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A Solution for Developing Countries' Problem with WTO Noncompliance

LIRAN ALIAV*

I. INTRODUCTION

Countries around the world are beginning a slow move towards equality. From internal campaigns, such as the "Occupy Wall Street" protests, to global campaigns, such as trade controversies in the World Trade Organization ("WTO"), petitioners are demanding relief from their alleged oppressive state.

For centuries, philosophers have grappled with how to best run an economy.[1] For the most part, the WTO seeks to eliminate discriminatory treatment in international trade relations in order to better the world economy.[2] Trade ministers in the WTO believe that free trade will promote economic development, alleviate poverty, and ultimately ensure better opportunities and welfare gains for all members participating in the multilateral trading system.[3]

An unregulated free trade economy is majestic in theory since other factors, such as politics and environmental concerns, will influence international trade aspects.[4] States impose regulations that promote their nation's agenda, which may consequently affect international political battles.[5] The essential concept behind free trade is

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1. *See* JAGDISH N. BHAGWATI, FREE TRADE TODAY 3–4 (2002).

2. *See* JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 501–31 (3rd ed. 1995).

3. Carmen G. Gonzales, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries*, 27 COLUM. J. ENVTL. L. 433, 435 (2002) [hereinafter *Institutionalizing Inequality*].

4. *See* KYLE BELL, FREE TRADE OR FAIR TRADE 1–3 (2009).

5. *See* DAVID LANGLET, PRIOR INFORMED CONSENT AND HAZARDOUS TRADE: REGULATING TRADE IN HAZARDOUS GOODS AT THE INTERSECTION OF SOVEREIGNTY, FREE TRADE AND ENVIRONMENTAL PROTECTION 4–5 (2009).

that having a world economy allows every state to utilize its comparative advantages for the betterment of the economy as a whole.[6] Domestic regulation, however, negates this central principle by giving a competitive disadvantage to foreign producers.[7] For instance, "[t]rade-restricting effects frequently occur even with facially nondiscriminatory regulations because the different geographic or market positions of foreign producers often make it more costly to comply with demanding regulations."[8]

The WTO seeks to clear roadblocks to trade on a global scale by enforcing the General Agreement of Tariffs and Trade ("GATT").[9] Like the Dormant Commerce Clause in the United States, the GATT includes sections that prohibit certain regulatory measures that act as obstacles to international trade.[10] These regulatory measures are usually products of legislative policies that promote protectionism or the ideologies of a select domestic group, such as lobbyists.[11]

The recent WTO decision, *Philippines—Taxes on Distilled Spirits,* highlights the tension some states wrestle with in the promotion of their economic agendas.[12] On one hand, the Filipino government required excise taxes on imports in the hope that it would stimulate their underdeveloped economy. On the other hand, the Philippines benefited from the free trade policies imposed by the WTO through the GATT. The WTO concluded that the Filipino government could not tax imported distilled spirits at a higher rate than it does domestic distilled spirits.[13] While the WTO correctly decided this case by applying the GATT, the WTO must shy away from its rigid enforcement of GATT principles to level the playing field for developing countries that have little influence within the political arena.

Part II of this comment will address the background of the *Philippines* case and the reasons why the WTO came to its conclusion.

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6. MICHAEL M. J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL FREE TRADE 486–87 (3rd ed. 2005).

7. 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, 1402 (1994).

8. *Id.*

9. *See generally* Donald. P. Kommers & Michael Waelbroeck, *Legal Integration and the Free Movement of Goods: The American and European Experience, in* INTEGRATION THROUGH LAW, BOOK 3, FORCES AND POTENTIAL FOR A EUROPEAN IDENTITY 165 (Mauro Cappelletti et al. eds., 1986).

10. General Agreement of Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 188, art. XX [hereinafter *GATT*]; *see also* Farber & Hudec, *supra* note 7, at 1403.

11. *See* DANIEL A. FARBER & PHILIP P. FRICKLEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

12. Panel Report, Philippines – Taxes on Distilled Spirits, WT/DS396 (Aug. 15, 2011).

13. *Id.* at 98B.

Next, I will compare similar cases upholding the same analysis and discuss the history of the WTO's tests comparing "like products" under the GATT. In assessing these tests, I will highlight the problems with each test and show how it evolved to the form of the test the WTO implements today.

Part III will discuss the issues surrounding WTO compliance in developed countries. I will compare the concept of facially neutral but discriminatory laws under the Commerce Clause in the United States with those of the GATT. Part IV will propose a solution for the WTO that would alleviate tensions between developing countries seeking to stimulate economic growth and those countries that use their stronger political influence to strategically circumvent the WTO and the GATT. The section will also address rebuttals and how the proposed solution is compatible with capitalism in the United States. I conclude that developing countries such as the Philippines should be able to impose taxes, in a facially neutral but possibly discriminatory manner, on uncooperative developed countries in order to further their economic agenda and level the international playing field.

II. ANALYZING THE COURT'S DECISION IN THE PHILIPPINES—TAXES ON DISTILLED SPIRITS

A. History Behind the Case

Distilled spirits are made from different types of raw materials such as sugar, palm and grains.[14] Alcohol producers can make products labeled with the same name from different raw materials.[15] For instance, whiskey is produced by fermenting either wheat or sugar.[16] Both wheat-based whiskey and sugar-based whiskey are labeled "whiskey" and are usually interchangeable products in the common household.[17]

The Philippines is a major producer and exporter of sugar, nipa, coconut, cassava, and palm (the "designated materials").[18] Since the country is blessed with these raw materials, Philippines-based producers almost always manufacture their distilled spirits from the designated materials. Producers in other countries, however, produce distilled spirits with other raw materials. Thus, most of the alcohol imported *into*

14. *Id.*
15. *Id.* at ¶ 7.61.
16. *Id.*
17. *Id.*
18. *Id.*

the Philippines is not produced from the designated materials.[19]

The Filipino government taxes distilled spirits made from different raw materials at dissimilar rates.[20] As a result, all imported alcohol is subject to a higher tax, resulting in lost profits for foreign producers.[21] For several years, the U.S. Government has been urging the Filipino government to change their tax fee schedule, both bilaterally and in WTO forums.[22] In addition, the European Union requested WTO dispute settlement consultations on these taxes in July 2009, and were joined by the United States in October 2009.[23] The European Union and the United States (hereinafter "Petitioners") brought suit in the WTO under GATT Article III:2, and other sections, prohibiting the imposition of different tax rates on similar products.

Article III:2 of the GATT states, "[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied directly or indirectly, to like domestic products."[24] In other words, regardless of domestic or international origin, like products should be subject to the same direct and indirect excise tax rates.[25]

The WTO panel received written submissions from Petitioner in October 2010 and issued an interim report on May 4, 2011. The panel then issued its final reports on June 27, 2011.[26] The appellate body circulated its report on December 21, 2011.[27] This paper will explore the Panel's assessment of the case.

B. The Criteria to Assess Like Products

1. Trouble with Assessing "Like" Products

The WTO has not always used the same factors to assess whether

19. *Id.* at ¶ 2.37.
20. *Id.* at ¶ 2.2–2.3.
21. *Id.* at ¶ 7.183.
22. U.S. Trade Rep., *U.S. Files WTO Case Challenging Philippine Excise Taxes* (Jan. 2010), http://www.ustr.gov/about-us/press-office/press-releases/2010/january/us-files-wto-case-challenging-philippine-excise-ta.
23. *Id.*
24. GATT art. III:2.
25. *Id.*
26. Panel Report, Philippines – Taxes on Distilled Spirits, WT/DS396 (Aug. 15, 2011) [hereinafter Philippines Tax Case].
27. Report of the Appellate Body, Philippines – Taxes on Distilled Spirits, WT/DS396 (Dec. 21, 2011).

two products are "like" under Article III:2.[28] The test has been a product of evolution, and rightfully so.[29] Assessing "like" products is extremely difficult, especially when accounting for the differences in cultures, environment, production, uses, and other external and internal factors.[30]

One descriptive scenario where the test for "like" products has been applied is where two countries have classified the same product differently.[31] For instance, an object may be used similarly by both country A and country B. However, the object may be considered harmful to country A's environment, but be useful and harmless to country B. Therefore, country A may label the product as an "environmentally unfriendly material" and impose taxes on it. Country B, on the other hand, may label it as "promoting health and good economy" and incentivize its production by offering subsidies and tax breaks.[32] Both products may look exactly the same, and may be used in the same way, but are ultimately classified differently because of external factors that reflect each country's political, social, and economic agenda.[33]

2. How the WTO Came to its Conclusion

The Philippines taxes whisky, gin, brandy, rum, vodka, tequila, and liqueurs at a lower rate when they are made from the "designated materials.[34] The fermentation process converts these raw materials into ethyl alcohol and the manufacturer distills the product to its liking.[35] The color, odor, and taste of the alcohol are natural results of the distillation of ethyl alcohol.[36] In the Philippines, domestic producers distill their alcohol from sugar cane molasses, which is one of the designated materials.[37] There is no evidence that suggests that a layperson in the Philippines can distinguish between imported and domestic spirits based on the raw materials used to produce them.[38]

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28. Edward S. Tsai, *"Like" Is a Four-Letter Word – GATT Article III's "Like Product" Conundrum*, 17 BERKELEY J. INT'L L. 26, 46–47 (1999).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. Philippines Tax Case, *supra* note 26, at 1.171.
35. *Id.* at ¶ 2.22.
36. *Id.* at ¶ 2.25.
37. *Id.*
38. *Id.* at ¶ 2.26.

3. Assessing a Violation of the First Sentence of Article III:2 of the GATT

The WTO Panel assessed the likeness of the products by analyzing each type of distilled spirit on a product-by-product basis.[39] The first sentence of Article III:2 reads, "[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied directly or indirectly, to like domestic products."[40] The WTO answered two questions to determine whether a violation of Article III:2 of the GATT existed: (1) whether the imported and domestic products were "like" products, and (2) whether the imported products are taxed in excess of the domestic products.[41] If both questions could be answered in the affirmative, then the Philippines was in violation of of Article III:2.[42]

The WTO analyzed "likeness" by assessing four factors: (1) the product's properties, nature, and quality; (2) the product's end uses in a given market; (3) consumers' tastes and habits; and (4) tariff classification.[43] The Court clarified that the products do not have to be identical since the language of the GATT would have said "identical" instead of "like products".[44] The Court then analyzed whether the tax on international products was in excess of the domestic product.[45]

a. Like Products Factors

i. The Product's Properties, Nature and Quality

The appellate body in *European Commission – Asbestos* ruled that this category is "intended to cover the physical qualities and characteristics of the products."[46] The Philippines argued that since the raw materials are wholly different, the chemical composition of the different brands and the organoleptic properties of spirits are not

39. *Id.* at ¶ 7.19.
40. *Id.* at ¶ 7.8.
41. *Id.* at ¶ 7.30.
42. *Id.*
43. *Id.* at ¶ 7.31.
44. *Id.* at ¶ 7.32.
45. *Id.*
46. *Id.* at ¶ 7.34 (citing Appellate Body Report, Citing EC – Asbestos, para. 110). The appellate body referenced this in analyzing likeness according to Article IV; however, the Panel in *Philippines – Taxes on Distilled Spirits* found that it should be applicable to Article II as well.

"like".[47] The court disagreed.[48]

The court found the Philippines' argument unpersuasive since the chemical composition or organoleptic properties do not divide the spirits produced from different raw materials into separate identifiable groups.[49] The court even examined the organoleptic properties of each type of alcohol and concluded that even if the chemical compositions are different due to the use of different raw materials, the alcohol results in the same organoleptic properties.[50] For instance, producing alcohol with different raw materials or with distinct fermentation processes may result in alcohols that have different colors, such as with brandy, whisky, and tequila. The taste that is associated with that alcohol remains the same because they are neutral alcohols.[51] The Panel thus concluded that the properties, nature, and quality of the product are similar.[52]

Moreover, the court asserted that the difference in raw materials is only relevant to the extent that it results in a dissimilar final product.[53] The court found that all distilled spirits in the present dispute are similar in that they are concentrated distilled potable alcohol with varying alcohol content.[54] In addition, consumption of distilled spirits usually causes similar physiological effects due to the presence of ethyl alcohol.[55]

ii. End Uses

In assessing this factor, the WTO looks to see if the products serve the same or similar end uses.[56] The panel found that the end uses of alcohol are "thirst quenching, socialization, relaxation and pleasant intoxication."[57] Since the manner in which people drink the product does not depend on what raw materials were used in the production, the court found that there are no differences in the products' end uses.[58]

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47. *Id.* at ¶ 7.40.
48. *Id.*
49. *Id.*
50. *Id.* at ¶ 7.42–7.47.
51. *Id.* at ¶ 7.36.
52. *Id.* at ¶ 7.39.
53. *Id.* at ¶ 7.37.
54. *Id.* at ¶ 7.35.
55. *Id.*
56. *Id.* at ¶ 7.48.
57. *Id.*
42. *Id.*

iii. Consumers' Tastes and Habits

By applying this factor, the WTO ensures the product is not used for different functions.[59] Filipino consumers' tastes and habits are a product of personal experience, product reputation, brand loyalty, and their limited propensity to switch brands based on income and expenditure constraints.[60]

The Philippines argued that the brands are not substitutable and offered a survey by Abrenica and Ducanes that concluded there is low price elasticity in the Philippine domestic distilled spirits market.[61] Petitioners argued that the taxes are part of the reason why the price of imported brands is high and therefore unappealing to the majority of the Philippines population.[62]

The WTO criticized both parties' reports and studies because they assume that the domestic price will increase and the imported price will decrease simultaneously.[63] The court explained that the increase in consumption could be caused by an increase in domestic price, a decrease in imported price, or a combination of both.[64] Since the rate of consumption was impossible to predict, the studies were flawed.[65]

The Philippines also argued that the population is separated into two groups based on purchasing power.[66] The majority of the population, segmented into the lower purchasing power group, only consumed distilled spirits made from designated raw materials.[67] Therefore, the Philippines concluded that habits and tastes are set for this specific group.[68] The WTO rightfully found the fallacy of this argument since it assumes that if the group with lower purchasing power has the ability to purchase more expensive alcohol, they would refrain from doing so because of habit. This assumption was not

59. *Id.* at ¶ 7.49.

60. *Id.* at ¶ 7.50. *See also* M.J. Abrenica and J. Ducanes, On Substitutability Between Imported and Local Distilled Spirits (Oct. 10, 2010), Panel Exhibit (PH-49) at the University of Philippines School of Economics Foundation.

61. Philippines Tax Case, *supra* note 26, at ¶ 7.52, ¶ 7.55. A narrowing of price differentials between imported distilled spirits and domestic Philippines distilled spirits results in a small change in their respective market shares.

62. *Id.* at ¶ 7.52, 7.54 (arguing that "on average at an import price decrease of 25% and domestic increase of 50%, consumers were 4.9% more willing to purchase imports and 4.0% less likely to purchase domestics . . . if price were no issue, on average, consumers were 43% more likely to purchase local brands and 86% more likely to purchase imported ones").

63. *Id.* at ¶ 7.58.

64. *Id.*

65. *Id.*

66. *Id.* at ¶ 7.56.

67. *Id.* at ¶ 7.58.

68. *Id.* at ¶ 7.58–7.59.

supported by the Philippines.[69]

In addition, the court found that the cheaper domestic spirits mimic the labels of their imported counterparts even when they are produced by different raw materials.[70] For instance, domestic producers label "blended brandy" as "brandy" to mimic the label of its imported counterpart.[71] Moreover, the labels do not mention the type of raw material used in making the product.[72] As a result, the court found that the tastes and habits of the consumers are not different regarding domestic or imported spirits.[73]

iv. Tariff Classification

The court found that the Harmonized System ("HS"), which is the rate schedule that describes the products and provides the tax rate of each item, does not differentiate between different raw materials used for production of the spirits.[74] The court held that "all distilled spirits at issue in this dispute, whether imported or domestic, and irrespective of the raw materials from which they are made, fall within the HS heading 2208, which refers to "undenatured ethyl alcohol of an alcoholic strength by volume of less than 80% vol[ume]; spirits, liqueurs and other spirituous beverages."[75]

b. Excess Taxation

The second question that the court addressed is whether the international product is taxed "in excess of" the domestic product.[76] Past panels have held that "even the smallest amount of excess is too much."[77] The panel noted that the difference in tax rate for the international product is about ten to forty times the rate imposed on the domestic product.[78] The Philippines did not dispute this fact.[79] Therefore, the court concluded that there was excess taxation.[80]

69. *Id.* at ¶ 7.58–7.59.
70. *Id.* at ¶ 7.61.
71. *Id.* at ¶ 7.62.
72. *Id.* at ¶ 7.61.
73. *Id.*
74. *Id.* at ¶ 7.63.
75. *Id.* (quotation omitted).
76. *Id.* at 7.86.
77. *Id.* at ¶ 7.87 (quotation omitted).
78. *Id.* at ¶ 7.88.
79. *Id.* at ¶ 7.89.
80. *Id.* at ¶ 7.90.

4. Assessing a Violation Under the Second Sentence of Article III:2 of the GATT.

The second sentence of Article III:2 of the GATT provides that "no contracting party shall . . . apply internal taxes to imported or domestic products in a manner contrary to the principles set forth in paragraph 1".[81] Article III:1 states that, "taxes and other internal charges, and laws, regulations and requirements . . . should not be applied to imported or domestic products *so as to afford protection to domestic production*."[82]

The court also assessed whether the products are "directly competitive or substitutable products" and whether "they are not similarly taxed".[83] The court concluded that both of these elements were present after analyzing similar factors to those used in assessing a violation under the first sentence of the GATT.[84]

The court then analyzed whether the Philippines implemented the tax to afford protection to domestic production. Petitioners argued that the magnitude in tax difference alone supports the claim that the excise tax is applied "so as to afford protection".[85] Complainants also pointed to a lack of rationality of the product differentiation used by the measure, the fact that the measure is de facto discriminatory, and the fact that the Philippines were aware of the discrimination.[86]

On the other hand, the Philippines argued that the tax differentials are de minimis and are "rooted in historical association between liquor made from designated raw materials and the average Filipino, who is a low income person."[87] The Philippines also argued that the tax is origin-neutral, giving any producer the opportunity to take advantage of the lower tax rates.

In considering "whether the dissimilar taxation affords protection, the Panel [sic] found it is not a question of intent or aim, but rather one of the protective application of the measure."[88] The court ascertained the "protective application" by examining the tax design, architecture, and revealing nature.[89] The court concluded that the taxes afforded protection because all of the Philippine products were produced from

81. GATT art. III:2.
82. *Id.* at III:1 (emphasis added).
83. Philippines Tax Case, *supra* note 26, at 7.96 (quotation omitted).
84. *Id.* at ¶ 7.138.
85. *Id.* at ¶ 7.170 (quotation omitted).
86. *Id.* at ¶ 7.171–7.172.
87. *Id.* at ¶ 7.174–7.175 (quotation omitted).
88. *Id.* at ¶ 7.180.
89. *Id.* at ¶ 7.180.

designated materials as opposed to a small percentage of foreign products.[90] The court also concluded that the legislative intent is not at the heart of the assessment of protectionism.[91]

5. The History of the Likeness Test

The WTO had its fair share of problems defining "like" products under Article III:2. Early cases in the WTO adopted a two-step test for assessing a violation of Article III:2.[92] The first step was to evaluate whether the imported and domestic product was "like" or "directly competitive or substitutable."[93] The second step was to compare the difference in tax burdens on the products in controversy.[94]

The panel in the "Border Tax" report noted that "likeness" depends on both objective and subjective criteria.[95] Objective refers to composition and manufacturing process, while subjective refers to consumption patterns and general uses of the product.[96] However, the panel injected an element of vagueness to ensure discretionary and subjective judgments by stating that minor differences in physical properties would not prevent products from qualifying as "like products."[97] Only if the court determined that the products were "like" did it then inquire into whether the country taxed the product discriminatorily.[98] As a result of this tiered test, a finding of "likeness triggers a very protective trade standard."[99]

Subsequent panels reconsidered the approach in the Border Tax report. In *United States – Measures Affecting Alcoholic and Malt Beverages*, the panel added another consideration to the previous method of assessing likeness: the like product determination should account for the purpose of Article III as a whole.[100] The panel noted the article's purpose is to prevent the use of internal taxes and regulation to protect domestic production, as opposed to preventing differential

90. *Id.* at ¶ 7.182, 7.187.
91. *Id.* at ¶ 7.184.
92. Tsai, *supra* note 28, at 30.
93. *Id.*
94. *Id.* at 30–31.
95. Panel Report, *Japan—Customs, Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages,* ¶ 5.7, L/6216-34S/83 (Nov. 10, 1987) [hereinafter *Japan – Customs, Duties and Labeling Practices*].
96. *Id.*
97. Tsai, *supra* note 28, at 31.
98. *Id.*
99. *Id.* at 32.
100. Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, ¶ 5.24, DS23/R -39S/206 (June 19, 1992) [hereinafter *Malt Beverages Panel*].

treatment for policy reasons.[101] As a result, the "like product" test incorporated a new element into its assessment: whether it violates Article III's prohibition against protecting domestic producers.[102]

Eventually, the two-step test evolved into a one-step test.[103] The test, called the "aim-and-effect test,"[104] assessed solely the motives behind the regulation to find a discriminatory purpose, which violated Article III:2.[105] This test, however, was problematic because the panel now needed to differentiate between valid and invalid regulatory schemes without first assessing whether the product was similar.[106] Under this test, the distinction between "like products" and "directly competitive or substitutable product" vanished.[107] Rather, the test inquired into whether the tax was implemented with a desired outcome of discrimination and whether the tax actually did discriminate between the two products.[108] As one can imagine, the aim-and-effect test essentially opened the doors for courts to find any two products similar, so long as they were in direct competition or substitutable.[109]

Nevertheless, the aim-and-effect test is attractive because it functions to enhance the regulatory autonomy of Member states.[110] This approach can save legitimate domestic regulations, such as the regulations for non-protectionist food labeling rules and protecting historic buildings.[111]

The aim-and-effect test, however, may cause an accidental disadvantage against imported products.[112] In addition, the aim-and-effect test is prone to circumvention.[113] Because the determination of likeness depends on the legislature's purpose for implementing the measure, problems arise with legislation that has more than one aim.[114] Manipulation of legislative history to avoid WTO suits[115] and translation issues with the texts can produce ambiguous, obscure, manifestly

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101. *Id.* at ¶ 5.25
102. Tsai, *supra* note 28, at 33–34.
103. *Id*. at 35.
104. *Id*.
105. *Id*. at 34.
106. *Id.* at 35–36.
107. *Id.* at 36.
108. *Id.* at 35.
109. *Id*. at 36.
110. Won Mog Choi, *Overcoming the "Aim and Effect" Theory: Interpretation of the "Like Product" in GATT Article III,* 8 U.C. DAVIS J. INT'L L. & POL'Y 107, 115 (2002).
111. *Id.* at 116.
112. *Id.*
113. *Id.* at 117–18.
114. *Id*.
115. *Id.* at 119.

absurd, and unreasonable aims.[116]

Over the past two decades, scholars have proposed solutions to the weaknesses of the aim-and-effect test and the two-step product test that would incorporate the goals and motives of the GATT. For instance, one scholar suggests that the WTO should exclude extraneous factors from the assessment of likeness to enhance court predictability and stabilize the concept of like products.[117]

The aim-and-effect test did not last long.[118] The 1996 Panel Report on *Japan – Taxes on Alcoholic Beverages*[119] disposed of the aim-and-effect test by arguing that the GATT's language, read literally, did not support the test.[120] According to the panel, Article III:2 requires the court to assess two separate legal obligations: (1) likeness, and (2) directly competitive or substitutable.[121] The panel essentially revived the prongs of the two-step "like product" test, while also adding another prong.[122] The steps thus became: (1) whether the products were similar, (2) whether the contested measure was an "internal tax" or "other internal charge," and (3) whether the tax imposed on foreign products was in excess of that imposed on domestic products.[123]

Even with this improved two-step test, scholars still criticize the test's lack of consideration for extraneous factors.[124] The new test implemented by *Japan Alcohol Panel* is a literalist approach, which compels the court to abide by the GATT's language. The problem with this test, however, is that there may be a loophole in the GATT.[125] This loophole could be exploited if it were to easily pass the *Japan Alcohol Panel* prongs.[126]

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116. *See* Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter *Vienna Convention*]. *See also* U.N. Doc. A/CONF.39/27 (1969), *reprinted in* 8 I.L.M. 679 (1969).

117. Choi, *supra* note 110, at 119.

118. Tsai, *supra* note 28, at 36-37.

119. Panel Report, Japan – Taxes on Alcoholic Beverages, WT/DS8/R, WT/DS10/R, WT/DS11/R (July 11, 1996) [hereinafter Japan Alcohol Panel].

120. *Id*. at 132.

121. Tsai, *supra* note 28 at 37.

122. *Id.* at 37.

123. Japan Alcohol Panel, *supra* note 119, at 134.

124. Choi, *supra* note 110, at 121.

125. *Id.*

126. *Id.*

III. COMPARING THE GATT WITH THE DORMANT COMMERCE CLAUSE

A. The United States' Dormant Commerce Clause

Article III of the GATT resembles the United States' Dormant Commerce Clause ("DCC"). While the DCC lacks a clear textual basis, its judicial interpretations employ the same basic principles under which the GATT is modeled.[127] In effect, the DCC seeks to equalize the economic playing field by prohibiting the implementation of discriminatory laws on free trade between the states.

Courts interpreting the DCC have classified cases into three categories. The first category consists of facially discriminatory measures taken against interstate commerce. For instance, in *City of Philadelphia v. New Jersey*, the Supreme Court nullified a law that prohibited importing waste from other states because it discriminated against articles of commerce coming from outside the state.[128] The Court reasoned that, "unless there is some reason, apart from their origin, to treat them differently," the measure is facially discriminatory.[129]

The second category involves those laws that are not facially discriminatory. The Supreme Court ruled that if the law has a discriminatory effect while not being facially discriminatory, then the law violates the DCC.[130] If a law has a discriminatory effect, the state has the burden to "justify it both in terms of the local benefits flowing from that statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interest at stake."[131]

The third category also involves facially nondiscriminatory regulations that negatively affect interstate commerce.[132] As opposed to having a "discriminatory effect," as in the second category, these regulations have an incidental effect and are subject to a balancing test.[133] The court balances the need for such a regulation, based on some legitimate purpose, with the degree of discrimination and the effects of the law on interstate commerce.[134]

The problem with these classifications is drawing the line between categories two and three.[135] Usually, the provisions the WTO deems

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127. Farber & Hudec, *supra* note 7, at 1408.
128. City of Philadelphia. v. New Jersey, 437 U.S. 617, 629 (1978).
129. *Id.* at 627.
130. Hunt v. Washington State Apple Adver. Comm'n., 432 U.S. 333, 352–53 (1977).
131. *Id.* at 353.
132. Farber & Hudec, *supra* note 7, at 1413.
133. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
134. *Id.*
135. Farber & Hudec, *supra* note 7, at 1414.

constitutional have public health or safety issues at stake.[136] Some courts have suggested the third category only applies to discriminatory burdens rather than baleful effects.[137]

Over time, however, the balancing test has proven to be somewhat lax.[138] Typically, the state is only required to present some evidence of a regulatory benefit while the court usually considers the law "as the empirical judgments of lawmakers concerning the utility of legislation."[139]

Typically, a statute that discriminates between different products based on their location of manufacture is facially discriminatory.[140] In those cases involving facially neutral regulations, courts look for discriminatory intent, use of a proxy characteristic, competitive advantage, and uniformity and consistency in order to assess its degree of discrimination.[141]

B. The GATT's Correspondence with the DCC

The GATT is an international agreement that contains protectionist trade barriers promoting free world trade.[142] Its structure starts with "tariff bindings," which set a maximum rate for tariffs for each item.[143] Aside from the bindings and rules related to them, the GATT raises the same issues as the DCC under U.S. law.[144] Like the DCC, GATT courts classify laws as facially discriminatory or facially neutral.[145] In addition, much like in the DCC, the GATT lays out exceptions in Article XX for when discriminatory measures are enforceable, such as when the measures involve a widely accepted regulatory objective for health and safety.[146]

When dealing with a facially discriminatory policy, the GATT requires a more elaborate legal analysis of the exceptions to discriminatory measures than the DCC.[147] This is because the GATT gives weightier attention to a country's plea for justifying its regulation

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136. *See Electrolert Corp. v. Barry*, 737 F.2d 110, 113 (D.C. Cir. 1984).
137. Farber & Hudec, *supra* note 7, at 14.
138. *Id.* at 1415.
139. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 680 (1981) (Brennan, J., concurring).
140. Farber & Hudec, *supra* note 7, at 1416.
141. *Id.*
142. *Id* at 1418.
143. *Id*.
144. *Id.* at 1419.
145. *Id.*
146. *Id.*
147. *Id.* at 1420.

or law.[148] Since the WTO regulates more than one country,[149] it must be sensitive to the varying justifications given by States having a unique outlook on the global market and different social customs and traditions. On the other hand, the DCC only regulates the United States, where people have similar social and economic norms, which results in less variance within the law.[150] Moreover, each state must comply with federal law and may not opt-out of the Constitution. Therefore, a WTO panel, made up of judges and representatives from different parts of the world, must be more lenient in their assessment of like products and violations of the GATT policies.

When dealing with facially neutral classifications, the GATT does not divide the category into two subcategories like the DCC.[151] The GATT usually deals with two types of facially neutral measures – those that "provide different taxes or regulatory treatment for two groups of similar products in a way that places all or most foreign products in the disadvantaged category;"[152] and those that have exactly the same restrictions placed on both international and domestic producers such that it is "substantially more difficult for foreign producers to comply with because of their different geographical or market positions."[153] The aforementioned *Philippines* case can be viewed as a mixture of both facially neutral types. The alcohol tax distinguishes between the raw materials used in distilling the alcohol in a country where most domestic production of the spirit is made from raw materials found domestically, subjecting the domestic companies to a lower tax rate.

C. The Inherent Problem of Taxation Between Developed and Developing Countries.

The relevant factor indicating discrimination here is the use of a proxy characteristic.[154] This applies when a state regulates on the basis of some neutral characteristic that "has little independent significance and is in reality a proxy for geographic differences—that is, the characteristic is shared by virtually all in-state firms and virtually no out-of-state firms."[155] In the *Philippines* case, the Panel found the tax

148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 1421.
152. *Id.* at 1422.
153. *Id.*
154. *Id.* at 1423.
155. *Id.* at 1416. *See also* Atlantic Prince, Ltd. v. Jorling, 710 F. Supp. 893, 902–03 (E.D.N.Y. 1989) (striking down a New York ban on commercial fishing vessels over ninety feet

discrimination criteria based on raw material used to manufacture the product had little independent significance and was set up to discriminate between all in-state firms and virtually no out-of-state firms.[156]

But how could the panel be certain that the taxes were set up for this alleged purpose? Let us consider this scenario: Filipino alcohol manufacturers found a business opportunity in the sale of alcoholic beverages. These manufacturers compared the cost of manufacturing alcohol with different raw materials and realized that it was more profitable to use domestically produced materials. These manufacturers then approached the country's legislature to propose a bill taxing them at a favorable rate. Assume that the Philippines have a comparative advantage and a niche in the market of sugar cane. The Filipino government understood that by charging a more favorable rate, it would stimulate their economy (farmers, transportation companies, and processing plants all prosper as a result) and produce much needed revenue for the country's development programs. Without the intention to discriminate against foreign produced items, the Filipino government then passed a tax law granting a more favorable rate to *anyone* using the specified raw materials to produce any alcoholic spirits.

The policy does not inherently discriminate against international markets. Any manufacturer can take advantage of this tax break by producing their alcohol with such materials. Why should a developing country, in desperate need of revenue to stimulate its economy, not exploit the fruits provided by its land? How should a country that does not have the manpower to exploit cheap and efficient labor such as China, or does not have the capital to build technological schools and promote scientific research, advance its economic agenda to compete with the rest of the developed countries on a global scale? The answer lies below. But before addressing the answer, another issue must be addressed to justify the solution and shed light on the injustice within the WTO.

D. Developed Countries and GATT Adherence

The "national treatment" rule found in Article III of the GATT requires that internal taxes and internal regulations treat foreign goods no less favorably than "like" domestic goods.[157] Its principal aim is to

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in length because only one such vessel was from New York).

156. Philippines Tax Case, *supra* note 26 at 7.187–7.188.

157. Farber & Hudec, *supra* note 7, at 1422.

promote fairness by treating all contracting parties similarly.[158]

Often, however, the playing field is far from fair. For instance, the Bush administration, in an effort to promote the agendas of its agricultural lobby, passed an "aggressive" farm bill in 2002.[159] The bill, named the Farm Security and Rural Investment Act of 2002 ("Farm Bill"), gave an artificial advantage to American farmers by providing incentives in the form of subsidies.[160] As explained below, with these subsidies in place, many farmers produced at capacity instead of responding to market demands.[161]

Currently, the United States spends about three billion dollars per year subsidizing its own farmers.[162] The European Union also subsidizes its farmers heavily.[163] For instance, farmers with cows get a subsidy of two dollars per cow a day.[164] The trade distortion created by these subsidies substantially affects developing countries' ability to compete in the world market.[165] Scholars have noted that "excessive subsidies lead to overproduction, depression of world prices, and the reduction of many developing nations' farmers to poverty."[166]

Developing countries usually have a specific dominant industry in agriculture.[167] Job opportunities are usually limited so some devote their lives to learning the operational skills needed for that specific market.[168] Economists predicted a force out of countries that are currently otherwise in compliance with international agreements, such as the free trade regulations of the International Monetary Fund and the World Bank.[169] In addition, Argentina and Brazil are projected to suffer damages in the amount of 39 billion dollars because of the change in commodity prices due to this Farm Bill.[170]

The Farm Bill also affected the Philippines, a member of the WTO

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158. Vance E. Hendrix, *The Farm Bill of 2002, The WTO, and Poor African Farmers: Can They Co-Exist?*, 12 TULSA J. COMP. & INT'L L. 227, 231–32 (2004).

159. The Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (2002) [hereinafter *Farm Bill*].

160. Hendrix, *supra* note 158.

161. *Id.* at 245.

162. *Id.* at 246.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Ari Afilalo, *Not in My Back Yard: Power and Protectionism in U.S. Trade Policy*, 34 N.Y.U. J. INT'L L. & POL. 749, 766 (2002).

168. *Id.*

169. *New U.S. Farm Bill Upsets WTO Partners, Could Hurt Developing Countries*, BRIDGES TRADE BIORES, May 16, 2002, *available at* http://ictsd.org/downloads/biores/biores2-9.pdf.

170. *Id.*

since 1995.[171] The country's officials believed that the cheap price of labor in their country would balance out the inflated prices abroad.[172] The government predicted that accessing world markets through the WTO would create a "net gain of a half-million farming jobs a year, and improve the country's trade balance."[173] This proved to be false because of the subsidies given to farmers in other countries such as in the United States and the European Union.[174]

It is almost impossible for a small developing country such as the Philippines to compete against the billions of dollars in subsidies given to international farmers.[175] The Philippines have lost hundreds of thousands of farming jobs since joining the WTO.[176] Some Filipinos view the Farm Bill's impact on domestic farmers as a modern version of imperialism.[177]

In the Philippines, the subsidies given to American and European farmers help them sell grain at a price that is less than the break-even point for farmers in developing countries.[178] One news writer describes the subsidy process as "kicking aside the development ladder for some of the world's most desperate people harvesting poverty around the world."[179] Allowing the markets to run freely without the aid of subsidies would improve the global welfare by a projected 120 billion dollars.[180]

The Farm Bill conflicted with the United States' commitments to the World Trade Organization.[181] Under the WTO, "actionable" subsidies were allowed so long as "they do not (a) cause an injury to a domestic industry of another Member; (b) nullify or impair the benefits other Members are accruing under the SCM[182] Agreement; or (c) cause serious prejudice to the interest of another Member."[183] One commentator stated that:

> Agriculture and food are fundamental to the well-being of all people,

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171. Editorial, *The Rigged Trade Game: The WTO in the Philippines*, N.Y. TIMES, July 20, 2003, at 4 [hereinafter *The Rigged Trade Game]*.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 1.
180. *Id.* at 2.
181. Hendrix, *supra* note 158, at 229.
182. Subsidies and Countervailing Measures
183. Hendrix, *supra* note 158, at 229.

> both in terms of access to safe and nutritious food and as foundations of healthy communities, cultures and environment . . . . Instead of ensuring the right to food for all, these institutions have created a system that prioritizes exportoriented [sic] productions and has increased global hunger and poverty while alienating millions from productive assets and resources such as land, water, and seeds.[184] . . . It is time that we insist on trade policies of Washington based on sound policy and reason, rather than on the supposed necessities of maintaining a political and market dominance.[185]

While many members of the WTO and scholars disapproved of the Farm Bill, proponents of the bill justified its $19.1B ceiling on subsidies by pointing out that other countries subsidized their farmers at higher ceiling rates of $60B for the European Union and $30B for Japan.[186] Another justification for the proposed rate is that $19.1B is far less than what was spent before the bill was passed.[187]

E. Playing Games with Compliance

The 2007 successor to the Farm Bill did not alleviate the issues its predecessor had with the WTO.[188] Since the 2007 Farm Bill gave "producers the option of remaining in the 2002 counter-cyclical payments program," it did not remedy the problems endemic to the counter-cyclical payments program, namely its price-contingent nature.[189] In response to continued conflicts with the WTO, the United States passed the Average Crop Revenue Election Program ("ACRE") in 2009.[190] While it attempts to comply with the WTO cyclical payments rulings by basing them on yields instead of prices, WTO members are nevertheless not satisfied with ACRE because the subsidy is still in a category that hurts other WTO members.[191]

Specifically, the 2007 Farm Bill caused "market loss and price suppression to the upland cotton market".[192] It seems that, with respect to WTO compliance, some legislators continue to be resolute and

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184. Anuradha Mittal, *Giving Away the Farm: The 2002 Farm Bill,* FOOD FIRST (July 8, 2002), http://www.foodfirst.org/node/52.

185. *Id*.

186. Hendrix, *supra* note 158.

187. *Id*. at 248.

188. Phoenix X.F. Cai, *Think Big and Ignore the Law: U.S. Corn and Ethanol Subsidies and WTO Law*, 40 GEO. J. INT'L L. 865, 882 (2009).

189. *Id*.

190. *Farm Bill Accomplishments*, USDA (Jan. 9, 2009), http://www.usda.gov/documents/fbJan09.pdf.

191. Cai, *supra* note 188, at 883.

192. *Id.*

hostile.[193] On the other hand, proponents of WTO compliance in the United States continue to argue that WTO compliance will require a meaningful restructuring of the subsidies program.[194]

United States noncompliance has enraged many developing countries.[195] These countries have waited five years, since the 2002 Farm Bill, for some positive movement towards WTO compliance.[196] Before the Farm Bill of 2012 was passed, these countries were aggravated with and resented its proposed legislation.[197] Brazil, for instance, expected reforms in the 2007 Bill after their favorable ruling in the *Upland Cotton* case in the WTO in 2005.[198] When the United States failed to deliver, Brazil authorized a $4B sanction on the United States as a form of retaliation.[199]

IV. THE SOLUTION TO DEVELOPED COUNTRIES' NONCOMPLIANCE WITH THE GATT

In view of the foregoing, one might ask why developing countries such as the Philippines should stay in the WTO? While the WTO aims to protect free trade around the world, its goal of equal product treatment hurts underdeveloped countries while having a negligent effect on powerhouses such as the United States and China. Proponents of the WTO argue that these underdeveloped countries gain access to world trade that would be more costly if they were to withdraw from the WTO. However, market liberalization in developing countries does not always follow from the WTO's efforts. For instance, the 1990's WTO agreement on agriculture hindered the ability of developing countries to liberalize their markets.[200] Developed countries evaded the obligations of the agreement through tariffs and by strategic use of its provisions.[201]

Developing countries rely on tariff revenues to finance food production programs, such as research and extension services, irrigation projects, and investment subsidies.[202] Exempting developing countries from tariff reduction for sensitive agricultural commodities would enable a developing country to promote domestic food production,

193. *Id.*
194. *Id.*
195. *Id.* at 884.
196. *Id.* at 883.
197. *Id.*
198. *Id.* at 884.
199. *Id.*
200. *Institutionalizing Inequality*, *supra* note 3, at 479.
201. *Id.*
202. *Id.* at 485.

thereby reducing international market dependence.[203] While this solution seems practical, it is also implausible considering the WTO's strict enforcement of the GATT's language in the likeness test. In addition, these countries may already have reduced tariff rates based on the GATT.[204] It is therefore necessary to look to other solutions, such as those that may require modifying the GATT, in order to equalize the playing fields between developing and developed countries.

The United States plays a two-faced game. On the one hand, it ratified a treaty that should result in fair free market trading. On the other hand, it delays compliance with unfavorable WTO decisions. Judging by the reforms in the 2007 Farm Bill and in ACRE, it seems that the United States is finally on the path towards compliance, albeit with a camel instead of a mustang. In the meantime, foreign developing markets such as the Philippines are nearing bankruptcy.[205]

The solution lies in playing hardball with the rules of the WTO. Those countries that are hurt by developed countries' noncompliance with WTO decisions should have other options besides imposing sanctions and trade barriers. They need a tool in their arsenal that is not facially illegal under the GATT, but is dangerous in the hands of developing nations. One possible solution lies in the Dormant Commerce Clause of the United States.

As discussed above, the DCC classifies different laws into three categories: (a) facially discriminatory, (b) facially neutral with a discriminatory effect, and (c) facially neutral without a discriminatory effect. Those laws passed by developing countries that are facially neutral but have a discriminatory effect should be allowed under the GATT under these criteria: (1) the country is developing; (2) the developing country has an enforceable judgment by the WTO against a developed country's law(s); (3) the developed country has not complied with the judgment within a specific time frame; (4) the developing country must show that the developed country's noncompliance is negatively impacting its economy.

The impact of such a law would make any developed country think twice about non-compliance. It would give any developing country the

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203. *Id.* at 486.

204. *See Treatment of Developing Countries: Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, L/4903 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 203 (1980).

205. Chris Wright, *Philippines Renews Efforts to Balance Budget*, EMERGING MARKETS (Mar. 5, 2010), http://emergingmarkets.org/Article/2478534/Philippines-renews-efforts-to-balance-budget.html.

ability to tax international products in a facially neutral yet discriminatory manner. If we take United States noncompliance with the *Upland Cotton* decision as an example, the effect of such a policy would allow all non-developed countries to impose taxes on foreign producers like the United States, such as a tax on alcoholic beverages central to the *Philippines* case. In essence, giving this edge to developing countries should balance out the fear of noncompliance in the international community.

The beauty of such a principle lies in the fact that it would not violate GATT principles of discrimination between countries. A law that said, for example, "The United States shall pay X tax on all imported corn," would still be actionable in the WTO because it is facially discriminatory. However, developing countries can look to their own strengths and exploit the opportunity created by these new rules. For instance, if developing country X is a major producer or manufacturer of sugar cane, then it can impose taxes in a way that the Philippines have done with their alcoholic spirits. The Philippines did not tax other countries unfavorably, but rather imposed a tax on the raw materials that made up the product.

It is imperative that we define the proposed criteria. The first criterion—the country must be developing—is problematic. What constitutes "developing"? One solution is that the WTO could categorize countries based on their gross domestic product. The WTO would define countries that fell below a particular percentage or rank as "developing". However, it is more effective to define a nation as developing by using a multi-category economic index, such as Heritage's Index of Economic Freedom. The Index ranks countries based on the assessment of ten economic factors, such as government spending, freedom from corruption, fiscal freedom, monetary freedom, and property rights.[206] After ranking them, the index groups the scores into categories of "economic freedom."[207] A country that falls under the category of "Mostly Unfree" would be considered a developing country.[208]

The problem with this system lies in the cut-off. Countries on the wrong side of the cut-off may start underreporting revenues and engage in otherwise deceitful activities to lower their standards so that they can

206. *Index of Economic Freedom*, HERITAGE FOUND. (2012), http://www.heritage.org/index/ranking.

207. *Id*.

208. *Id*.

take advantage of passing facially neutral discriminatory laws. The solution is to have a non-partisan third party conduct the studies. In addition, the countries on the cusp of "developing" would be dissuaded from misreporting numbers because their economy may plummet. Trading partners would be less inclined to continue the same business ties with a country that is losing economic stability.

The second criterion—the developing country has an enforceable judgment by the WTO against a developed countries' law(s) – is straightforward. The WTO decision should be enforceable, final, and not be subject to appeal.

The third criterion—the developed country has not complied with the judgment within a specific time frame—is harder to conceptualize. Every product has a different shelf life. Grape producers in one developed country may be more sensitive to time than producers in a different country. Therefore, it is imperative that the WTO consider each case individually and set a date for each case in which this proposed law would take effect, should the developed country choose not to comply with the WTO's decision.

The final criterion—the developing country must show that noncompliance by the developed country is negatively impacting its economy—should be closely monitored. The developing country must use economic data and research that demonstrates the law is adversely impacting their economy. Again, exaggerated assessments, bribes, and corruption may ensue. Therefore, non-partisan third parties should conduct the studies. The developing country should apply to the WTO for third party economic assessment research. Once the country meets these criteria, the WTO can grant the country the ability to tax in facially neutral ways.

Through this process, the hope—and, indeed, the plausible reality—is that developed countries should start to comply with these decisions. Otherwise, the economic consequences would be substantial. Its deterrent effect should be sufficient to prevent countries from ever having to utilize this new tool.

V. CONCLUSION

Countries choose to become members of the WTO in hopes of developing their economy. The history of the WTO proves that while many countries in the WTO sue others to alleviate some wrong practice or procedure affecting their economy, these same countries may

nevertheless neglect to comply with other WTO rulings.[209] For the most part, when countries neglect to comply with WTO decisions, it is because of internal or external political battles and environmental considerations. Typically, strong developed countries have more bargaining clout and leeway when it comes to WTO compliance than developing countries, such as the Philippines.

The *Philippines* case and the U.S. Farm Bill illustrate the point above. The United States has not complied with the WTO ruling to fix its agricultural subsidies. The subsidies given to American farmers allow them to lower their prices on agricultural items in the world market, forcing foreign producers, such as those in the Philippines, out of the market. Not only are these developing countries suffering from underdeveloped economies, but now they must struggle to maintain their place in the world market by battling subsidies.

Concurrent with its violations of WTO rulings, the United States sues developing countries in the WTO to equalize the taxes on alcoholic beverages. While the United States is correct in that the Philippines is taxing the spirits in violation of the principles in GATT, it is unfair to force one country to comply with WTO rulings while the other plays a foot-dragging game with the world.

To alleviate this problem, the WTO must arm developing countries with a new weapon. Unlike existing weapons, such as sanctions, a new weapon should be specifically tailored to non-compliant, developed countries. Sanctions may or may not force a developed country to budge. WTO case filings show that domestic corporations and groups sway the developed countries into filing cases in the WTO.[210] The new weapon will have the most impact on the corporations who are not complying with WTO rulings as opposed to general sanctions affecting an entire industry. In turn, the corporations will pressure the United States to change its policy so that the restrictions will be taken away.

The WTO should set out clear parameters for handing out such a power. The WTO should build off these proposed criteria and establish a third, unbiased party to determine whether the countries are not committing fraud or circumventing the laws.

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209. *See, e.g.*, Patrick Nicholson, *UK Hypocrisy at the WTO Will Hurt Poor Countries*, INST. AGRIC. & TRADE POL'Y (June 20, 2003), http://iatp.org/news/uk-hypocrisy-at-the-wto-will-hurt-poor-countries; Nate Anderson, *IP Hypocrisy: US Likes WTO Rulings Only When It Wins*, ARSTECHNICA (Mar. 25, 2008, 6:46 PM), http://arstechnica.com/uncategorized/2008/03/ip-hypocrisy-us-likes-wto-rulings-only-when-it-wins/.

210. Christina L. Davis and Sarah Blodgett Bermeo, *Who Files? Developing Country Participation in GATT/WTO Adjudication*, 71 J. POL. 1033 (2009), *available at* http://www.princeton.edu/cldavis/files/who_files.pdf.

The solution is that a country which falls under these conditions may impose a law that is facially neutral but has a discriminatory effect when: (1) the country is developing, (2) the developing country has an enforceable judgment by the WTO against a developed country's law(s), (3) the developed country has not complied with the judgment within a specific time frame, and (4) the developing country must show that the developed country's noncompliance is negatively impacting its economy. The goal of such a "weapon" in the hands of a developing country is to deter non-compliance with WTO rulings, thereby equalizing the playing field that is the world market.