

ARE WE LEARNING FROM THE MISTAKES OF ENVIRONMENTALISTS? THE APPLICATION OF ENVIRONMENTAL HARMONIZATION MODELS TO THE AUTOMOTIVE INDUSTRY

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I. INTRODUCTION

This Note will examine the current attempts at harmonization of automotive standards for safety regulation in the Triad Region, which includes the United States, Japan, and the European Community.¹ Harmonization can be defined as the standardization of any number of trade criteria in order to eliminate barriers to free trade. Sometimes referred to by its proponents as “leveling the playing field,” harmonization is viewed as an alternative to traditional free trade efforts achieved through making regulatory regimes in two or more countries identical. Thus far the thrust of international harmonization efforts in the automotive industry has been to increase market access and facilitate free trade. Less attention has been paid to safety

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1. See S. Tamur Cavusgil, *Globalization of Markets and Its Impact on Domestic Institutions*, 1 IND. J. GLOBAL LEGAL STUD. 83, 90 (1993). The importance of the Triad Region as automotive producers and manufacturers makes examination of this region particularly relevant since this region encompasses the top three producers in terms of market share in the automotive market. See generally *Working Party on the Construction of Vehicles—Its Role in the International Perspective*, U.N. Economic Commission for Europe, at 1 U.N. Doc. E/ ECE/ 324 (1958) revised by U.N. Doc. E/ ECE/ TRANS/ 505/ Rev.1 (1967) and published with a letter from the Chairman of WP.29, Bernard Gauvin (1994) [hereinafter UNITED NATIONS]. In 1996, the U.S. exported \$17,175,950 worth of passenger vehicles. See *1996 International Trade Statistics Yearbook, Volume I*, at 1082, U.N. Doc. ST/ESA/STAT/SER.G/45 (1997) [hereinafter *Volume I*]. This figure represented seven percent of the world's exports in this market. See *1996 International Trade Statistics Yearbook, Volume II*, at 196, U.N. Doc. ST/ESA/STAT/SER.G/45 (1997) [hereinafter *Volume II*]. In 1996, Japan exported \$39,973,644 worth of passenger vehicles (16.3% of the world's exports), and the European Union weighed in with \$135,758,069 (55.3%) worth of passenger vehicle exports. See *Volume II, supra* at 196. Additionally, the relationship between the U.S. and Japan is particularly significant since outside of Canada and Mexico, Japan is the largest trading partner to the U.S. See U.S. TRADE REP., 1998 NAT'L. TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS, at app. (1998).

and quality control.² The automotive industry has experienced special difficulties with respect to safety considerations in light of harmonization efforts.³

Various harmonization efforts employ different techniques and consider various criteria. In particular, harmonization efforts based on safety considerations have been viewed with some skepticism as susceptible to protectionist applications. On the other hand, harmonization efforts that do not consider safety tend to have adverse effects on safety regulations. Additionally, the net effect of most models is an averaging effect in which countries with good safety records compromise safety developments in the name of free trade.

In parts II and III, this Note presents an overview of harmonization and examines different methods by which harmonization can be achieved. Part IV will present an overview of the current state of automotive harmonization amongst members of the Triad Region. Part III will illustrate the individual regulatory regime used in each region. Additionally, it will endeavor to discuss the efforts of Working Party 29 in the European Union (EU) and the U.S.-Japan Framework Agreement. Part V will endeavor to illustrate the possible implications of various harmonization efforts in the automotive industry. In comparing the strengths of the multilateral agreement adopted by the EU, it is this author's opinion that a multilateral effort better focuses the parties' attention on the safety issues. Bilateral agreements with little or no structural guidance create the opportunity for implementation in the name of safety, when all that really is achieved is a protectionist trade barrier.

2. See UNITED NATIONS, *supra* note 1, at 1. For a general discussion of harmonization see I FAIR TRADE AND HARMONIZATION 1 (Bhagwati & Hudec eds., 1996), David W. Leebron, *Lying Down With Procrustes: An Analysis of Harmonization Claims*, in I FAIR TRADE AND HARMONIZATION, *supra* at 43. Leebron discusses the typical use of harmonization models in the environmental and labor arenas. See *id.* at 9.

3. See UNITED NATIONS, *supra* note 1, at 1. In particular the UN has noted:

While it is possible to imagine that the problems of controlling energy consumption could be solved by using purely or principally economic instruments, this is not the case as regards road traffic safety and the protection of the environment. . . . [T]he control of political aims and the pursuit of a social optimum depend on the elaboration of Regulations governing the construction, ownership, and use of vehicles.

Id. at 1.

II. AN OVERVIEW OF HARMONIZATION

A. The Purposes Behind Harmonization

Harmonization is an attempt to facilitate free trade through implementation of a standardized approach to production. Standardization may be implemented with respect to safety, quality control, labor inputs, or environmental standards.⁴ Harmonization allows two or more countries to recognize each other's laws as equivalent to their own laws; therefore these foreign laws carry the same weight as domestic statutes.⁵ Unlike more traditional approaches enabling free trade, such as judicial bounding,⁶ harmonization is a prospective rather than a negative or corrective measure.⁷ In other words, harmonization is a preventative measure since it establishes the appropriate parameters from the outset in order to better facilitate the free flow of goods.⁸

The globalization⁹ trend has become significant in modern markets due to many changes in the way international trade is structured.¹⁰ Harmonization is just one of the many means of achieving globalized markets.¹¹ The ultimate goal of

4. *See id.*

5. *See* LEWIS A. PRESNER, *THE INTERNATIONAL BUSINESS DICTIONARY AND REFERENCE* 153 (1991).

6. *See* D. Esty & D. Geradin, *Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreements*, 21 *HARV. ENVTL. L. REV.* 265, 280-282 (1997). Judicial bounding is a corrective measure designed to address obstacles presented by tariffs and trade barriers. Through selective invalidation a judicial or quasi-judicial body has the power to strike down market-access-protecting provisions disguised as substantive trade barriers to address environmental or safety concerns. *See id.* Other traditional methods include embargoes and quotas. *See id.*

7. *See id.* at 282.

8. *See id.*

9. The goal of globalization is for corporations to seek and achieve long-run, large-scale efficient production by standardizing the methods of that production such that good quality items are produced that consumers will buy. The problem with globalization is that it calls for standardized production and no or little variation allowance is built in for regional or local differentiation. *See* PRESNER, *supra* note 5, at 142.

10. Cavusgil points to five developments in particular which have shifted the trade focus from the nation state to the global nature of multinational corporations. These are: (1) the goal of industry in achieving fluidity in manufacturing (economic efficiency in having goods produced in the place where it is cheapest to manufacture them); (2) increased competition in the global market; (3) the variety of international business transaction available have increased; (4) the development of the theory that technological advances occur more rapidly where the free and open exchange of ideas comes from free trade; and (5) the new international nature of borrowing and financing. *See* Cavusgil, *supra* note 1, at 84.

11. Malcolm Waters points to the following methods as means of achieving higher levels of economic globalization, although he states the desirability of using each these

harmonization is to facilitate the production of goods by the most inexpensive means possible, to the widest possible markets, at the lowest possible prices.¹² Particularly in "truly global industries,"¹³ such as the automotive industry, in which a few companies dominate the majority of the markets around the world, harmonization has been viewed as a solution to the free trade dilemma in the face of "indications that, at least in the Triad Region, a convergence of lifestyles, consumer preferences, and media habits is underway."¹⁴ Harmonization is viewed as a particularly useful solution to developing stronger roots for free trade because it, in theory, is designed to regulate trade in a nondiscriminatory manner without underlying protectionist motives.¹⁵ Thus, harmonization is viewed by some theorists as a panacea to tensions between total deregulation and regulations that act as a shield to imports. However, harmonization efforts may fail to consider various quality concerns unless quality is the criteria that forms the basis of the harmonized regime.

B. The Effects on Quality of Harmonized Goods

A primary goal of harmonization is increased market access and the elimination of competitive disparities.¹⁶ Another aspect of harmonization that is often overlooked in the economic literature but is a concern to consumers is product quality, particularly with respect to safety.¹⁷ While the primary focus of most harmonization movements is to remove impediments to free trade, harmonization has been viewed as an alternative to total deregulation because it often provides a threshold for acceptable quality of products rather than allowing market principles to override all other considerations.¹⁸

methods to achieve globalization ends may be questionable: (1) growth of capitalism in various component countries often leads to deregulation on a global level; (2) multinational enterprises tend to allow for less restrictive trade; (3) development of international financial markets; (4) use of and dependence on migrant labor sources; and (5) minimal use of tariffs and trade barriers. See MALCOLM WATERS, GLOBALIZATION 75, 86, 90, 94 (1995).

12. See generally Cavusgil, *supra* note 1.

13. *Id.* at 86. See also WATERS, *supra* note 11, at 7-8.

14. Cavusgil, *supra* note 1, at 90.

15. See *id.* at 88.

16. See Esty & Geradin, *supra* note 6, at 265.

17. See generally RICHARD GOODMAN AND THE CENTER FOR AUTO SAFETY, AUTOMOTIVE DESIGN LIABILITY (Supp. 1997).

18. See Esty & Geradin, *supra* note 6, at 265.

1. Race-to-the-Bottom Theory

The concern that total deregulation would allow a complete degradation of standards is, in large part, embodied in the race-to-the-bottom theory.¹⁹ While this theory has been primarily applied with respect to environmental standards,²⁰ it also has application in the realm of safety in consumer products. Race-to-the-bottom theory postulates that when a market is completely deregulated, efficiency will be achieved by whatever means possible, so long as those means do not discourage consumers from purchasing the finished product.²¹ Daniel Esty describes the phenomenon as a “race from desirable levels of environmental quality that states would pursue if they did not face competition for industry to increasingly undesirable levels that they choose in the face of such competition.”²² Race-to-the-bottom theorists postulate that without regulation, for instance, undesirable effects of production, such as pollution, will significantly increase in order to achieve lower prices and increased sales.

Race-to-the-bottom theory has been almost exclusively applied to environmental impact in production, but it is an instructive model for safety regulation as well. In particular, race-to-the-bottom theorists frequently define environmental impact as a low priority for consumers in discriminating among products. The model has been less frequently applied in looking at harmonization’s production effects on safety aspects because consumers are more likely to differentiate between products that are “more” or “less” safe.²³ However, in the interests of producing the most affordable product, it is possible that safety considerations would be neglected in the manufacturing process, and the result would be an increasingly unsafe product. Total deregulation creates the concern that market

19. See J. Bhagwati & R. Srinivasan, *Trade and the Environment: Does Environmental Diversity Detract From the Case of Free Trade?* in 1 FAIR TRADE AND HARMONIZATION, *supra* note 2, at 191. For general critiques of race-to-the-bottom theory see John Douglas Wilson, *Capital Mobility and Environmental Standards: Is There a Theoretical Basis For Race to the Bottom?* in 1 FAIR TRADE AND HARMONIZATION, *supra* note 2, at 394; Alvin K. Klevorick, *Reflections on the Race to the Bottom*, in 1 FAIR TRADE AND HARMONIZATION, *supra* note 2, at 459.

20. See, e.g. Esty & Geradin, *supra* note 6. See also Klevorick, *supra* note 19, at 460.

21. See Bhagwati & Srinivasan, *supra* note 19, at 191. The analogy to a prisoner’s dilemma scenario suggests that in the interests of lower production costs, without regulation between competitors, standards will follow a perpetual downward spiral. See Klevorick, *supra* note 19, at 461.

22. DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* 135 (1994). However, this model may not be totally realistic. The race-to-the-bottom theory has been criticized for failing to take into account various tax principles that may prevent these perpetually declining standards. See Wilson, *supra* note 19, at 423-24.

23. See ESTY, *supra* note 22, at 135.

access would override the needs and concerns of a particular group.²⁴ In environmental applications, the class that is typically affected is the one that is subject to the effects of the environmental standards, usually the country in which the item is produced.²⁵ With respect to consumer safety, this group is regularly the segment of the market seeking some safety feature that is not available.²⁶

2. Regulatory Impacts

The flip side of deregulation is total regulation attained through a stringent regulatory process. Strict regulatory provisions, often referred to as total harmonization, could invariably restrict market access such that goods could only be produced in a finite number of places and still remain profitable endeavors. For instance, some goods could only be manufactured in particular countries which could afford to bear the costs of the excessive regulation, either because the cost of supplies were uniquely low or because the state was particularly wealthy.²⁷ While these products would be extremely safe and environmentally friendly, they would also be costly and probably not worth their production costs since they would only be marketable to a small group of consumers.²⁸

Short of total harmonization, there are concerns with regulation in general, since most regulatory measures are enforced by the importing nation.²⁹ First, free trade advocates are particularly concerned with the discriminatory application of many trade regulations.³⁰ Many countries hide behind regulations as a means of protecting domestic industries.³¹ When these regulations facially impose distinct requirements for domestic and imported products, per se discrimination occurs.³² When the requirements are parallel but have a purported purpose quite distinct from

24. See UNITED NATIONS, *supra* note 1 at 1.

25. See Esty & Geradin, *supra* note 6, at 268.

26. See UNITED NATIONS, *supra* note 1, at 268.

27. See Esty & Geradin, *supra* note 6, at 268.

28. See Bhagwati & Srinivasan, *supra* note 19, at 191.

29. For a discussion of regulating trade imports as a means of protecting national interests see PATRICK LOW, *TRADING FREE: THE GATT AND US TRADE POLICY* 69-78 (1993). Low defines protection as any trade measure that "lessens foreign competition for domestic producers." Protective measures may include tariffs, qualitative or quantitative restrictions, voluntary export restraints, and subsidies. The only technique that is *not* a regulatory restriction imposed on the exporting producer is voluntary export restraints in which a country will exercise abeyance in exporting products in certain "non-competitive" markets. See *id.* at 70-78.

30. See *id.* at 70.

31. See *id.* at 69.

32. See generally Esty & Geradin, *supra* note 6.

their effect, discrimination in effect occurs.³³ Second, regulations, even those that are equitably applied, may have the effect of fragmenting the market, increasing transaction costs, and generating diseconomies of scale,³⁴ even where no discriminatory intent is present.³⁵ These effects occur because, at least in theory, regulation restricts market access and increases costs.

III. MODELS OF ECONOMIC HARMONIZATION

While there are problems with both total harmonization and total deregulation approaches, fortunately there are several variations on the themes represented by either end of the spectrum that might serve as more appropriate solutions to any given situation.³⁶ While some models are designed with market access as their primary purpose, others focus on competitiveness concerns.³⁷

A. Market Access

1. Goals of the Market Access Models

Models that focus on improving market access typically have six primary goals, some of which directly inhibit competition concerns and/or consumer safety issues. First, increased market access is usually deemed desirable as a means of increasing consumer choice—the more producers, the broader the spectrum.³⁸ Second, with an increase in the number of available markets, manufacturing inputs should become less expensive, since presumably producers would move to the places in which production is cheapest.³⁹ The result would not only be increased profits for producers, but also lower cost for consumer goods.⁴⁰ Third, economies of scale⁴¹

33. *See id.* A third type of discrimination may also occur in instances where nationalism and cartel-like arrangements create a type of social discrimination. For instance, Japanese industry engages in *keiretsu*.

34. Diseconomies of scale occur when lower levels of cooperation and higher levels of trade restrictions result in increased cost of production per unit. *See* INTERNATIONAL TRADE: A BUSINESS PERSPECTIVE 10 (C. J. Jepma and A. P. Rhoen eds., 1996).

35. *See generally* Esty & Geradin, *supra* note 6.

36. *See id.* at 265.

37. *See id.*

38. *See id.* at 283.

39. *See id.*

40. *See id.*

41. Economies of scale occur when lower production costs are achieved by increasing the number of units produced such that rapidly increasing production decreases production

could be developed in which producers would enjoy "potentially higher returns on investment."⁴² Fourth, increased markets should stimulate "social progress" through increased levels of interaction.⁴³ Since the goal of harmonization in increasing market access is to facilitate free trade, many theorists believe that the free flow of goods would be accompanied by the free flow of ideas and policies.⁴⁴ As a sort of corollary to the fourth goal, the fifth goal envisions more rapid technological advances.⁴⁵ The underlying theory is that in an atmosphere in which the free and open exchange of ideas and policies are encouraged, technological advances would occur more quickly.⁴⁶ Finally, increased market access would increase interdependence between participating nations; and, therefore, the new and expanded market would effectively act as a positive peace-keeping force to encourage cooperation rather than competition.⁴⁷

2. Standard Models of Increasing Market Access

a. Total Harmonization: The All-or-Nothing Approach

The first model, the classical model of total harmonization or uniformity of standards,⁴⁸ can be achieved by one of two methods—complete uniformity of regulations or total deregulation.⁴⁹ While total deregulation is not actually harmonization because there are no standards, the *laissez-faire* approach is completely uniform since there are no rules applicable to the participating parties.⁵⁰ The advantage to deregulation is that it allows the market to operate in its natural state and allows for the most efficient distribution of resources.⁵¹ Additionally, there are no enforcement difficulties because there are no applicable regulations. The drawback, however, is that it results in placing market controls above all other

cost per unit. See INTERNATIONAL TRADE: A BUSINESS PERSPECTIVE, *supra* note 34, at 10. See also UNITED NATIONS, *supra* note 1, at 5 (discussing the effects of cost spreading across the entire industry as beneficial, particularly with respect to research and development and technological advances).

42. Esty & Geradin, *supra* note 6, at 265.

43. *Id.*

44. *See id.*

45. *See id.*

46. *See id.*

47. *See id.* See also Leebron, *supra* note 2, at 51-66.

48. See Esty & Geradin, *supra* note 6, at 265.

49. *See id.* See also Leebron, *supra* note 2, at 47.

50. See WATERS, *supra* note 11, at 94. See also Klevorick, *supra* note 19, at 462.

51. See Esty & Geradin, *supra* note 6, at 265.

concerns.⁵² By not protecting the “benefits of specialized production and trade,” the “comparative advantage” of certain special societal structures can be completely annihilated.⁵³

In a total harmonization scheme, the standards are exactly the same and no variation is permitted.⁵⁴ The advantages of the uniform system are many. First, total harmonization prevents market fragmentation and allows producers to realize economies of scale.⁵⁵ Second, total uniformity prevents confusion with respect to which rules are applicable.⁵⁶ When each country relies on its own individual standards for production, confusion about what products are acceptable for importation often arise, but under a uniform scheme everyone is held to an identical standard.⁵⁷ Third, uniformity facilitates regulatory economies of scale by allowing officials to share data, policy strategies, and enforcement techniques.⁵⁸ Finally, participating parties incur administrative gains from “network effects.”⁵⁹ Adherence to a common standard allows efficiency in technological advances in developing “control technology, training programs, [and] legal systems. . . .”⁶⁰

The total harmonization approach, however, is an extremely rigid system and is fraught with difficulties. Since the system is inflexible, solutions to context-specific problems are not available.⁶¹ Every situation is treated the same regardless of the particulars.⁶² Additionally, just as in the deregulated system, efficiency becomes something of a driving force, trumping other considerations such as quality control, safety concerns, and environmental issues.⁶³ And finally, such a system would be unwieldy. The sheer number of variables that countries would need to control would be a nearly impossible task.

52. See UNITED NATIONS, *supra* note 1, at 1.

53. Esty & Geradin, *supra* note 6, at 274. See also Klevorick, *supra* note 19, at 462.

54. See Esty & Geradin, *supra* note 6, at 283.

55. See *id.* See also Leebron, *supra* note 2, at 31.

56. See Esty & Geradin, *supra* note 6, at 283.

57. See *id.*

58. See *id.* See also Leebron, *supra* note 2, at 29. Leebron supposes that without harmonization “different domestic institutions and policies behind . . . borders” could lead to “predation” or “unfavorable distribution of gains” between those countries producing cheaper goods without regulation and those achieving social goods but selling a more expensive product. *Id.* at 29-30.

59. Esty & Geradin, *supra* note 6, at 283.

60. *Id.*

61. See *id.*

62. See *id.* at 284.

63. See *id.*

b. Maximum Standards

Another prominent access model is the system of maximum standards. In a maximum standard regime, the primary focus is setting the ceiling for acceptable regulation.⁶⁴ This harmonization option is primarily designed to guard against protectionist efforts to insulate domestic industry. The concern is that a participating nation would adopt a harsher set of standards for domestic products than agreed upon for imports, an option which is impossible under the maximum standards scheme.⁶⁵ While this system allows the entry of more parties into the market, it has significant detracting features. First, the system does not facilitate better quality control and, in fact, enforces a system of mediocre standards.⁶⁶ Second, since only the ceiling is set, participants are all but encouraged to adopt sub-optimal standards.⁶⁷ Therefore, while protectionist concerns can be eliminated, quality and safety considerations are subverted and research and development innovations are not only discouraged but are also disallowed. Therefore, while maximum standards create a workable framework with moderately enforceable regulations, the desirability of such an arrangement is questionable.

c. International Standards

A third model designed to improve market access is implementation of international standards, the most common of which are the International Standards Organization standards (ISO) and Codex Alimentarius.⁶⁸ The ISO 9000 series of

64. *See id.* *See also* Leebron, *supra* note 2, at 47.

65. *See* Esty & Geradin, *supra* note 6, at 284. An example can be made of the current system employed in Germany. German automotive manufacturers have the choice of adhering to those Regulations of the UN European Commission on Economics Working Party 29 [hereinafter WP.29] provisions adopted and promulgated in Germany or parallel national standards, where the government has chosen to have both. In the event that the German standards were more restrictive than the UN/ECE WP.29 provision and importing countries were only required to obtain UN/ECE WP.29 certification, adoption of maximum standards would not allow the German government to impose these stricter standards on domestic producers. The fear is that the German government's alternative standard would be a form of qualitative discrimination creating a protectionist advantage for domestic products, which would be viewed as safer in the domestic market. *See* UNITED NATIONS, *supra* note 1, at 57.

66. *See* GOODMAN, *supra* note 17, at § 3:4.1 (3d ed. 1996).

67. *See* ALAN O. SYKES, PRODUCT STANDARDS FOR INTERNATIONALLY INTEGRATED GOODS MARKETS 50 (1995).

68. *See* Esty & Geradin, *supra* note 6, at 285. The ISO 9000 is a series of quality control guidelines for business organizations promulgated by the International Standards Organization. While it does not have the effect of binding law, ISO 9000 guidelines are often used as a benchmark for trade custom and quality expectations within given industries. *See*

regulations has been particularly influential in the automotive industry.⁶⁹ The adoption of international standards can function in one of two ways: (1) the parties entering into the agreement can identify the standards as the necessary requisites for trade; or (2) the standards may be adopted as a rebuttable presumption.⁷⁰ Under the second variant, a participating nation could set a higher standard if it could establish just cause for doing so, and no intent to discriminate was present.⁷¹ The second variation is more flexible than the first. However, even rigid adherence to ISO standards has proven to be more flexible than some other options, in that an item is often registered and subject to periodic reassessment, but need not be reexamined every time design alterations take place.⁷² Therefore, a product can evolve without the danger of losing its ISO certification or incurring additional costs in an attempt to ensure perpetual compliance.

Under periodic monitoring, trends that reveal difficulty with certain standards can lead to change and new developments.⁷³ The uniformity in the system gives adoption of international standards certain advantages. International standards are not only easy to enforce, but also time and cost efficient because they require no time or effort to develop since they are already delineated by trade industries or supranational organizations.⁷⁴ Furthermore, it helps to build a common canon of quality standards and alleviates problems commonly associated with reciprocity, because adoption of a disinterested set of quality controls effectively facilitates freer and fairer trade since international standards give at least the appearance of unbiased guidelines.⁷⁵

Suzanne LaPlante, Note, *The European Union's General Product Safety Directive: Another Call For U.S. Exports To Comply With the ISO 9000 Series*, 22 SYRACUSE J. INT'L L. & COM. 155 (1996). See also Mindy H. Chapman, Comment, *Rx: Just What the Doctor Ordered: International Standards For Medical Devices*, 14 NW. J. INT'L L. & BUS. 566, 584 (1994). ISO membership is purely voluntary and is supported primarily by private industry. See Alessandra Casella, *Free Trade and Evolving Standards*, in 1 FAIR TRADE AND HARMONIZATION, *supra* note 2, at 147. Codex Alimentarius is an international group of experts appointed by each state to develop and promulgate international food quality standards. For general information on the protocol for developing Codex provisions see Leebron, *supra* note 2, at 87.

69. See generally LaPlante, *supra* note 68, at 155. See also Lisa C. Thompson and William A. Thompson, *The ISO 9000 Quality Standards: Will They Constitute a Technical Barrier to Free Trade Under the NAFTA and the WTO?*, 14 ARIZ. J. INT'L & COMP. L. 155 (1997).

70. See Esty & Geradin, *supra* note 6, at 285.

71. See *id.*

72. See March Laree Jacques, *The Best and the Worst of ISO 9000*, CORPORATE REPORT WISCONSIN, Aug. 1, 1992, available in 1992 WL 3233866.

73. See Esty & Geradin, *supra* note 6, at 285.

74. See Cavusgil, *supra* note 1, at 85.

75. See ESTY, *supra* note 22, at 135.

The disadvantages of international standards often relate to their formulaic nature, such that governments, consumers, and industries view these guidelines with some skepticism.⁷⁶ These non context-specific regulations do not always achieve their intended goals. For instance, when the adopting countries borrow the international instruments without participating in the drafting, sometimes the intended use of the product is quite different from that contemplated by the drafters. In these instances, the boilerplate language is ineffective as a regulatory measure.⁷⁷ A similar problem is that these standards are often drafted without proper public input before their adoption.⁷⁸ Therefore, the provisions often fail to reflect the public interest.⁷⁹ Furthermore, because it is difficult to draft an instrument that does represent a wide array of public interests, the drafters many times adopt the "lowest common denominator" approach, in which the regulations simply reflect what the country with the lowest standards is already doing.⁸⁰ Additionally, in practice most of these regulations (as products of trade organization caucusing) tend to be unenforceable and lack any teeth, since they are typically "voluntary" from the standpoint of most governments. Finally, when attempts are made to make these somewhat generic instruments inclusive, they often become bureaucratically unwieldy.⁸¹

d. Essential Requirements

A fourth approach to improving access through harmonization is the essential requirements approach. Like international standards, this approach avoids developing specific regulations.⁸² In adopting such an approach, the parties agree on a specific number of issues or areas that they want to regulate, rather than trying to include everything.⁸³ The essential requirements approach is extremely flexible and, unlike the adoption of international standards, has a relatively low degree of administrative burden.⁸⁴ Furthermore, adopting this approach can act as a bellwether to parties not subject to the agreement by pulling in states with a lot of economic influence. Thus, the standard for an entire industry is set.⁸⁵ However, this approach

76. See Esty & Geradin, *supra* note 6, at 285. See also Jacques, *supra* note 72, at 6.

77. See Esty & Geradin, *supra* note 6, at 285.

78. See *id.*

79. See *id.*

80. See *id.* at 302.

81. See Jacques, *supra* note 72, at 1. However, many manufacturers report increased quality control gains when the instruments are effectively employed. See *id.*

82. See Esty & Geradin, *supra* note 6, at 285.

83. See *id.*

84. See *id.*

85. See *id.* at 285-86.

may be difficult to structure, or at least take a long time to develop, because of its shallower reach. It focuses on areas of concern; however, defining an area specifically enough without imposing a hypertechnical regulation is a difficult task.⁸⁶

e. Prestandard Harmonization

Another model is the prestandard harmonization approach, which attempts to increase market access without implementing after-market regulatory measures.⁸⁷ With prestandard harmonization, the jurisdictions coordinate regulatory systems so that each country uses common data collection, testing protocol, scientific methodology, and risk assessment.⁸⁸ Prestandard harmonization is extremely efficient (both economically and temporally) with respect to technological advances because the harmonization element applies to production, rather than the resulting product.⁸⁹ Additionally, prestandard harmonization is enforceable since it delineates clearly what is required of member states with respect to production.

The uniformity of developmental standards puts everyone on the same track, and everyone can then adopt new developments that look promising.⁹⁰ The problem with this approach is that in some cases, after-market testing is not ever conducted.⁹¹ This can be dangerous, since there is no method for predicting how effective certain safety measures are until someone using the product discovers the danger.⁹² While prestandard harmonization is a good method of pooling research and development, since all the regulation occurs at the front end of production, it is not an effective model for safety and quality controls.

f. Public Information, "Eco-Labels" and Other Warnings

The final market access measure is public information harmonization.⁹³ Public information harmonization is basically the implementation of a labeling requirement and has been adopted in some countries with respect to environmental

86. *See id.* at 285.

87. *See id.*

88. *See id.*

89. *See id.* *See also* ESTY, *supra* note 22, at 109-10.

90. *See* Esty & Geradin, *supra* note 6, at 286.

91. *See id.* Problems with failure to conduct after market testing in the area of medical devices illustrates many of the dangers with this approach. *See* Chapman, *supra* note 68, at 567, 572.

92. *See* Esty & Geradin, *supra* note 6, at 286.

93. *See id.* at 286.

standards as the eco-label.⁹⁴ The advantages to labeling requirements are that they increase consumer awareness, provide the consumer with additional information, and allow consumers to use the labels to discriminate between products, thus influencing the way in which certain products are developed.⁹⁵ The problem with labeling in the absence of other regulatory measures is that labeling does little or nothing to improve quality control unless consumers really use the labels to select which products to buy.⁹⁶ Additionally, if different countries adopted different labeling systems, even when employing the same criteria, the credibility and reliability of certain labels may be called into question.⁹⁷ Easy to enforce and administratively efficient as labeling may be, the value may not be worth the cost of the act since labeling does little or nothing to improve quality.

B. Competition Models of Harmonization—Improving Quality

1. Goals of the Competition Models

Certain harmonization models are designed to offset competitive inequities rather than increase market access. These models, like the market access models, sometimes fail to place safety considerations towards the top of their list of concerns.⁹⁸ The goal of harmonization approaches designed to deal with competitive inequities is typically to allow countries with higher standards, and usually higher production costs, to remain competitive in markets that are typically dominated by the cheapest products.⁹⁹ The underlying premise of harmonizing to address competitiveness concerns is that without standardization, competition may be distorted, all other things being equal.¹⁰⁰

94. See generally Esty & Geradin, *supra* note 6. See also Julie Cromer, *Recent Developments: Sanitary and Phytosanitary Measures: What They Could Mean for Health and Safety Regulations Under GATT*, 36 HARV. INT'L L. J. 557 (1995).

95. See Esty & Geradin, *supra* note 6, at 286.

96. See *id.*

97. Such was the case in the European Community (EC) controversy over adopting an EC wide labeling system that was opposed by countries like Germany that had well developed labeling systems that they felt would be compromised by the new continental standard. See *Commission Seeks Outside Consultant to Help Beleaguered Eco-Labeling Program*, 19 INT'L ENV'T REP (BNA) 536 (June 26, 1996).

98. See UNITED NATIONS, *supra* note 1, at 1.

99. See Esty & Geradin, *supra* note 6, at 269.

100. See *id.* at 271.

2. Models of Competitive Harmonization

a. Minimum Standards

Where attempts to increase market access can be implemented by using a model of maximum standards, the alternative for leveling the playing field with respect to competition concerns can be seen through the adoption of a minimum standards requirement.¹⁰¹ Instead of capping requirements, minimum standards set a regulatory floor below which no product may fall.¹⁰² Adopting minimum standards is advantageous for those countries that already institute higher regulatory standards.¹⁰³ From the consumer's point of view minimum standards are thus very effective for ensuring quality control.¹⁰⁴ Furthermore, setting the floor helps to reduce the possibility of competitive distortions, industrial relocation, and the race-toward-the-bottom phenomenon commonly associated with each.¹⁰⁵ The one major drawback to minimum standards is that it opposes attempts to increase market access and can result in drastically higher prices since a floor instead of a ceiling is being set. Thus quality may be ensured while price efficiency suffers.¹⁰⁶

b. Multitier Harmonization

A second means by which to eliminate competitive distortions is through the adoption of multitier standards or differentiated standards.¹⁰⁷ Multitier standards allow parties to a multilateral agreement to adopt different standards for economies of different strengths.¹⁰⁸ Under a multitier system, parties with the most resources or cheapest production costs would be held to more stringent standards than those countries with less resources or greater costs.¹⁰⁹ Differentiated standards represent

101. *See id.* at 287.

102. *See id.* This may be the most common harmonization model. *See also* Leebron, *supra* note 2, at 47.

103. *See* Esty & Geradin, *supra* note 6, at 287.

104. *See* GOODMAN, *supra* note 17, at § 3:4.1 (3d ed. 1996).

105. *See* Esty & Geradin, *supra* note 6, at 288.

106. *See id.* High standards not only cut out low standard competitors but also may nullify the effects of harmonization between high standard producers. This may occur because low standard producers cannot be shut down by harmonization agreements; their markets are simply limited. *See* Bhagwati & Srinivasan, *supra* note 19, at 188 (applying this dilemma to GATT article XX(b) & (g)).

107. *See* Esty & Geradin, *supra* note 6, at 289.

108. *See id.*

109. *See id.* Esty and Geradin explain that any number of factors can be taken into consideration and controlled for. For example, usage and design of roadways could be considered in the automotive arena. *See id.*

a more individuated approach. Unlike the multitier system which adopts a certain number of classes into which everyone must fit, the differentiated standards approach allows each country to tailor a common canon of standards to its particular needs.¹¹⁰

The multitier and differentiated methods are extremely flexible since they take into account various differences of consequence. However, unlike some of the flexible approaches that seem to have no teeth, these methods set a floor for acceptable standards and therefore are not accompanied as strongly by the threat of the race-to-the-bottom phenomenon.¹¹¹ Another advantage of the multitier and differentiated approaches is that, unlike many of the other competitive centric approaches, these models help improve market access for many groups.¹¹² Also these approaches facilitate common goal setting.¹¹³

The difficulties with the differential approaches are two-fold. First, these approaches encourage industrial drift, a phenomenon by which companies move to those countries in which production costs and quite often standards are the cheapest with which to comply.¹¹⁴ Second, the differential standards, while not likely to create a race-to-the-bottom scenario, do little to encourage development of better standards over time.¹¹⁵ This variation on the theme of race-to-the-bottom, known as "political drag" or "regulatory chill" may leave safety standards at an archaic standstill over an extended period of time.¹¹⁶

c. Converging Standards

Another vehicle for achieving harmonization and leveling the playing field is by converging standards.¹¹⁷ The convergence of standards approach is designed to essentially take the mean of the high and low standards and make that the new standard.¹¹⁸ Convergence harmonization is one of the most realistic approaches, since it sets standards in light of the existing market, rather than setting regulations in a vacuum and assuming that the market will adjust. Like the multitier approach,

110. *See id.* at 291.

111. *See id.* at 288.

112. *See id.* at 289.

113. *See id.* A similar approach is found in Germany. The German scheme requires products to meet tougher standards in order to preserve quality, yet imports are held to a lesser standard. *See discussion infra* at Part IV.B.3.a. *See also* James Levinsoh, *Competition Policy and International Trade*, 1 FAIR TRADE AND HARMONIZATION, *supra* note 2, at 332.

114. *See* Esty & Geradin, *supra* note 6, at 289.

115. *See id.* However, the authors argue that elimination of standard differentials is not static and may be altered over time. *See id.*

116. *See* ESTY, *supra* note 22, at 135.

117. *See* Esty & Geradin, *supra* note 6, at 289.

118. *See id.*

this model eliminates the possibility that a race-to-the-bottom will occur. Additionally, it is administratively efficient and highly flexible.¹¹⁹ However, the downside is that the same stagnation of improved safety standards that occurs in a multitier system may be present under a convergence scheme as well.¹²⁰

d. Goal Harmonization

Similar to convergence, goal harmonization takes the existing realities of the market into account. Goal harmonization, like essential requirements, does not delineate specific standards and regulatory measures.¹²¹ Instead, goal harmonization looks less at the specific means and only standardizes the ends.¹²² In a goal harmonization scheme, methods and strategies for achieving these goals are rarely, if ever, specified.¹²³ The underlying idea is that if the goals are the same, then essentially the standards will be the same.¹²⁴

Goal harmonization is particularly administratively efficient because, in addition to being extremely flexible, it requires little if any enforcement since there are no specified standards.¹²⁵ Additionally, in theory, goal harmonization encourages a high degree of creativity and autonomy.¹²⁶ By virtue of this fact, conceivably more efficient means for achieving better safety methods would become more readily available more quickly.¹²⁷ The downside is that since no actual standards are set, while administratively cheap, goal harmonization is extremely difficult to monitor and enforce.¹²⁸ How and when to assess which goals are being met and which are not seems to have no simple solution.¹²⁹ In this way, this model lacks the teeth of some of the more structured harmonization approaches.

119. *See id.*

120. *See id.* *See also* Klevorick, *supra* note 19, at 462.

121. *See* Esty & Geradin, *supra* note 6, at 291.

122. *See id.* Goal harmonization may address any number of ends, from labor rights to pollution control. The bottom line with goal harmonization is that it can be used to achieve any number of policy initiatives. *See* Leebron, *supra* note 2, at 44-46.

123. *See* Esty & Geradin, *supra* note 6, at 291.

124. *See id.*

125. *See id.*

126. *See id.* In particular, goal harmonization is not fraught with normative and value-laden restrictions on participating countries. *See* Klevorick, *supra* note 19, at 465.

127. *See* Esty & Geradin, *supra* note 6, at 291. *See also* Klevorick, *supra* note 19, at 465.

128. *See* Esty & Geradin, *supra* note 6, at 291.

129. *See id.* at 292.

e. Options Standardization

Similar to goal harmonization is the standardization of options. In the standardization of options approach, the parties develop a list of acceptable means by which harmonization goals can be met.¹³⁰ In this way, the options approach remedies some of the difficulties inherent in the goal harmonization approach. The advantages of this approach are that the parties are encouraged to engage in consensus building by defining not only what goals they hope to achieve, but also the acceptable means by which to achieve them.¹³¹ Also, analogous to goal harmonization, this approach allows some latitude and flexibility, experimentation, and, hopefully demonstrates what works best.¹³² However, the disadvantages to the approach are two-fold: first, it is not particularly efficient; and second, while easier to enforce than goal harmonization, it may not be as effective as some of the other approaches because noncompliance is difficult to determine.¹³³ So while options standardization is more structured, arguably parties to such an agreement could claim they were performing something analogous to one of the options when in reality they were completely failing to comply with the letter and spirit of the option.

f. Systems Harmonization

The final approach to harmonization that addresses competition concerns is systems harmonization.¹³⁴ In the systems harmonization approach certain protocols are adopted without requiring uniformity of all substantive requirements.¹³⁵ The systems approach is administratively efficient because the processes are harmonized instead of the results.¹³⁶ Additionally, it encourages change to be driven by need rather than by "public choice distortions" or "regulatory failure."¹³⁷ In other words, standards would be reflective of consumer choice rather than other administrative considerations.¹³⁸ This would hopefully prevent a race-to-the bottom from occurring. The disadvantage to such a system is that there may be too little substantive convergence. The protocols may be in place, but over time the nations

130. *See id.*

131. *See id.*

132. *See id.*

133. *See id.* at 291.

134. *See id.* at 293.

135. *See id.*

136. *See id.* See discussion *supra* at Part III.A.2.e, for the analogous market access model called "pre-standard harmonization."

137. *See* Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 597-599 (1996).

138. *See id.*

that were parties to the agreements may fail to achieve the goals for which these protocols were originally designed.¹³⁹

IV. THE CURRENT STATE OF AUTOMOTIVE HARMONIZATION EFFORTS

A. Social and Economic Impact of Automobile Manufacturing

The social and economic impact of the automotive industry as an increasingly global industry has led to the recent focus on harmonization to enable expansion of markets and free flow of goods.¹⁴⁰ The size of the industry has increased three-fold over the last quarter century.¹⁴¹ While the growth of the automotive industry has been slower in the last decade or so (only two percent growth per annum in the 1980s for production of passenger cars),¹⁴² new trends have made the industry more global in nature.¹⁴³ The growth of components manufacturing in many developing countries has changed the face of the industry.¹⁴⁴ This has been accompanied by a phenomenon known as vertical integration of markets in countries like Japan and Korea, in which Korea produces some of the component parts, the finished product is assembled in Japan, and ultimately the product is exported for sale in Korea.¹⁴⁵ A second developing trend is the expansion of foreign soil production, such that cars built for ultimate sale in a developing

139. See Esty & Geradin, *supra* note 6, at 293.

140. See generally Cavusgil, *supra* note 1.

141. See WATERS, *supra* note 11, at 4.

142. See *Report on Structural Changes in the Automobile and Components Industry During 1980s*, from U.N. Conference on Trade and Development; UNCTAD/ITP/46, in UNITED NATIONS, *supra* note 1, at 68.

143. See WATERS, *supra* note 11, at 70.

144. See *id.* at 68, 70. Examples of developing countries in the components market include Korea, India, Mexico, Brazil, and Yugoslavia. A component is an "integral element, segment, or ingredient of a piece of equipment, product, data-processing system, or other unit that is composed of multiple parts." WILBUR CROSS, PRENTICE HALL ENCYCLOPEDIA DICTIONARY OF BUSINESS TERMS 69 (1995). Component parts for automobiles are parts designed to be placed in a new car, but are not necessarily manufactured by the producer of the finished product. See MICHAEL J. SMITKA, COMPETITIVE TIES: SUBCONTRACTING IN THE JAPANESE AUTOMOTIVE INDUSTRY 13-14 (1991).

145. See WATERS, *supra* note 11, at 70. Vertical integration is a "business combination of firms engaged in different levels of production, for example, a manufacturer of finished goods that owns a distributorship." CAROL R. GIPSON, MCGRAW-HILL DICTIONARY OF INTERNATIONAL TRADE & FINANCE 405 (1994). Toyota, for instance, has a vertical integration arrangement with Nippon (a subsidiary of Toyota) that produces various parts for Toyota's finished products. See SMITKA, *supra* note 144, at 55.

country are often manufactured in that country by a foreign company.¹⁴⁶ Both of these trends have led to the development of replacement parts industries and increased reliance on local assembly in many developing countries.¹⁴⁷

A second substantial influence driving the call for harmonization is the sheer number of accidents that occur yearly. In 1993, in Europe alone, there were 100,000 motor vehicle fatalities.¹⁴⁸ In 1995, in the U.S., there were 43,900 deaths due to automobile accidents.¹⁴⁹ This figure accounts for sixteen percent of the deaths in the U.S. in 1995 and was the leading non-health related cause of death in that year.¹⁵⁰ In 1992 the figure in Japan was in excess of 10,000 fatalities.¹⁵¹ In economic terms, the total loss of revenue in America in 1997 due to car crashes was \$150.5

146. See WATERS, *supra* note 11, at 70. Foreign soil production is the idea that goods can be engineered in one place and manufactured in another. See SMITKA, *supra* note 144, at 212 n. 16. An example in the U.S. is the proliferation of "transplants" in which American labor is used to manufacture Japanese engineered vehicles here. When the items are placed on the market they are treated as domestic products. For an account of the transplants see C. FRED BERGSTEN & MARCUS NOLAND, RECONCILABLE DIFFERENCES 108 (1993). Transplants can be generally defined as Japanese plants in the U.S. These arrangements are usually joint ventures in which Japanese engineering and U.S. production methods and labor are used. See SMITKA, *supra* note 144, at 44, 258.

147. See WATERS, *supra* note 11, at 70. Replacement parts are parts that are manufactured with the sole purpose of replacing worn-out parts. These can be distinguished from original parts, manufactured for use in a new car, and reconditioned parts, which are cheaper substitutes for replacement parts. See KONOSUKE ODAKA et al., THE AUTOMOBILE INDUSTRY IN JAPAN: A STUDY OF ANCILLARY FIRM DEVELOPMENT 9 (1988).

148. See UNITED NATIONS, UNITED NATIONS ECONOMIC COMMISSION ON EUROPE STATISTICS OF ROAD TRAFFIC ACCIDENTS IN EUROPE, v. 28 (1993).

149. See THE WORLD ALMANAC AND BOOK OF FACTS: 1997, 967 (Robert Famighetti ed., 1996). However shocking this number might be, it is an improvement from 1990 when there were 44,531 vehicular fatalities. See SUMMARY OF AN NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION REPORT, *Economic Aspects of Road Safety Assessed in the United States of America*, in UNITED NATIONS, *supra* note 1, at 77.

150. See THE WORLD ALMANAC AND BOOK OF FACTS: 1997, *supra* note 149, at 967.

151. See UNITED NATIONS, *supra* note 1, at 85. Since 1995 these figures have essentially remained steady. In 1997 there were 6,764,000 automobile accidents in the U.S., and 37,280 of these accidents were fatal. The result was 41,967 fatalities and 2,167,000 injuries in the U.S. last year. See National Highway Traffic Safety Administration, Traffic Safety Facts: 1997 (visited Mar. 19, 1999) <www.nhtsa.dot.gov/people/ncsa/pdf/TSF97.pdf>. These numbers represent the leading cause of death among Americans under the age of 34. See Insurance Institute for Highway Safety Fatality Facts, General (visited Mar. 19, 1999) <www.hwysafety.org/facts/gen.htm>. Seventy-six percent of the deceased were passengers in passenger vehicles, as opposed to pedestrians, cyclists, or those riding in mass transit vehicles. See Insurance Institute for Highway Safety Fatality Facts, Passenger Vehicles (visited Mar. 19, 1999) <www.hwysafety.org/facts/passveh.htm>.

billion.¹⁵² Many administrative and intergovernmental agencies seek to improve car safety in order to lower these figures.¹⁵³

The harmonization solution has been solicited primarily to address three major problems that arise when this type of global good is present. First, harmonization efforts are thought to bring down the costs of technical research and accident analysis, since the application of almost any harmonization model calls for the sharing of technology and safety advances.¹⁵⁴ In the same vein, reciprocal agreements eliminate repetition of statutory inspections of vehicles prior to marketing.¹⁵⁵ The idea is that in a harmonized system the product need only be examined once, not at several points along the exporting chain, thus ultimately bringing down consumer prices.¹⁵⁶ Finally, different regulations result in different product specifications which could result in: (1) increased manufacturing costs and a greater complexity in line sequencing results where a producer has to essentially manufacture a different product for every country to which it exports;¹⁵⁷ or (2), a country finding it not economically feasible to export its product at all.¹⁵⁸

B. Regulatory Rulemaking Procedures in the Triad Region

1. United States

The U.S. regulatory system is two-tiered. Not only must cars comply with federal standards set by the Department of Transportation, but often they must also comply with regulations set by the state governments' parallel administrative agency.¹⁵⁹ For the purposes of this Note, the examination of the U.S. system is restricted to the federal design and safety provisions that are promulgated and administered by the National Highway Traffic Safety Administration (NHTSA).¹⁶⁰

NHTSA establishes safety regulations through a rulemaking procedure intended to meet the Federal Motor Vehicle Safety Standards (FMVSS) by

152. See NHTSA Traffic Safety Facts, *supra* note 151. This is down over \$20 billion from 1995, when loss was estimated at \$170.6 billion. See THE WORLD ALMANAC AND BOOK OF FACTS: 1997, *supra* note 149, at 968.

153. See UNITED NATIONS, *supra* note 1, at 2.

154. See *id.*

155. See *id.*

156. See Esty & Geradin, *supra* note 6, at 268.

157. See UNITED NATIONS, *supra* note 1, at 2.

158. See Esty & Geradin, *supra* note 6, at 268.

159. An example of these dual requirements is seen in California emissions regulations, which depart somewhat from national regulatory standards. See GOODMAN, *supra* note 17, at § 3:4 (3d ed. 1996).

160. See UNITED NATIONS, *supra* note 1, at 65.

realistically assessing implementation of new safety regulations, including lead times for establishing and cost-benefit analyses of adopting.¹⁶¹ Furthermore, the NHTSA is supposed to act as an objective intermediary between manufacturers' and consumers' interests.¹⁶² The NHTSA tends to promulgate regulations which are performance-oriented rather than design-specific.¹⁶³ In other words, the goal of NHTSA regulations is to achieve certain levels of quality while allowing manufacturing autonomy.¹⁶⁴ When applying harmonization models, the NHTSA model seems most closely related to goal harmonization, since it is results-oriented rather than directive.¹⁶⁵

Under NHTSA regulations, after a proposed rule is developed, it is submitted for public comment.¹⁶⁶ After the period for public comment the rule is either adopted or rejected.¹⁶⁷ If adopted, the provision becomes equally applicable to both imports and exports.¹⁶⁸

While the second half of NHTSA's responsibility is to administer the rules once promulgated, NHTSA tends to take a very passive role in the certification and testing process.¹⁶⁹ Safety certification is performed by the manufacturer and testing methods are completely discretionary.¹⁷⁰ NHTSA does conduct periodic compliance checks in order to ensure that manufacturers' claims regarding safety are accurate.¹⁷¹ If a product fails to meet the applicable standard the product may be subject to recall.¹⁷² Additionally, another safeguard applies to those defects not within the scope of FMVSS, such that the FMVSS acts as an illustrative rather than an exclusive regulatory scheme.¹⁷³ If an item is unsafe, the manufacturer is required by NHTSA to inform the consumer of the "safety-related defect" and fix the problem, regardless of whether the FMVSS is silent on the matter.¹⁷⁴ In order for NHTSA to determine exactly what is a safety defect, the agency tracks complaints, determines trends, and evaluates the effects of such defects.¹⁷⁵

161. *See id.* For a detailed description of the federal rulemaking process *see* GOODMAN, *supra* note 17, at § 3:1 (3d ed. 1996).

162. *See* UNITED NATIONS, *supra* note 1, at 65.

163. *See id.*

164. *See id.*

165. *See* Esty & Geradin, *supra* note 6, at 292.

166. *See* GOODMAN, *supra* note 17, at § 3:1 (3d ed. 1996).

167. *See id.*

168. *See* UNITED NATIONS, *supra* note 1, at 65.

169. *See* GOODMAN, *supra* note 17, at § 3:4 (3d ed. 1996).

170. *See* UNITED NATIONS, *supra* note 1, at 66.

171. *See id.*

172. *See id.*

173. *See id.*

174. *See id.*

175. *See id.*

2. Japan

The Japanese regulatory system is governed by the Ministry of Transport, which was granted its authority by the Road Vehicles Act.¹⁷⁶ The Ministry of Transport's goal is to adopt safety standards that improve "active safety."¹⁷⁷ The Ministry may amend the Road Vehicles Act, but before doing so, the Ministry refers all recommendations to the Council for Transport Technology, which reviews the recommendation and advises the Ministry as to what steps should be taken.¹⁷⁸ Then the Ministry consults with General Agreement on Tariffs and Trade (GATT)¹⁷⁹ to make sure that the proposed regulation is not an invalid trade restriction.¹⁸⁰ The Japanese regulatory scheme tends to be highly protectionist and bilateral agreements tend to conform with type approval principles.¹⁸¹

3. Europe

a. Germany

The German system is a dual system. Manufacturers generally may either elect to follow those UN Economic Commission for Europe Working Party 29 (UN/ECE WP.29) provisions adopted by the German government or the parallel

176. See *id.* at 58.

177. *Id.* Active safety is the attempt to design automobiles with accident prevention in mind. Active safety provisions tend to include analyses of vehicle behavior and handling, studies of equipment (particularly vehicle improvements in the areas of lighting to improve visibility), and attempts to prevent component failures (especially brakes and running gear). This contrasts with passive safety measures, which are designed to decrease damage in the event that an accident occurs. Passive safety measures tend to include studies of crashworthiness, occupant protection, body design, seat structure, airbags, and other safety features. See generally GOODMAN, *supra* note 17, at § 4:1 (3d ed. 1996). See also UNITED NATIONS, *supra* note 1, at 8-9.

178. See UNITED NATIONS, *supra* note 1, at 58.

179. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

180. See UNITED NATIONS, *supra* note 1, at 58.

181. If a product is to be produced by the same means as a previously approved prototype, the product is said to be type approved and need not be reviewed on a case by case basis. See *Japan's Increasing Interest in Steel Frame Housing*, 18 No. 11 E. ASIAN EXECUTIVE REP. 16 (1996). Type approval can be significantly important in areas such as automotive manufacturing where parts may be type approved for use in various cars. For an illustration of this general principle being used in a protectionist manner see Eleanor Roberts Lewis & David J. Weiler, *Will the Rubber Grip the Road? An Analysis of the U.S.-Japan Automotive Agreement*, 27 LAW & POL'Y INT'L BUS 631, 631 (1996).

federal standard.¹⁸² However, there are about ten UN/ECE WP.29 provisions that have been adopted as the exclusive regulations for safety provisions.¹⁸³ In these cases the manufacturer has no discretion as to electing a standard.¹⁸⁴ Similarly, if only a national provision is adopted, regardless of the existence of a UN/ECE WP.29 provision, the manufacturer must follow the national provision.¹⁸⁵ This is rarely a problem since Germany is one of the leading advocates of the UN/ECE WP.29 provisions. As of 1992, Germany had adopted sixty-four of the ninety provisions in existence.¹⁸⁶ The German system of regulation would most likely mesh with either a minimum or maximum standards approach to harmonization depending on whether the German standards are more or less restrictive than the UN/ECE WP.29 provisions.¹⁸⁷

b. The Russian Federation

The Russian Federation has also, in large part, adopted the UN/ECE WP.29 provisions. As of 1992, the Russian Federation had adopted fifty-one of the provisions and established testing facilities throughout the federation in accordance with UN/ECE WP.29 recommendations.¹⁸⁸ In addition, the Russian Federation has tried to open Russian import and export markets by adopting type approval and reciprocal recognition principles.¹⁸⁹ These trade liberalization principles were adopted in the late 1980s in an attempt to allow the Russian Federation to establish parts plants with both national and foreign ownership.¹⁹⁰

Type approval in the Russian Federation is based on the Russian Federation Law on Consumer Protection.¹⁹¹ Type approval is extremely similar to essential requirements provisions, because to meet the requirements established by the importing country, there may be several means by which the exporting country may

182. See UNITED NATIONS, *supra* note 1, at 58. The German approach parallels what has been labeled as multi-tier harmonization. See discussion *supra* at Part III.B.2.b.

183. See UNITED NATIONS, *supra* note 1, at 58.

184. See *id.*

185. See *id.*

186. See *id.*

187. See Esty & Geradin, *supra* note 6, at 295.

188. See UNITED NATIONS, *supra* note 1, at 62.

189. See *id.* at 62-63. Reciprocal recognition, or mutual recognition, is a form of quasi-harmonization in which the importing state will accept goods from any country that in turn accepts its goods. See Leebron, *supra* note 2, at 91. For a definition of type approval principles see discussion *supra* note 181.

190. See *id.* at 63.

191. See *id.*

meet the import requisites.¹⁹² In other words, several models are deemed as meeting the requirements, and if a given product meets one of these model types it is deemed as meeting all the safety requirements.¹⁹³ This is not to say that type approval is only applied to the finished product. For example, in the Russian Federation, type approval is applied to both the component parts and the motor vehicle in granting certification.¹⁹⁴

The goal in adopting type approval is two-fold. While it is seen as a means of quality control by the Russian Federation, that is really subsidiary. The idea is that type approval will give Russian Federation products the requisite safety credibility to become major exports, without acting as an impediment to exportation.¹⁹⁵ In conjunction with reciprocal recognition, the Russian Federation hopes to open export markets by opening import markets.¹⁹⁶

C. An Illustration of Multilateral Trade Agreements: Working Party 29

Multilateral trade agreements are those agreements in which there are three or more contracting parties, and each party is required to comply with the agreed upon parameters adopted by all parties involved.¹⁹⁷ Examples of multilateral agreements in the field of automotive manufacturing include member parties of the UN/ECE WP.29 and parties to GATT¹⁹⁸ adopting the ISO 9000¹⁹⁹ quality controls.²⁰⁰ Each agreement represents a sort of hybrid multilateral, since neither of these multilateral agreements are as binding in actuality as are their theoretical counterparts.²⁰¹

WP.29 was established by the UN in 1953, as a subsidiary of the European Commission on Economics (ECE) to address vehicle construction issues in Europe.²⁰² In 1958 the UN adopted the Agreement Concerning the Adoption of

192. See Esty & Geradin, *supra* note 6, at 285.

193. See UNITED NATIONS, *supra* note 1, at 63.

194. See *id.*

195. See *id.*

196. See *id.* Reciprocal recognition (or mutual recognition) is the trade concept that when another country recognizes a foreign product as meeting the requisite quality requirements for importation, the foreign company should act with reciprocity and do likewise. See ESTY, *supra* note 22, at 276.

197. See ESTY, *supra* note 22, at 288.

198. See GATT, *supra* note 179.

199. See LaPlante, *supra* note 68.

200. See UNITED NATIONS, *supra* note 1, at 63. See also Thompson & Thompson, *supra* note 69, at 156.

201. See ESTY, *supra* note 22, at 288.

202. See UNITED NATIONS, *supra* note 1, at 6.

Uniform Conditions of Approval and Reciprocal Recognition of Approval for Motor Vehicle Equipment and Parts, to establish a forum for technical consultations and the exchange of ideas, in order to institute standard regulations for vehicle construction and equipment.²⁰³ This agreement became the steering document for WP.29 and efforts to harmonize automotive construction on the continent.²⁰⁴ The freestanding agreements adopted in light of the 1958 Agreement are designed to run parallel to the original document.²⁰⁵ Since the incorporation of the 1958 Agreement, the goal of WP.29 is to keep the provisions promulgated in light of the Agreement current and to adopt new provisions when necessary.²⁰⁶

As of 1997, WP.29 claimed fifty-five member states in Europe, as well as the U.S., Canada, and a number of non-European states unilaterally apply selected UN/ECE WP.29 provisions.²⁰⁷ Ninety-one vehicle construction regulations have been adopted by WP.29 with a focus on the contribution of cars' physical attributes to accidents and injury.²⁰⁸ Through a system of type approval, the mission of WP.29 is to develop more economically efficient cars, without neglecting safety and quality control concerns.²⁰⁹ Ultimately, WP.29 wants to achieve performance standards in the areas of environmental and safety considerations that are both economically viable and have a high degree of uniformity.²¹⁰ WP.29 has chosen, via type approval, to establish standard testing provisions and to allow a certain degree of flexibility for individualized considerations.²¹¹

WP.29, along with the European Community (EC), has embraced harmonization in order to achieve economic integration in the region.²¹² The ECE has touted harmonization as effective in encouraging the sharing of the results and costs of research and development, as well as effecting other types of cost spreading for manufacturers.²¹³ In addition, harmonization has been viewed as a way of ensuring that legislative provisions are need-based rather than protectionist.²¹⁴

203. *See id.*

204. *See id.* at 7.

205. *See* GOODMAN, *supra* note 17, at § 3:4 (3d ed. 1996).

206. *See* UNITED NATIONS, *supra* note 1, at 4.

207. *See id.* at 2, 7. *See also* GOODMAN, *supra* note 17, at § 3:4.1 (3d ed. 1996). Other states recognizing ECE provisions include Australia and South Africa. *See id.*

208. *See* UNITED NATIONS, *supra* note 1, at 7.

209. *See* UNITED NATIONS, *supra* note 1, at 1.

210. *See* Eric Dunn, *Possible Role of Working Party as a Platform for Worldwide Harmonization of Technical Requirements in the Construction of Wheeled Vehicles*, reprinted in UNITED NATIONS, *supra* note 1, at 5.

211. *See id.*

212. *See generally* UNITED NATIONS, *supra* note 1.

213. *See id.*

214. *See* Dunn, *supra* note 210, at 5.

The goals of WP.29 seem lofty when the structure of the system is taken into consideration. WP.29 is composed of twenty-three member states. In order to adopt a new regulation, the proposal must be reviewed by the Working Party, which is composed of representative members of the ECE, including UN members throughout Europe, the U.S., and Canada.²¹⁵ Other parties are also allowed to participate in the discussion and debate, including those states authorized under UN/ECE Articles Eight and Eleven to participate in UN/ECE discussions and Non-Governmental Organizations accredited by the UN Economic and Social Council.²¹⁶

All that is required to adopt a new WP.29 provision is that two or more countries accede to the provision.²¹⁷ The only parties bound by the regulation are those acceding.²¹⁸ Any party may denounce an accession, and within one year the denouncing party is no longer bound by its original accession.²¹⁹ Additionally, parties not in WP.29 may independently and unilaterally agree to comply with any of the provisions in a trade agreement with any of the WP.29 members.²²⁰ Amending existing provisions is a bit more difficult, since an amendment requires unanimous approval.²²¹ However, since it is easy to denounce an undesirable provision, failure of an amendment is not really critical.²²² Thus, while the work of WP.29 is multilateral in scope, it is a sort of hybrid multilateral agreement because contracting parties may pick and choose which provisions they find most attractive or necessary and totally disregard the others.²²³ This neither encourages developing parallel safety standards nor free trade in the absence of pre-existing shared social goals and economic abilities.²²⁴

D. Bilateral Agreements: The Framework,²²⁵ the U.S., and Japan

A bilateral agreement is an agreement entered into by two parties.²²⁶ The illustrative example of a bilateral agreement in the field of automotive trade is the recent Joint Statement on the U.S.-Japan Framework for a New Economic

215. See UNITED NATIONS, *supra* note 1, at 3.

216. See *id.*

217. See *id.*

218. See *id.*

219. See *id.*

220. See *id.*

221. See *id.*

222. See *id.*

223. See Esty & Geradin, *supra* note 6, at 285.

224. See Cavusgil, *supra* note 1, at 90.

225. See Joint Statement of the U.S.-Japan Framework for Economic Partnership [hereinafter Framework], signed July 13, 1993, reprinted in 32 I.L.M. 1414.

226. See Esty & Geradin, *supra* note 6 at 265.

Partnership (Framework Agreement).²²⁷ The Framework Agreement was a particularly useful tool for the U.S. and Japan to employ because the two countries were similarly situated with respect to resources to meet the regulatory requirements and production capabilities and there were none of the accompanying regional difficulties that EC countries would encounter should they elect to enter into bilateral agreements with EC or non-EC countries.²²⁸

The Framework began as a series of talks started in 1993 in response to the extreme trade imbalance between the U.S. and Japan.²²⁹ As of 1993, the U.S. had a sixty billion dollar trade deficit with Japan, sixty percent of which was the result of Japanese automotive imports in the U.S. (or lack of American ability to export automobiles in Japan).²³⁰ Primarily, the U.S. automotive industry and government believed, the marked discrepancy was the result of extensive trade barriers set by the Japanese government disallowing the importation of American vehicles. A further impediment, in the absence of concrete trade barriers, was a cultural phenomenon: many Japanese dealerships refused to sell American-made vehicles because the foreign dealers felt they should not be selling American cars.²³¹

The American automotive industry made several attempts to circumvent the Japanese trade barriers and open the market to U.S. imports. Regularly the Japanese government had justified trade barriers as restrictions placed on U.S. manufacturers since American cars were not designed for use in Japan.²³² By the early 1990s, the "Big Three" American manufacturers (GM, Chrysler, and Ford) had attempted to remedy this complaint by drastically improving quality control in many of their vehicles, in order to make the American cars competitive in the Japanese market.²³³ For the first time, in some cases, American manufacturers were making right-side

227. See Lewis & Weiler, *supra* note 181, at 631. See also Framework, *supra* note 225.

228. See Esty & Geradin, *supra* note 6, at 265.

229. For a brief historical overview of the U.S.-Japan Roundtable Agreements see Lewis & Weiler, *supra* note 181, at 631. See also Kristin Leigh Case, *An Overview of Fifteen Years of United States-Japanese Economic Relations*, 16 ARIZ. J. OF INT'L & COMP. L. 11 (1999). See generally Framework, *supra* note 225.

230. See BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 1995, 818 (TABLES 1340-1341) (1995). When the 1993 estimates included automobiles and automotive parts, the trade imbalance jumped to 72% and equaled \$43.3 billion. See INT'L TRADE COMM'N., 1993 THE YEAR IN TRADE: OPERATION OF THE TRADE AGREEMENTS PROGRAM 45TH REPORT 94 (1994).

231. See Lewis & Weiler, *supra* note 181, at 633-36, 655. See also Case, *supra* note 229, at 11; David Broiles, *When Myths Collide: An Analysis of Conflicting U.S.-Japanese Views on Economics, Law, and Values*, 1 TEX. WESLEYAN L. REV. 109 (1994); Gary Saxonhouse, *A Short Summary of the Long History of Unfair Trade Allegations Against Japan*, in 1 FAIR TRADE AND HARMONIZATION, *supra* note 2, at 471.

232. See Lewis & Weiler, *supra* note 181, at 631.

233. See *id.* at 646.

drive columns and other features distinct from American consumer needs available to the Japanese public.²³⁴ Furthermore, studies such as the Market Oriented Sector Specific Talks on Transportation and Machinery (MOSS) of 1993²³⁵ and other consumer surveys showed that Japanese owners of American vehicles neither complained of safety nor drivability concerns and overall were quite satisfied with American vehicles.²³⁶ The result was that the American automotive industry had agreed to a tacit form of “type approval” harmonization, but the acceptable “type” was perpetually changing, such that American manufacturers could not keep up, and the provisions were looking suspiciously protectionist in nature.²³⁷

American labor unions responded somewhat differently to the trade imbalance, seeing the problem more from the perspective of lost American jobs, wages, and productivity.²³⁸ In negotiations with the Japanese automotive industry American labor unions successfully brought Japanese “transplants” to the U.S.²³⁹ These “transplants” assembled Japanese designed cars on American soil, using U.S. labor and often American raw materials.²⁴⁰ However, this did little to improve access to Japanese markets since no parallel arrangement allowed American manufacturers to establish “transplants” in Japan.²⁴¹ This foreign soil production method, while good for employment in the U.S. was seen as a further expansion of the Japanese market share.²⁴²

The basic objectives of the Framework were written down in 1993 to facilitate free trade in the automotive arena between the U.S. and Japan. While the

234. *See id.*

235. *See id.* at 645.

236. *See Lewis & Weiler, supra* note 181, at 645.

237. *See id.* at 646.

238. *See id.* at 636.

239. *See generally* BERGSTEN & NOLAND, *supra* note 146 at 108; DONALD H. DALTON & PHYLLIS A. GENTHER, JAPANESE DIRECT INVESTMENT IN U.S. MANUFACTURING 19-20 (U.S. Dept. Of Commerce, 1991); U.S. INT’L TRADE COMMISSION REPORT, U.S. GLOBAL COMPETITIVENESS: THE U.S. AUTOMOTIVE TRADE, REPORT TO THE COMMITTEE ON FINANCE, U.S. Senate Investigation No. 332-232 at 6-2 to 6-7 (1987). *See also* Lewis & Weiler, *supra* note 181, at 636.

240. *See Lewis & Weiler, supra* note 181, at 637.

241. *See id.*

242. *See* WATERS, *supra* note 11, at 70 for a description of foreign soil production.

While the long-term impact of the Framework is yet to be seen, since its implementation, U.S. and Japanese import and export figures have changed somewhat. As of 1990, U.S. passenger vehicle imports represented 9.2% of the aggregate U.S. imports. Additionally, 7.2% of all U.S. imports were automotive parts. These numbers have fallen to 8.4% and 6.2%, respectively. *See Volume I, supra* note 1, at 1076. However, the Japanese figures have remained relatively constant. 2.7% of the nation’s imports were passenger vehicles in 1990, as opposed to 2.9% in 1996. Vehicle parts imports represent 1.5% of the nation’s imports in 1996, just as they did in 1990. *See Volume I, supra* note 1, at 542.

goal of the agreement was freer trade, both parties were realistic about the impossibility of complete liberalization based on their previous trade history. Thus, both parties identified areas that would constitute unacceptable limitations on free trade.²⁴³ The goals and objectives section of the agreement delineates these general principles as four-fold: (1) to create a "two-way dialogue" with the U.S. "actively pursu[ing] medium-term objectives of . . . strengthening its international competitiveness,"²⁴⁴ (2) to increase cooperation,²⁴⁵ (3) to extend Most Favored Nation trade status to each another,²⁴⁶ and (4) to limit the "scope and responsibility" of government regulation to selected fields.²⁴⁷ The Sectoral and Structural Consultations and Negotiations section of the agreement effectively achieves the fourth goal by designating five "baskets" of cooperative concern for the two countries, including one with the goal of economic harmonization for the U.S. and Japanese automotive industries.²⁴⁸

E. The Environmental Analog: General Agreement on Tariffs and Trade [GATT]²⁴⁹ and Article XX²⁵⁰

An illustration of the concern with the possibility of depressed automotive safety standards can be seen in the analog with GATT and Article XX. The purpose of GATT is to increase trade by eliminating discriminatory treatment.²⁵¹ However, GATT has various working exceptions that suspend the goals of trade liberalization, such as in the case of ecological concerns and health and safety factors, as does Article XX.²⁵²

Article XX was designed to create exceptions to GATT for the purposes of natural resource conservation as that conservation relates to either national security or to the protection of the health and safety of any human, animal, or plant.²⁵³ This

243. See Lewis & Weiler, *supra* note 181, at 650.

244. See Framework, *supra* note 225, at 1415-1416.

245. See *id.* at 1415.

246. See *id.* at 1416.

247. See *id.*

248. See *id.* at 1417-19. The final agreement was ultimately signed on June 28, 1995. See *Japan-U.S. Automotive Agreement and Supporting Documents*, Aug. 23, 1995, 34 I.L.M. 1482 (1995). The final agreement attempted to set specific time frames for reaching goals and to shift focus from removal of trade barriers to results. See Case, *supra* note 229, at 11-12.

249. See generally GATT, *supra* note 179.

250. See *id.* at art. XX(b).

251. See *id.*

252. See Cromer, *supra* note 94, at 557. For the exact provision see GATT, *supra* note 179, at art. XX(b).

253. See Cromer, *supra* note 94, at 563.

extremely broad and vague exception to GATT was somewhat limited by the Uruguay Round Agreements,²⁵⁴ which passed the Sanitary and Phytosanitary Measures that delineate a more technical level of requirements than general "health and safety."²⁵⁵ The Uruguay Round Agreements were a response to the concerns of many nations that without the limiting instructions on application of Article XX, the Article would become a blanket protectionist excuse for trade barriers.²⁵⁶ Part of the problem arose from the great disparity of resources available to First and Third World countries in food and drug production and consumer expectation.²⁵⁷ However, the result has simply been an extreme swing in the other direction, away from environmental management and towards trade liberalization.²⁵⁸ Because the regulation must be necessary in order to invoke Article XX²⁵⁹ and not just be an elective measure designed in the best interests of the citizenry within a particular country, "some regulations that were written in the best interests of the public health could suddenly be called into question as potential trade barriers."²⁶⁰

Likewise, this same danger exists in the automotive arena with respect to multilateral scope agreements in which access is the focus. Often multilateral agreements contain directives which generally speak to safety concerns; but in a situation like the Sanitary Measures under GATT, specific restrictions that fit the specific context of a country's particular needs may be violative regardless of a compelling state interest such as safety.²⁶¹ When a multilateral agreement either adopts functional equivalency or alternative levels of stringency based on available resources and then restricts the ability to keep out products not conforming to safety standards in a country with more rigorous safety standards, the result is a decrease

254. See General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, reprinted in 33 I.L.M. 1125 [hereinafter GATT Sanitary Code].

255. See *id.*

256. See Cromer, *supra* note 94, at 557.

257. See John H. Jackson, Note, *World Trade Rules and Environmental Policies: Congruence and Conflict*, 49 WASH & LEE L. REV. 1227, 1241 (1992). One theorist suggests this problem could be solved by a process of cost spreading in which wealthier states could subsidize poorer states to off-set the costs of compliance. See Bhagwati & Srinivasan, *supra* note 19, at 198-99.

258. Article XX of GATT has never been effectively applied to protect health and safety of a citizenry in a trade barrier designed to do so. See Steve Charnovitz, *The Environment versus Trade Rules: Defogging the Debate*, 23 ENVTL. L. 475, 494 (1993).

259. See GATT Sanitary Code, *supra* note 254, at para. 10.

260. See Cromer, *supra* note 94, at 570. Cromer points to the Food, Drug, and Cosmetics Act as potentially failing GATT in her analysis. See *id.*

261. This has particularly been a problem in the EC with respect the lighting restrictions for WP.29. See GOODMAN, *supra* note 17, at § 3:4.1 (3d ed. 1996).

in the number of safe cars on the road.²⁶² This is particularly true where the more dangerous car is cheaper, since its production cost was lower. This will either hurt domestic manufacturers in these higher standard regions or cause domestic manufacturers to urge a relaxing of domestic standards in order to enable a higher degree of competition.²⁶³ As one author put it, "because developing nations often have profoundly different circumstances with regard to the quality and technological advancement of motor vehicles and highways, the prevailing economic and environmental conditions and the administrative capacity of the state to enforce motor vehicle regulations . . ." (when a proposed attempt at harmonization does not allow for flexible application of these standards) can have disastrous effects.²⁶⁴ In other words, an "averaging" effect on automotive safety is not desirable to many consumer interest groups in the U.S.²⁶⁵

The Framework situation sets up the analogy to the fears of the Uruguay Round drafters imagined scenario of an unrestrained application of Article XX. With respect to the Framework Agreement, market access as a goal in automotive harmonization, has produced less than optimal results for the U.S.²⁶⁶ In the American attempt to break into the Japanese market, the results have been less than stunning. The U.S. has been required to bring in the World Trade Organization in an attempt to invoke sanctions since the U.S. has repeatedly complained of inadequate enforcement on the part of the Japanese government.²⁶⁷ Furthermore, while the terms of the Framework Agreement tend to be extremely flexible, this has left the U.S. a step behind, perpetually missing Japanese requirements in the area of quality control that act as a gate to keep out American products.²⁶⁸ This bilateral agreement, with overly broad terms and no supra-national enforcement authority has seemed to do nothing more than pay lip service to American markets for cars in Japan. Since no numbers of units were set as goals in the initiative, the Framework seems to be doing very little work.²⁶⁹

262. This is a parallel to the race-to-the-bottom model used by Esty and Geradin in their article on environmental standards, *see* Esty & Geradin, *supra* note 6, at 285. In the article the authors point to the example of the inability to control the importation of tuna that was not harvested using dolphin-safe netting since this is seen as protectionist rather than aimed at preserving a common good. *See id.*

263. *See* GOODMAN, *supra* note 17, at § 3:4.1 (3d ed. 1996).

264. *Id.*

265. *See id.*

266. *See* Lewis & Weiler, *supra* note 181, at 650, 655.

267. *See id.*

268. *See id.* at 650.

269. *See id.* The GATT's multilateral form may be more efficient, amongst other things, in that it reduces transaction costs by creating predictability in product requirements. *See* Leebron, *supra* note 2, at 53. This same security may be absent in a bilateral agreement since the number of players requiring compliance is substantially lower. This can be seen by looking at the difficulties in enforcing the Framework embodied by different interpretations

V. CONCLUSION

While an extremely pessimistic view of international harmonization of automotive safety directives has been presented in this Note, it is not necessary to say that all is lost in trade liberalization in the automotive industry. However, it seems that the U.S. should learn from its mistakes and exercise caution in future attempts. Particularly, there is a real tension between increasing trade markets and preserving high levels of safety regulation.

In particular, while specificity in harmonization agreements is seen as an impediment to free trade since it lacks flexibility to deal with future events, on some level a degree of rigidity is desirable. Rigidity gives some teeth to any agreement. It also ensures that, at least on matters of particular importance, vehicles will meet construction standards designed to protect consumers on the road. Increased access, while a desirable goal, comes at some cost. Therefore, it seems worth the time and effort to make sufficiently explicit agreements regarding safety even if they come at an additional cost.

As can be seen from the current examples of major bilateral agreements, particularly the Framework Agreement, these instruments tend to illustrate power struggles between the parties involved in negotiating trade terms most favorable to one party or the other and focus very little on the actual consumer safety and usage concerns. On the other hand the multilateral example of WP29 has shown that sometimes adding too many variables makes the project unmanageable from the standpoint of constant revision and difficulty with compliance. For nations like the U.S. and Japan where safety standards are usually quite high, harmonization may have more to do with protectionism than improving safety quality. However, even when safety harmonization is approached as a real concern and not just a shield to imports, when dealing with countries with lower safety standards an averaging effect is likely to occur.²⁷⁰ This averaging will compromise safety in the form of cheaper imports or lower standards for domestic products, unless an approach that emphasizes sharing research and development is seriously contemplated.

of the factual scenario by each nation. See Daniel J. Gifford & Mitsuo Matsushita, *Antitrust or Competition Laws Viewed in a Trading Context: Harmony or Dissonance*, in 2 FAIR TRADE AND HARMONIZATION 277 (Bhagwati & Hudec eds., 1996).

270. See GOODMAN, *supra* note 17, at § 3:4 (Supp. 1997). Some critics suspect harmonization with lower safety standards is an attempt by producers at institutionalizing the cheaper and lower standard. Goodman uses the example of American manufacturers embracing EU standards. See *id.*

