Africa Today* 7/24/05 ; and Ayesha Kajee, “Made in China, Made Scared In a Textile Mill in Africa, www.saiia.org.za/modules.php?op=modload&name=News&file=article&sid=515.

based standards. In June 2001, several other Central American countries agreed to promote a regional tourism scheme based on this model (Certification for Sustainable Tourism: 2003). In this regard, the government is trying to reassure travelers that its hotels are eco-friendly.

In 1998, the Columbia government asked the WTO Committee on Trade and the Environment and the Committee on Technical Barriers to trade to ensure that eco-labeling schemes did not distort trade. While it did not receive final guidance on how to do so, in 2003, the Colombian Ministry of the Environment created the Green Markets Program to develop instruments and mechanisms to induce the production of environmentally friendly goods and services. Both the Colombian government, through Plan Colombia, and USAID, through AID contractors, began to provide financial support for environmentally responsible production of goods such as cacao, rubber, forest products and coffee. The project will be supported by a voluntary National Ecolabeling Program (Fox et al: 2002 and Friends of the Earth: 2005).

Meanwhile, in January 2002, the Belgian Parliament approved a law aiming to promote socially accountable production by introducing a voluntary social label. According to the Belgian government the law “offers companies the possibility to acquire a label, which is granted to products whose chain of production respects the eight fundamental ILO conventions. The label is given by the Ministry of Economic Affairs after a positive and binding opinion of a stakeholder committee (composed of government officials, social partners, business federation, consumers, and NGO representatives for a maximum of three years (it can be renewed). The Committee for Socially Responsible Production established a program of control for the company and

monitors its compliance. Certification is carried out by the inspection bodies accredited by the Minister of Economic Affairs. This social label was not designed to link to a trade agreement but was vetted both by the Belgian government and the European Commission to ensure that it was compatible with WTO rules. The label is not just for Belgian or EU firms. A US NGO, Social Accountability International, has been accredited under the Belgian Social labeling law. Thus, it does not seem to violate one key norm of the WTO, to treat foreign and domestic market actors similarly.¹⁴

Taken in sum, these actions demonstrate real interest on the part of governments and corporations to find ways to promote trade and promote global CSR. But they also raise important questions for trade policymakers. Can such links be replicated or even facilitated at the global level? Can they be done without distorting trade? These and other questions can only be answered by WTO members through WTO activities. The members can do so through a variety of means: through negotiations—as example during a new round, as proposed by the former Director-General; through resolution of trade disputes (which have the effect of clarifying WTO rules); or through an amendment or clarification of WTO rules. Although the WTO has now been linked to a CSR initiative through a waiver of WTO rules, the members of the WTO have not yet officially “spoken” on the relationship between its rules and voluntary CSR initiatives. There has never been a trade dispute or negotiation centered on a link between a CSR initiative and a trade policy or agreement. Nonetheless, one thing is clear. The WTO has

¹⁴ Information on the Belgian Social Label at mineco.fgov.be/protection_consumer/social_label/home_nl.htm and europa.eu.int/comm/employment_social/emplweb/csr-matrix?c... SA8000, is a way for retailers, brand companies, suppliers and other organizations to maintain just and decent working conditions throughout the supply chain. [/www.sa-intl.org/SA8000/SA8000.htm](http://www.sa-intl.org/SA8000/SA8000.htm)

no explicit mandate to promote global corporate social responsibility. However, in the view of this scholar, WTO members can and should examine how the WTO system can help members encourage global corporate social responsibility without undermining WTO norms.

IV: The Limits and Potential of WTO Rules

The WTO has three main functions: it governs trade through its set of international agreements; it stimulates trade through negotiations aimed at expanding market access; and it mediates trade disputes. Like its predecessor organization, the GATT, the WTO regulates how and when governments may apply policies that can distort trade.

The WTO has two key principles to which all members must adhere: most favored nation and national treatment. Under the most favored nation principle (MFN), WTO member states must extend the best trade conditions granted to goods and services of one member to the goods and services of every other nation that belongs to the WTO. Second, these countries must treat products under the WTO of foreign firms in the same way they do local firms. Policymakers cannot discriminate between products originating in different countries nor between imported goods and *like* domestically produced goods.¹⁵ These principles may limit how and when governments can link CSR initiatives such as eco-labels linked to trade agreements.

The WTO regulates the behavior of governments, not business in the international trade arena. As a result, it is more concerned with relationships **between** states than with

¹⁵ WTO Analytical Index; Technical Barriers to Trade: Agreement on Technical Barriers to Trade, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/tbt_01_e.htm#top.

relationships **within** states. Thus, the GATT/WTO is not concerned with how a state treats its own citizens, but rather how it treats non-citizens who seek to trade (Charnovitz: 1999).

But many people misunderstand what the WTO does; they think it can do more to make business act more responsibly. When they hear about sporting companies using child labor to produce soccer balls in Pakistan or companies dumping toxic waste in Indonesian rivers, they blame the WTO for letting business get away with such practices. They allege that the WTO is “captured by business” and works to meet the needs of multinationals and not the needs of the world’s people. (Oxfam, 2001, Sell, 2004) But as noted above, while the WTO does not directly regulate business, it is dependent on business. In WTO publications, the members have asserted that it is the activities of firms that make the WTO’s rules successful or failures, accepted or controversial. The members of the WTO have come to recognize that they must respond to this criticism or the credibility and work of the WTO will be undermined (WTO: 2004, 18).

But while policymakers from member states may want to do more to encourage business to act responsibly in countries where governance is inadequate, the members of the WTO cannot officially promote global CSR through the WTO agreements. The WTO has no direct authority over business. National governments must regulate the behavior of business within their borders. Nonetheless, the members of the WTO did find a way to promote global CSR in one sector: diamonds. The members of the WTO acted in the interest of ensuring that legitimate trade in diamonds could continue, to ensure that the diamond trade would not fuel conflicts or fund terrorism, and to ensure that human rights violations did not occur in the mining or processing of diamonds.

The architects of the GATT and the WTO recognized there may be times, when member states may need to put aside WTO rules. They delineated a relatively simple procedure to approve such waivers to enable members to respond to such exceptional circumstances. The rules state that members in attendance at a ministerial conference may waive an obligation imposed on a member, provided that any such decision is approved by three-quarters of the other members.¹⁶

In the 1990s the international community determined that they must respond to such an exceptional situation in Africa. Countries such as Uganda, Liberia, and the Congo experienced constant war, human rights abuse, and brutality. These wars were often funded by trade in conflict diamonds. After the members of the United Nations called for a ban on trade in conflict diamonds, WTO member states eventually agreed upon a waiver under the WTO for such a ban. Under the waiver, nations are allowed to trade only those diamonds certified under the Kimberley Process Certification Scheme. That certification is named after the city in South Africa where it was first developed. In 2000, participants developed a voluntary system of industry self-regulation, underpinned through verification by independent auditors of individual companies and supported by internal penalties set by industry, to help government authorities fully trace rough diamond transactions. The Kimberley Process Certification Scheme is a way for consumers and producers to ensure that they do not trade diamonds that indirectly fund

¹⁶ Procedures for waivers, http://www.wto.org/english/docs_e/legal_e/11-25_e.htm, last searched 1/06/2006. See update in Global Witness, "An Independent Commissioned Review Evaluating the Effectiveness of the Kimberley Process, Submitted to the Ad Hoc Working Group on the Review of the Kimberley Process 2006, at www.globalwitness.org.

wars in Sierra Leone or the Democratic Republic of the Congo.¹⁷ As of January 2005, some fifty member states have applied for a waiver regarding their trade in conflict diamonds (Kimberley Process: 2005).

The Kimberley waiver sets two important and far-reaching precedents. It is the first time that the WTO has approved a waiver of WTO rules in order to protect human rights. It is also the first and only time that any international organization officially linked a voluntary CSR initiative to a trade agreement. By so acting, the WTO gave its seal of approval to a CSR strategy—a voluntary certification devised through a multi-stakeholder dialogue and negotiation. (Price: 2003 and GAO: 2002). However, waivers are temporary measures. (Pauwelyn: 2003) Thus, this example provides little guidance to trade policymakers on how to react to similar situations in the future.

Members of the WTO must move cautiously if they want to link WTO rules and voluntary CSR initiatives through additional trade waivers. First, any such match should probably be at the behest of the members of the UN, so a waiver of WTO rules is rooted in international law. Second, the industry must have expertise putting the CSR initiative into place. Diamonds have long been certified for their quality. Thus, it was relatively easy to add a certification based on where and how they were mined. A certification may not be appropriate for other products.¹⁸ Third, any such CSR strategy must have the

¹⁷ <http://www.kimberleyprocess.com>. Also see WTO, “Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds,” Decision of 15 May, 2003. 2003, WT/L/518, 5/27/2003.

¹⁸ For example, in the future policymakers may want to ensure that trade in coltan (a mineral used in cell phones and electronic devices) does not fuel further conflict in countries such as Congo where it is mined. A 2002 UN Security Council report outlined the alleged exploitation of coltan by militia and armies from other countries such as Uganda, Rwanda and Burundi. These forces smuggled coltan out of the Congo and used it to finance their arms purchases. The Rwandan army made some \$250 million in 18 months from trading coltan. See abcnews.go.com/sections/nightline/dailynews/Coltan_explainer.html; Edith Lederer, “Security Council Reaffirms Congo Baking,” *Guardian* at www.guardian.co.uk/world/latest/story/0,1280,-3926701,00.html. The Security Council resolution, was 1499, (2003), which demanded that all States

support of developing country policymakers and civil society groups as well as leaders in business and government. The Kimberley Process had the support of many developing countries diamond exporters such as Botswana and South Africa, as well as importers such as the United States, Canada, the EU, and Israel. Finally, these linkages must be designed so that they do not discriminate between firms from the developing world and firms from the industrialized world. Otherwise some policymakers may perceive such a link as a trade barrier. (Campbell and Sabapathy: 2004).

Although WTO member states have married the WTO and a CSR initiative through a waiver of WTO rules, these countries have not examined how WTO rules may affect the ability of member states to prod multinationals to act responsibly. The next section delineates several examples where WTO rules may, without intent, undermine global corporate social responsibility (See *Appendix C*).

V. A Place for CSR at the WTO: Areas Where WTO Rules May Undermine Responsible Corporate Behavior

Trade has expanded dramatically since 1948, when the GATT, the precursor organization to the WTO, first governed world trade. By stimulating economic growth, such trade has also help policymakers achieve a better quality and standard of living for more of the world's people. However, there is also growing evidence that trade can fuel conflict, undermine the environment, and weaken the ability of WTO member states to promote human rights such as labor rights, access to food, or equal access to public

concerned take immediate steps to end the illegal exploitation of natural resources and other forms of wealth in the Democratic Republic of the Congo, at www.un.org/News/Press/docs/2003/sc7841.doc.thm.

services. (Aaronson and Zimmerman: 2007) The section below delineates several examples where WTO rules may undermine global corporate social responsibility or may make it harder for governments to promote corporate social responsibility.

TRIPS and Access to Affordable Medicines

In the brief course of its 11 year history, the members of the WTO have already had to clarify the relationship between pharmaceutical drug pricing, intellectual property rules, and their combined effect on the ability of developing country WTO member states to provide access for affordable medicines. Access to medicines is a basic human right that governments have committed to provide for their citizens in so far these states are able. At the same time, because research is expensive and time consuming, drug companies must reflect those costs in the price of drugs. However, such high prices e companies make it harder for such governments to meet their human rights responsibilities. Many observers see such business practices as unethical and irresponsible.¹⁹ Thus drug pricing has become a global CSR issue. Most pharmaceutical firms have responded by developing drug donation programs or reducing the price of their drugs for needy citizens around the world.²⁰

However, the price of drugs does not only reflect market conditions; it also is a function of global and national intellectual property systems. Under such systems, individuals can apply for copyrights, patents and/or trademarks to protect their

¹⁹ See as example, the comments of Act Up and the Consumer Project on Technology, and Oxfam. Act Up says it is a group of people united in their anger about AIDs, at <http://www.actupny.org/reports/tsunami.html>Jamie Love is the Director of Consumer Project on Technology (CP-Tech), <http://www.cptech.org/jamie/>. CPATH at <http://www.cpath.org/>.

²⁰ Dr. Harvey Bale Jr., Director General, International Federation of Pharmaceutical Manufacturers Associations (IFPMA), "The Pharmaceutical Industry and Corporate Social Responsibility," <http://www.responsiblepractice.com/english/insight/ifpma/>

innovations and creative works. With these copyrights, patents and trademarks, the creator obtains limited exclusive rights to whatever economic reward the market may provide for their creations and products. These rights are enforceable through government action and the court system.

In the 1980s, as trade in goods and services expanded dramatically, policymakers recognized that they needed to find ways to harmonize these different systems of protecting intellectual property. During the Uruguay Round of trade talks, the members of the GATT agreed to a comprehensive and enforceable system of rules covering intellectual property rights (TRIPS).²¹ This agreement helped reduce non-tariff trade barriers stemming from different IPR regimes, and also established transparency standards that require all members to publish laws, regulations and decisions on intellectual property.

But in recent years, academics, policymakers and development advocates have become increasingly critical of TRIPS. While that system may promote trade and help developing countries attract investment, it may also undermine access to affordable

²¹ The TRIPS agreement covers: how nations should give adequate protection to intellectual property rights; how countries should enforce those rights; how to settle disputes on intellectual property between members of the WTO; and special transitional arrangements during the period when the new system is being introduced. The TRIPS agreement took effect on 1 January 1995, developed countries were given one year to ensure that their laws and practices conform with the TRIPS agreement. Developing countries and (under certain conditions) transition economies were given five years, until 2000. Least-developed countries have 11 years, until 2006 — now extended to 2016 for pharmaceutical patents. If a developing country did not provide product patent protection in a particular area of technology when the TRIPS Agreement came into force (1 January 1995), it had up to 10 years to introduce the protection. But for pharmaceutical and agricultural chemical products, the country had to accept the filing of patent applications from the beginning of the transitional period, though the patent did not need to be granted until the end of this period. If the government allowed the relevant pharmaceutical or agricultural chemical to be marketed during the transition period, it had to — subject to certain conditions — provides an exclusive marketing right for the product for five years, or until a product patent was granted, whichever was shorter. Proponents of the TRIPS agreement argued that it would create a framework which encourages domestic innovation, and by protecting foreign IPR holders, gave them incentives to invest in production and research in the developing world. http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm, last searched 4/18/2006.

medicines. Critics allege that when developing country policymakers institute stronger protections for IPR, they drain scarce money and manpower from other important endeavors, such as education.²² For example, the World Bank recently estimated that the United States would receive some \$19 billion per year from developing countries as net rent transfers from the patent provisions of TRIPS.²³

For example, many developing countries such as South Africa, Uganda, and India, face major public health crises, such as epidemics of malaria or AIDS. In these countries, citizens often cannot afford the medications they need and they rely on their governments. But public health officials often find the drugs they need to cure or prevent the spread of disease are too expensive to purchase for all of those in need. Thus, many developing country policymakers wanted to use the public health waiver to the TRIPS agreement, which would allow them to breach patent rules and create their own versions (compulsory licensing) of needed medicines or import the drugs from countries where they may be more affordable. However, these policymakers also recognized that if they used the waiver, foreign investors might be alienated and reduce the very investment these nations need.

²² See, as example, “Civil Society Report on Intellectual Property, Innovation and Health,” <http://www.policynetwork.net/main/index.php>; and Commission on Public Health, Innovation and Intellectual Property Rights “Public Health, Innovation, and Intellectual Property Rights,” 4/3/2006, <http://www.who.int/intellectualproperty/documents/thereport/en/index.html>, both searched 5/18/2006; and “How Poor Countries can Avoid the Wrongs of Intellectual Property Rights,” *Economist*, 9/14/2002, http://www.economist.com/science/displaystory.cfm?story_id+1325360. For a scholarly overview of these issues, see Carsten Fink and Keith E. Maskus, *Intellectual Property and Development: Lessons From Recent Economic Research* (Washington: World Bank and Oxford University Press, 2005), pp. 1–13. In September 2002, an international study group warned that IPR systems may introduce distortions that are detrimental to development. For example, in many developing countries, domestic industries profit by copying rather than innovating; thus, IPR protection does not help them. The study group concluded that industrialized countries should pay more attention to reconciling their commercial self-interest with the need to reduce poverty in developing countries, which is in everybody’s interest. Commission on Intellectual Property Rights, “Integrating Intellectual Property Rights and Development Policy: Report of the Commission,” London, 9/2002, p. 3.

²³ World Bank, “Global Economic Prospects and the Developing Countries,” 2002, 137.

Government officials and civil society groups demanded greater clarity as to when nations could use the public health waiver under TRIPS. In the Doha Ministerial Declaration of November, 14, 2001, WTO member governments adopted a Declaration on the TRIPS Agreement and Public Health, which stressed that the TRIPS agreement does not and should not prevent members from taking measures to protect public health. Members agreed that in times of public health emergencies, policymakers can use the flexibilities that are built into the TRIPS agreement, including compulsory licensing and parallel importing. Moreover, the members of the WTO also stressed that they would allow the least developed countries more time to put pharmaceutical patent protection laws in place. But members of the WTO could not resolve all these questions at Doha. They asked the TRIPS Council to sort out how countries unable to produce pharmaceuticals domestically can obtain supplies of copies of patented drugs from other countries.²⁴ On December 5, 2005, in recognition that many countries still needed even greater certainty, policymakers decided to make the waiver a permanent part of the agreements. Two-thirds of the WTO membership must agree to this change by December 2007.

With this amendment, the members of the WTO clarified how and when members could use the public health exceptions under TRIPS. But with their actions, members seemed also to signal that they did not want the public to perceive that WTO rules undermined responsible business behavior and made it harder for governments to meet their human rights obligations.

TRIPS and Traditional Knowledge

²⁴ Fact Sheet: TRIPS and Pharmaceutical Patents: Obligations and Exceptions, at www.wto.org/english/tratop_e/trips_e/factsheet_pharm02_e.htm, last searched 12/05/2005;

In recent years, policymakers from countries such as Brazil and India have complained that corporations and universities from the industrialized world have stolen medicines, seeds, plants, animals, and practices from the developing world. Although policymakers have created local laws to regulate such trade and prevent theft, they have also sought clarification at the WTO. They want to make the TRIPS agreement more consistent with the Convention on Biodiversity in order to protect biodiversity and ensure that indigenous populations reap the benefits of intellectual property protections.²⁵ In 2001, WTO members agreed to further discuss this issue as part of the TRIPS Council mandate.²⁶ Brazil, China, Cuba, the Dominican Republic, Ecuador, India, Pakistan, Thailand, Venezuela, Zambia, and Zimbabwe have all requested that TRIPS be amended to include rules requiring the disclosure of the country of origin of biological resources and traditional knowledge used in inventions; disclosure of evidence of informed consent prior to the exploitation of another nation's resources; and establishment of and

²⁵ Since the establishment of the Council for TRIPS in the WTO in 1999, member states have submitted more than thirty communications related to the issue. WTO Document IP/C/W/420, "The Relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD)," Checklist of Issues, 3/2/2004.

²⁶ WTO Document WT/MIN(01)/DEC/1, Doha Ministerial Declaration, paragraphs 12, 19, and 47. Paragraph 19 of the 2001 Doha Declaration says the TRIPS Council should also look at the relationship between the TRIPS Agreement and the UN Convention on Biological Diversity and at the protection of traditional knowledge and folklore. WTO Document IP/C/W/420, "The Relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD)," Checklist of Issues, 3/2/2004; and http://www.wto.org/English/tratop_e/trips_e/art27_3b_background_e.htm. The TRIPS agreement allows Members to provide patents over biological resources (plants, animals, and micro-organisms). Currently, the TRIPS agreement contains no provisions preventing biopiracy acts, in which a person may claim patent rights in one country over genetic resources that are under the sovereignty of another country. In particular, the TRIPS agreement contains no provisions ensuring the prior informed consent of the owners of the biological resources used in the invention. The agreement also contains no provisions allowing a Member's claims to enforce its national regimes for fair and equitable sharing of benefits from the patenting of its own genetic resources in another country.

compliance with rules for benefit sharing between indigenous groups and corporations under relevant national regimes.²⁷

Citizens in some countries believe that corporations are profiting unfairly from tribal knowledge. Thus, here again, the members of the WTO could examine how WTO rules can promote responsible corporate behavior as well as trade. However, thusfar, WTO members have made little progress on these issues.

Export Processing Zones and Labor Rights

Many WTO member states have put in place export processing zones or special economic zones (EPZs), to attract foreign investment and stimulate trade. In some countries, policymakers have exempted firms in these zones from certain fiscal or financial regulations. In other countries, policymakers do not require firms in their EPZs to comply with labor laws. As a result, in many such EPZs, workers toil in substandard conditions and have little recourse to improve such conditions. Some employers in these zones ignore minimum wage regulations, fail to give workers written contracts of employment specifying the hours of work, wages and other entitlements, or provide decent working conditions.²⁸ Firms find it difficult to behave responsibly in such circumstances. Companies that maintain national standards may find that they can't compete with those firms that do not protect labor rights in their factories in these zones.

WTO members could promote global CSR by making it clear to governments that they must uphold the rule of law in all areas of their country. The members of the WTO

²⁷ See WTO Document IP/C/W/429/Rev.1, "Elements of the Obligation to Disclosure the Source and Country of Origin of the Biological Resources and/or Traditional Knowledge Used in an Invention," Submission from Brazil, Cuba, Ecuador, India, Pakistan, Peru, Thailand, and Venezuela, 9/27/2004.

²⁸ ILO, Bureau of Multinational Enterprises, "Export processing zones: Addressing the social and labor issues" at <http://www.transnationale.org/pays/epz.htm>.

pushed for such a strategy during China's accession. The 2001 Protocol on the Accession of the People's Republic of China states as a condition of accession that China must enforce "uniform administration of Chinese law" throughout China as a condition of accession. "The provisions of the WTO Agreement and this protocol shall apply to the entire customs territory of China, including ...special economic zones...and other areas where special regimes for tariffs, taxes and regulations are established."²⁹ The agreement requires China to notify the WTO about "all the relevant laws, regulations and other measures relating to its special economic areas." Finally, it calls on China to ensure that "those laws, regulations and other measures pertaining to and affecting trade shall be enforced."³⁰ The China accession document did not address labor laws in China's EPZs explicitly, but it reveals that members recognized that the failure to enforce its laws could distort trade.

Building on this strategy, WTO members could issue a declaration stating that all members agree to adhere to a no-standards lowering clause. In this way, all countries will maintain all of their labor laws even in such EPZs.

Business in Conflict Zones

In zones of conflict, trade may provide much needed funds and employment. However, when business operates in conflict zones, they may trade with non-state actors that don't comply with international norms. In other instances, trade may perpetuate conflict. The members of the WTO should develop procedures for dealing with such problems so that they can move quickly to ensure that trade does not undermine human

²⁹ WTO, "Accession of the People's Republic of China, Decision of 10 November 2001," WT/L/432, (A) 1, 2, <http://www.wto.org>.

³⁰ *Ibid.*, Sections (B), (C), 3.

rights. . As noted above, WTO members used a trade waiver and a CSR certification to deal with the problem of conflict diamonds, but such a strategy may not be appropriate for oil from the Sudan or coltan.

The members of the WTO can promote corporate social responsibility and better meet their human rights responsibilities if they determine, in advance, strategies will allow member states to address trade that undermines human rights.

Procurement Rules and CSR

A growing number of WTO member states want to use the market power of government to promote globally responsible practices, but they are unsure whether their strategies distort trade. In many countries, government purchasing can move markets, because the government is such a large consumer. Many WTO members use their procurement policies not only to buy needed goods and services but as an incentive to move government suppliers to address other important policy objectives such as energy efficient production. The WTO sets no limits on how they may do so; it simply requires governments to do so in a manner that does not distort trade.

For example, some European governments including Belgium want ILO conventions to be included as selection criteria for the awarding of public contracts. Some provinces of Italy use SA 8000 certifications (a certification of socially responsible manufacturing) to award public procurement. In 2001 the Danish Parliament passed an act which enables public authorities to stipulate certain social obligations in relation to enterprises that either provide services for the public authority or are receiving grants

from the public authority.³¹ The UN Global Compact, the UN Development program, the UN Environmental Program, the Government of Canada, Global Ecolabeling Network and the OECD have set up an “Environmentally and Socially Responsible Procurement Working Group” to examine how to ingrate sustainability into procurement practices on an international basis.

Some analysts have raised questions as to whether or not WTO rules restrict the ability of governments to use procurement as a means of promoting objectives such as advancing human rights. For example, the South African government has a program of Black Economic Empowerment, which encourages private firms that wish to do business with the government to take steps to transfer skills, assets, and expertise to those South Africans who were previously denied economic and educational opportunities. These analysts allege that South Africa’s approach, which is essentially a strategy to promote corporate social responsibility, might violate national treatment provisions (Cho and Dubash: 2003). Thus, WTO member states need further guidance as to how they might use procurement policies to promote global corporate social responsibility without violating MFN obligations under the WTO agreements such as GATT 1994, the Services Agreement, and the Plurilateral Agreement on Procurement.³² In general, WTO members gain insights into acceptable strategies through trade disputes. Nonetheless, rather than waiting for such a dispute, it would be helpful if member states studied these issues in depth.

Social and Eco-Labeling

³¹ europa.eu.int/comm/employment_social/emplweb/csr-matrix/csr_topic_allcountries_en.cfm?field=14

³² Environmentally and Socially Responsible Procurement Working Group, www.sustainableprocurement.net/home3.html; and http://www.euocities.org/carpe-net/site/imprimer.php?id_article=27

Another area where the WTO might provide needed clarity is on social and eco-labeling. As noted above, a growing number of governments, civil society groups, and business groups have partnered to develop labeling programs, for example fair trade certification schemes. These schemes often provide farmers with a guaranteed price often higher than the market prices. As a result, farmers will receive a higher and more stable source of income. Consumers gain a guarantee that when they purchase labeled goods, farmers and farm workers were not exploited. (Consumers International: 2005) But these same labeling programs may create conditions that are not always so socially responsible. For example, producers in the developing world may find it difficult and expensive to invest in creating equitable and environmentally sustainable production conditions. Some producers may go bankrupt and developing country jobs may be lost. These labels may also create oligopolies or monopolies for those firms that early on meet social or eco-label standards (Consumers International: 2005). In addition, some trade observers allege that these labels could be trade distorting because they create barriers to trade based on a technical or qualitative requirement. Some developing country policymakers allege that these “stricter product standards” are *de facto* trade barriers. The WTO sees such labels as standards. In advance of the Doha ministerial, WTO documents reemphasized that eco-labeling efforts should not become disguised trade restrictions or impede market access for developing country producers.(Nedlac: 2003). Thus, the WTO agreements provide little guidance on how and when government can encourage the use of social and eco-labeling. Moreover, trade measures based on how goods are made could challenge the WTO approach to “like products.” Currently, WTO rules state:

“In conformity with Article 2.9 of the Agreement, Members are obliged to notify all mandatory labeling requirements that are not based substantially on a relevant international standard and that may have a significant effect on the trade of other Members....When assessing the significance of the effect on trade of technical regulations, the Member concerned should take into consideration such elements as the value or other importance of imports in respect of the importing and/or exporting Members concerned, whether from other Members individually or collectively, the potential growth of such imports, and difficulties for producers in other Members to comply with the proposed technical regulations. The concept of a significant effect on trade of other Members should include both import-enhancing and import-reducing effects on the trade of other Members, as long as such effects are significant.”³³

³³ WTO Analytical Index; Technical Barriers to trade: Agreement on Technical Barriers to Trade, /www.wto.org/english/res_e/booksp_e/analytic_index_e/tbt_01_e.htm#top.

The members of the WTO generally would clarify how nations could encourage such labels with a trade disputes. However, WTO members could respond in a different manner, so that they encourage, rather than frustrate efforts by governments to use such strategies. In the next section, I attempt to delineate how.

VI. How WTO members Can Provide Clarity on What Governments Can and Can't do to Promote Global Corporate Social Responsibility

Clearly, many WTO members are struggling with how they can encourage both trade and global corporate responsibility. But CSR is not a subject for negotiations; nor is it part of the WTO's mandate. However, the members of the WTO could provide further clarity by taking two steps: empowering the WTO staff to do further research on these issues, and setting up member study groups to examine these issues, perhaps in concert with other international organizations.

The WTO staff is not currently empowered to do research. But a wide range of scholars, advisors and international organizations think that WTO member states should give the staff that responsibility. In December of 2004, the Director General of the WTO established an Advisory Board to make recommendations to the WTO about its future activities. The advisors suggested that the staff and should be empowered to do more

research—for example to examine the effects of trade upon the achievement of other important policy objectives such as the Millennium Challenge Objective of Reducing poverty (WTO:2004). These calls have been echoed by other scholars of the trade regime, such as Sylvia Ostry, who suggested that the WTO should enhance its research capacity and debate policy. (Ostry: 2005). The members of the United Nations have also called on the WTO to find ways to facilitate trade and development through research and a broad based policy debate. In order to “develop a global partnership for development,” the 191 nations of the UN adopted Millennium Development goals, including the pledge to further develop a rule-based open trading system that includes a commitment to good governance, is nondiscriminatory, provides access to affordable drugs and makes the benefits of new technologies and information available.³⁴

The members of the WTO not must find ways to ensure that trade rules do not undermine the achievement of other important policy goals or conflict with the responsibilities of national governments and international organizations. Thus, the members of the WTO could meet to approve new research responsibilities for the staff. As the Consultative Board noted, “a clearer-though always careful lead on policy issues should be emerging from the Secretariat. Members should not be afraid of asking the Secretariat to provide policy analysis” (WTO: 2004, 77). But WTO member states can also take on more responsibility at the WTO. For example, the WTO’s Consultative Board suggested that WTO members develop a senior level consultative body to provide guidance and research to negotiators (WTO: 2004, 70-71). Alternatively, the members of

³⁴ <http://www.un.org/millenniumgoals/>

the WTO agree to serve on Working Groups. The members of the WTO should set up such a Working Group to examine the impact of WTO rules upon global corporate social responsibility.

VII. Conclusion

Trade is a means to the end of sustainable development (WTO: 1995, 9). If the members of the WTO want to achieve this objective, these same countries must find ways to encourage companies, the main drivers of trade and investment, to act responsibly in nations with inadequate governance.

The members of the WTO has already acted to ensure that trade in diamonds does not undermine human rights. These countries should also examine whether similar actions would be useful for other sectors where trade may fuel conflict or human rights violations. But the WTO can also be linked to CSR initiatives less explicitly. The members of the WTO can examine the impact of WTO rules on corporate behavior through further study and recommendations. While such study does not have the force of international law or WTO dispute settlement decisions, such studies could help provide much needed clarity to executives, activists and government officials.

The world has much to gain by encouraging a link between trade and voluntary CSR initiatives. Such a marriage might bolster existing CSR initiatives and help to rationalize the plethora of CSR approaches in place today. These links might stimulate more companies to adopt CSR initiatives. Finally, such a union could strengthen the limited ability of trade agreements to promote global standards by stimulating greater demand and supply for such standards.

CSR –trade links are essentially a policy hybrid- a new way to link soft law strategies with traditional global governance mechanisms. With such innovations, policymakers may be able to build greater support not only for corporations as positive agents of globalization, but for the much misunderstood WTO.

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**Appendix A:
Governments That Link CSR to Trade Policies or Agreements**

Government	Action	Objective	Highlight	Challenge
European Commission	Rhetoric CSR language in bilateral agreements	Policymakers see CSR as means of capturing market share, but no clear path to CSR/Trade links	EC-wide framework	Moving Beyond Talk
Canada	CSR language in FTAA; CSR Guide Book	To encourage CSR in the Americas	Explicit CSR guidance for Canadian Companies	Moving beyond conferences
United States	CSR language in FTA's	Promotion of CSR	Chile, CAFTA-DR, Singapore FTA's	Currently language is only in environmental chapters, not labor chapters. Language is also vague.
The Netherlands	Must Read OECD Guidelines to apply for Dutch Export Credit	To reassure Dutch taxpayers that their money promotes global CSR	MNC's required to read OECD CSR Guidelines	Monitoring compliance
South Africa	Proudly South African Label	Labeling	Labor and Environmental Standards	Possible Trade Distortion
Belgium	CSR Label	Labeling	Certification, Monitoring, WTO compatibility	Possible Trade Distortion
Costa Rica and other Central American governments	Developed certification	Regional tourism scheme	Hotels are certified that the hotel is eco friendly, stimulates trade	

Appendix B: CSR and Trade Links
Examples of Government-Led Links Between CSR and Trade

Government Policy Approach to Promoting CSR	Type Of CSR Initiative	Audience	Link to trade policy or agreement, potential trade implications	Countries Adopting
Language Delineating Mutual Adherence to CSR as delineated in OECD Guidelines	OECD Guidelines	European and Chilean multinationals	Linked to Association agreements such as EC/Chile	European Commission
Language Delineating CSR, but not a specific code or well defined	Generic CSR	Companies operating in FTA Countries	Recent US Free Trade Agreements with Chile, Singapore etc...	US, CAFTA, Singapore, Chile etc..
Language Requiring Firms to Read and Try to Adhere to OECD Guidelines	OECD Guidelines	Firms applied for export credits in the Netherlands and Dutch taxpayers.	Indirect, tied to a trade related policy.	Netherlands
Trade waiver linked to a CSR certification	Kimberley Process Certification of links to conflict or human rights abuse	Members of the WTO, diamond producers, traders and consumers.	Tied to WTO. Waiving most favored nation rules to ensure protection of human rights.	50 countries have applied for the waiver, all WTO members can apply.
Procurement preferences	Eco labeling	To encourage eco-efficient production and sales to Taiwan government	Tied to WTO procurement rules, may violate MFN	Taiwan
Social Label	Social Labeling	Companies producing in South Africa	Tied to WTOs, but voluntary, so not a violation of MFN	South Africa
Social Label	Social Labeling	Any company producing in Belgium	Voluntary, so not a violation of	Belgium

Appendix C
How the WTO May Undermine Global CSR

Issue	Effect on social environmental conditions and potential of CSR	Why WTO may Undermine CSR	Suggested Solution: How the WTO might clarify concerns
Export Processing Zones (EPZs)	Government ignores its own labor laws to stimulate trade. Companies caught in middle.	Promotion of FDI and trade stimulation	No-lower-standards clause in Hong Kong Ministerial (Dec. 2005) or formation of Working Group to clarify governmental responsibility/corporate responsibility.
Drugs and Intellectual Property (IPR)	Access to medicines vs. control of IPR	Fear by governments that if they take public health exception, foreign investors may view country negatively.	Resolved by amendment to TRIPS
Social Labeling	Provide consumers, investors with information about how goods and services are produced.	Language against discrimination between "like products"	Working Group clarify Standards for social labeling and eco labeling
Procurement	Governments use market power to encourage CSR business practices behavior standard	Requirement that policy does not distort trade	Working Group to Clarify if Current CSR Stimulating Approaches are Trade Distorting
Trade in Conflict Zones	Trade among non-state actors exacerbating conflict, unclear signals to companies	Trade promotion	Study best strategy to enable quick response