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Philip M. Nichols
University of Pennsylvania

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PARTICIPATION OF NONGOVERNMENTAL PARTIES IN THE WORLD TRADE ORGANIZATION

EXTENSION OF STANDING IN WORLD TRADE ORGANIZATION DISPUTES TO NONGOVERNMENT PARTIES

PHILIP M. NICHOLS*

1. INTRODUCTION

Slightly more than one year ago, the General Agreement on Tariffs and Trade¹ went through a striking metamorphosis as it was folded into the World Trade Organization.² Whether the ugly duckling³ that was the GATT has grown into a swan cannot

* Ronald Koenig Term Assistant Professor of Legal Studies, The Wharton School of the University of Pennsylvania. A.B., Harvard University; J.D., LL.M. (foreign and international law), Duke University.

¹ See The Protocol of Provisional Application of the General Agreement on Tariffs & Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT 1947]. This essay will follow the general usage and refer to the document as the "General Agreement" and the quasi-institution that evolved to administer the document as the "GATT."

² See *The WTO Enters into Force*, FOCUS: GATT NEWSLETTER (GATT Info. & Media Relations Div., Geneva), Dec. 1994, at 1; David E. Sanger, *U.S. Threatens \$2.8 Billion of Tariffs on China Exports*, N.Y. TIMES, Jan. 1, 1995, at 14. The GATT, as an institution, ceased to exist on Dec. 31, 1995. See Frances Williams, *GATT's Spirit Lives on As Talk Marks Its Final Hour*, FIN. TIMES, Dec. 13, 1995, at 5.

³ The General Agreement was awkward because it was neither a treaty nor an institution but, out of necessity, developed attributes of both. "As an institution, the General Agreement on Tariffs and Trade (GATT) is a complex and untidy thing. There is not even a consensus as to what it should be called." Gardner Patterson & Eliza Patterson, *The Road from GATT to WTO*, 3 MINN. J. GLOBAL TRADE 35, 35 (1994) (footnote omitted). See *infra* note 40

yet be stated with any certainty. What is certain, however, is that the creation of the World Trade Organization represents a serious change in the regulatory environment of international trade — a change that, in turn, could affect the global economy on an enormous scale.

Much of the World Trade Organization's potential effect is quantifiable in dollars. Accompanying the creation of the World Trade Organization are decreases in tariff and nontariff barriers that should increase the value of the world economy by between 212 billion and 500 billion dollars.⁴ The import of these international regulatory changes is not, however, entirely numerical. While agreements attached to the World Trade Organization's charter do provide for reductions in tariffs,⁵ the charter itself also creates powerful new means of creating trade policies⁶ and resolving disputes that arise under those policies.⁷ International trade policy will no longer be created in separate, cumbersome rounds of multilateral negotiations; instead, the World Trade Organization will be a permanent forum in which trade policy

(discussing the history of the GATT).

⁴ See INTERNATIONAL MONETARY FUND, *WORLD ECONOMIC OUTLOOK MAY 1994*, at 83, 86-87 (1994) (discussing estimates of the Uruguay Round's effects on global income).

⁵ See GATT Secretariat, *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, Apr. 15, 1994, *reprinted in* 33 I.L.M. 1125, 1165 (1994) (establishing schedules for tariff reduction) [hereinafter *Final Act*]; see also Alan Riding, *109 Nations Sign Trade Agreement: 7 Years of Struggle to Reduce Tariffs*, N.Y. TIMES, Apr. 16, 1994, at 35, 48 (stating that the Uruguay Round Agreements would reduce industrial and agricultural tariffs by an average of forty percent).

⁶ Two legislative bodies associated with the World Trade Organization — the Ministerial Conference and the General Council — will formulate trade policy. Under the overall guidance of the General Council, the World Trade Organization Agreement establishes a Council for Trade in Goods, a Council for Trade in Services, and a Council for Trade-Related Aspects of Intellectual Property Rights. These Councils will: carry out functions assigned by the General Council; establish their respective rules of procedure; be open to representatives of all Members; meet as necessary to carry out their functions; and establish subsidiary bodies as required. See *Agreement Establishing the World Trade Organization, Final Act*, *supra* note 5, art. IV, 33 I.L.M. at 1145-46 [hereinafter *Charter*].

⁷ The process for resolving trade disputes under a World Trade Organization covered agreement is set forth in the Understanding on Rules and Procedures Governing the Settlement of Disputes, *Final Act, supra* note 5, 33 I.L.M. at 1226 [hereinafter *Understanding*].

can be promulgated and fine-tuned.⁸ Furthermore, the decisions of trade dispute panels are no longer subject to veto by the losing country; instead, the decisions of these panels will automatically be adopted by the World Trade Organization.⁹

The import of these changes has not escaped the attention of policymakers or scholars. In a recent article,¹⁰ for example, this author argues that the power of the World Trade Organization to force national law into conformity with its trade norms is a power that must be exercised with restraint.¹¹ In particular, laws that primarily reflect important underlying societal values and only incidentally impede trade should not be subjected to scrutiny by the World Trade Organization.

The trade agreements annexed to the World Trade Organization charter act as a template against which national laws are measured. A complaint may be lodged against one member by another if the former's legal regime does not comply with the template and the violation nullifies or impairs a benefit that is supposed to accrue to the complaining member.¹² If the complaining member and the violating member cannot agree upon a solution, then the complaint will be submitted to a dispute resolution panel, which will operate in a quasi-judicial fashion.¹³ If the dispute resolution panel does in fact find a violation, it will "recommend that the Member concerned bring the [violative] measure into conformity with" the trade agreements.¹⁴ A panel

⁸ See Charter, *supra* note 6, art. II(1), 33 I.L.M. at 1144 ("The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.").

⁹ See Understanding, *supra* note 7, arts. 16(4), 21, 33 I.L.M. at 1235, 1238.

¹⁰ See Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658 (1996).

¹¹ See *id.* at 700, 719.

¹² See Understanding, *supra* note 7, arts. 3, 23, 33 I.L.M. at 1227-28, 1241-42. In many cases, the nullification or impairment of a benefit is itself a violation of the trade agreements. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 94 (1989).

¹³ See Understanding, *supra* note 7, arts. 6-12, 33 I.L.M. at 1230-34.

¹⁴ *Id.* art. 19(1), 33 I.L.M. at 1237 (footnote omitted). The first finding by a panel convened by the World Trade Organization has made such a recommendation. The complaint, brought by Venezuela and Brazil, involved U.S. standards for reformulated gasoline. Such gasoline was required to be 15% cleaner by 1995 than that sold in 1990. Each U.S. producer was allowed to measure the improvement against the quality of the reformulated gasoline that

decision, however, may not “add to or diminish the rights and obligations provided in the covered agreements.”¹⁵ The panel’s decision is then voted on by the Dispute Settlement Body, or, if the losing party so desires, the decision may be appealed to an Appellate Body and then voted upon by the Dispute Settlement Body.¹⁶

Procedure aside, what is pertinent is the dispute resolution process’s mandate. In its legislative form, the World Trade Organization has latitude to deal with the myriad ways in which the promotion of global free trade intersects with other global issues. In its quasi-judicial form, however, its mandate is limited

it actually produced in 1990, whereas foreign producers were held to a single, and in most cases higher, standard. In keeping with a questionable (and in practice almost always circumvented) rule that findings not be released until final, the finding of the dispute resolution panel has not yet been made public. Those who have read it, however, report that the panel opined that the United States is free to do whatever it wishes with its environmental policy so long as it does not discriminate against foreign producers and does not shelter domestic producers.

While news of the panel’s decision resulted in predictable election year rhetoric, the finding itself is a nonevent. The differing standards are facially discriminatory — the office of the United States Trade Representative itself warned Congress several years ago of this fact. Additionally, Congress seems to have been motivated in this instance not by environmental impulses, but instead by a desire to protect U.S. producers. To illustrate, Congress, at the insistence of domestic producers, ordered the Environmental Protection Agency to stop work that the agency had begun on a unitary standard. Moreover, the statute ceases to extend preferential treatment to U.S. producers by 1998, which is about the same time that the dispute resolution process will render a final ruling. Thus, before the process ultimately concludes, the issue could well be moot. Venezuela, in fact, has indicated that even though the ruling was in its favor, it has no plans to increase production of reformulated gasoline.

Finally, although this particular decision found a U.S. law to be violative, it sets a precedent that generally will benefit U.S. producers. Similarly, environmental advocates have argued that congressional protection of the domestic oil industry generally hinders environmental causes. See *U.S. Charges WTO Panel On Gasoline From Venezuela Exceeded Legal Mandate*, Int’l Trade Rep. (BNA), at 9 (Feb. 28, 1996); Bhushan Bahree, *WTO Panel Rules Against U.S. In Dispute Over Gasoline Norms*, WALL ST. J., Jan. 18, 1996, at A11; Paul Blustein, *WTO Ruling Draws Fierce Criticism*, WASH. POST, Jan. 19, 1996, at F3; Gerald Karey, *Regulation and the Environment*, PLATT’S OILGRAM NEWS, Feb. 5, 1996, at 3; Jane Knight, *Despite Win, PDVSA Sits Tight On RFG*, PLATT’S OILGRAM NEWS, Jan. 17, 1996, at 4; David E. Sanger, *World Trade Group Orders U.S. to Alter Clean Air Act*, N.Y. TIMES, Jan. 18, 1996, at D1; Frances Williams, *US May Appeal Against WTO Ruling*, FIN. TIMES, Feb. 19, 1996, at 4; . . . *And the WTO Flaplet*, WASH. POST, Jan. 24, 1996, at A18.

¹⁵ Understanding, *supra* note 7, art. 19(2), 33 I.L.M. at 1237.

¹⁶ See Nichols, *supra* note 10, at 700.

to review of national laws and legal regimes.¹⁷

Although limited, this mandate is far from trivial. Just as is true of multinational legal regimes (and just as is true of local legal regimes), national legal regimes often reflect underlying societal values.¹⁸ Laws that do not comport with such underlying societal values are generally perceived not to be legitimate and tend to be either short-lived or disregarded.¹⁹ Every country maintains a set of these societal values, of which free trade is only one.²⁰ Countries continually engage in evaluative or balancing processes when coordinating these societal values, and the value of free trade is not always preminent.²¹ By contrast, the GATT consistently²² preferred free trade to expressions of other values.²³ Under the GATT's more mediative dispute resolution process, in which panel decisions were subject to the review of all of the parties to the GATT, this institutional bias to some extent could be ameliorated.²⁴

¹⁷ The World Trade Organization could, of course, reach multinational agreements by reviewing a nation's implementing legislation of a particular treaty. It is interesting to note that while scholarly commentators argued that environmental treaties such as the Convention on International Trade in Endangered Species or the Montreal Protocol did in fact violate the General Agreement, *see, e.g., Janet McDonald, Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order*, 23 ENVTL. L. 397, 450-59 (1993), the question never came before a GATT panel. This reflects either great prudence or great fortune on the part of the GATT.

¹⁸ *See Nichols, supra* note 10, at 670.

¹⁹ *See id.* at 671-72. As Oliver Wendell Holmes noted, "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong." OLIVER W. HOLMES, JR., *THE COMMON LAW* 41 (1881).

²⁰ *See Nichols, supra* note 10, at 702-05.

²¹ Various countries restrain trade not for economic reasons but because the prohibited or restrained item violates some belief or value of the prohibiting country. Examples include France's restriction of U.S. movies, Saudi Arabia's restriction of pornography, or the U.S. restriction of narcotics. *See, e.g., id.* at 703-04.

²² But this practice was not without exception. For example, the General Agreement itself contained a list of exceptions in Article 20, which included legislation or action which was necessary to protect public morals or human, plant, or animal life, which related to prison labor, or which was imposed to protect national treasures. *See GATT 1947, supra* note 1, art. XX, 61 Stat. at A61, 55 U.N.T.S. at 262.

²³ *See Nichols, supra* note 10, at 700-02.

²⁴ In the entire history of the GATT, it was necessary only one time for the parties to authorize a complaining country to undertake compensatory

The rigidity of the dispute resolution process in the World Trade Organization, however, presents a special danger. To the extent that the World Trade Organization forces countries to reform their laws so as to exalt the value of free trade over other values, the empirical legitimacy of national laws could be eroded.²⁵ Countries asked to choose between obedience to the World Trade Organization and having empirically legitimate laws may choose to ignore the World Trade Organization.²⁶

The compliance of member countries is critical to the efficacy of the World Trade Organization. Unlike the International Labour Organization, for example, which extends membership to unions and special interest groups,²⁷ or INTELSAT, which is composed of quasi-commercial agencies,²⁸ the World Trade Organization membership is comprised solely of countries.²⁹ In the absence of any coercive power with which to enforce its rules, the World Trade Organization ultimately depends upon the voluntary compliance of its members.³⁰

Thus it is critical to the survival of the free trade regime that

measures for the violative acts of another party. See *Netherlands, Measures of Suspension of Obligations to the United States*, Nov. 8, 1952, GATT BISD 1st Supp. 32 (1953); see also ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 191-98 (2d ed. 1990) (explicating to the Netherlands Action initiated in response to U.S. restrictions on dairy imports).

²⁵ See Nichols, *supra* note 10, at 707.

²⁶ See *id.*

²⁷ See Nicolas Valticos, *International Labour Law*, in 1 INTERNATIONAL ENCYCLOPEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS 29 (Roger Blanpain ed., 1983 & supps.).

²⁸ See Nicolas M. Matte, *Institutional Arrangements for International Space Activities*, in SPACE LAW: DEVELOPMENT AND SCOPE 97, 99-100 (Nandasiri Jasentuliyana ed., 1992) (INTELSAT is "an international organization and an international enterprise, operating on a commercial basis and as a public utility service").

²⁹ Membership will also be extended to any "separate customs territory possessing full autonomy in the conduct of its external commercial relations." Charter, *supra* note 6, art. XXII(1), 33 I.L.M. at 1150. Hong Kong, for example, will join the World Trade Organization as a member rather than as part of the People's Republic of China.

³⁰ See Nichols, *supra* note 10, at 708; see also ORAN R. YOUNG, INTERNATIONAL COOPERATION 73-74 (1989) (stating that defiance of any treaty creates a risk that the cooperative structure built around that treaty will collapse); Guy de Jonquières, *Dreams Behind the Scenes*, FIN. TIMES, Jan. 5, 1995, at 11 (asserting that if the World Trade Organization's "authority is once eroded by a big trading power, that will be the end of the [World Trade Organization]") (quoting "a senior trade official").

the World Trade Organization adopt an exception that will accommodate societal values. The appropriate exception would state that laws primarily codifying an underlying societal value and only incidentally hindering free trade should not be subject to World Trade Organization scrutiny.³¹ This exception to World Trade Organization scrutiny could be enacted by the legislative body of the World Trade Organization³² or, more likely, fashioned as a doctrine by the Dispute Settlement Body or the Appellate Body.³³ While administration of this exception would require an inquiry into the motive for the creation of a law, such inquiries are routinely undertaken by both domestic and international tribunals.³⁴ Indeed, evidence of societal values would be similar to evidence of custom, which is a source of international law, and evidence of which is often parsed by international tribunals.³⁵ Placing a real burden of proof on the

³¹ See Nichols, *supra* note 10, at 708.

³² See *id.* at 709-11.

³³ See *id.* at 712-13; see also Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT'L L. (forthcoming May 1996) (discussing creation of doctrine by GATT dispute panels).

³⁴ See Nichols, *supra* note 10, at 714-16. Courts in the United States have been required to inquire as to legislative purpose when considering legislation relating to bills of attainder, the First Amendment, the Fourteenth Amendment, and the Commerce Clause. See RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* §§ 11.7, 15.9(c), 18.4, 20.49 (2d ed. 1992). Similarly, the European Court of Justice inquires into legislative purpose. See, e.g., Case C-312/89, *Union Departementale des Syndicats CGT de L'Aisne v. SIEDEF Conforma and Others*, 3 C.M.L.R. 746, 759 (1993) (requiring review into purpose); Nichols, *supra* note 10, at 715. GATT panels themselves examined the legislative purpose behind laws. See e.g., *United States, Measures Affecting Alcoholic and Malt Beverages*, GATT BISD 39th Supp. 206, 276-77 (1993) (conducting an inquiry into whether a law was passed for protectionist purposes or for the purpose of effecting a legitimate regulatory goal).

³⁵ To constitute custom, a country's behavior must not only consist of a general practice, it must also be accepted by that country as obligatory. See Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060, 3 Bevans 1153, 1187. Thus, a court that is ascertaining the existence of custom must ascertain the beliefs and values of a sovereign and a society. Evidence that is parsed by the courts include diplomatic correspondence, policy statements, press releases, opinions of official legal advisors, policy manuals, executive practices, comments by government officials, domestic legislation, and patterns of behavior. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4-5 (4th ed. 1990). It should be noted that GATT panels were no strangers to this type of evidence. See, e.g., *Norway, Restrictions on Imports of Apples and Pears*, June 22, 1989, GATT BISD 36th Supp. 306, 321

party claiming the exception, rather than simply allowing that party to claim the exception, would mitigate the possibility that this exception would be used as a pretext for the enactment of protectionist laws.³⁶

This argument has been criticized as not going far enough. Professor Richard Shell, in a recently published article of his own, damns the value-based argument for World Trade Organization restraint with faint praise and endorses a theoretical model he calls the "Trade Stakeholder Model."³⁷ Shell's model, in its simplest form, argues for "broad participation in trade dispute resolution for all parties with a stake in trade policy, not just commercial parties."³⁸ Although Shell is admittedly vague about how such participation should occur, his discussion and examples point to an expansion of the universe of parties with standing before World Trade Organization dispute panels, thus allowing private parties, as well as governments, to argue before those tribunals.³⁹

While Professor Shell's contribution to the understanding of

(1990) (reviewing series of Norwegian legislative actions).

³⁶ See Nichols, *supra* note 10, at 716-17. In the context of judicial inquiry into legislative purpose in the United States, Paul Brest has noted that supposed problems in ascertainability of purpose are largely illusory, and that both circumstantial and direct evidence often exist to explain the motivations of lawmakers. See Paul Brest, *Palmer v. Thompson: An Approach to the Problems of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 120-24. He also argues that the occasional impossibility of determining motive "does not justify a blanket refusal to undertake the inquiry if a decisionmaker's motivation can sometimes be determined with adequate certainty." *Id.* at 120. Moreover, placing the burden on the party claiming the exception would mean that when it could not be determined with a degree of certainty whether or not a law actually expressed an underlying societal value, the exception would not apply.

It is, of course, slightly possible that protectionist laws occasionally would escape World Trade Organization scrutiny by means of this exception. If, however, systems of governance and legal regimes were held to a standard of absolute perfection, then systems of governance and legal regimes would cease to exist. The argument is not that the proposed exception is flawless; rather, the argument is that a system of trade governance that accommodates national expressions of societal values is superior to a system of trade governance that does not.

³⁷ See G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 921 (1995).

³⁸ *Id.* at 911.

³⁹ For example, Shell points to the influence of workers' and employers' organizations on the International Labour Organization. See *id.* at 916. He uses as another example the European Union, which extends standing to individual citizens in many areas. See *id.* at 918.

the role of trade in the social edifice is extremely valuable, his argument for the expansion of standing must be viewed with caution. It is possible that his argument is based on implicit assumptions that do not comport with reality. Moreover, expansion of standing might erode many of the gains made over the past fifty years by countries working within the GATT. This essay examines the assumptions implicit in the argument to expand standing, explains why those assumptions are unsound, and poses the argument against expansion of standing. As a superior alternative to expansion of standing, this essay suggests changing the composition of dispute settlement panels. Before undertaking this analysis, however, this essay briefly discusses the nature of the World Trade Organization, in order to emphasize that the change being discussed — an extension of standing to nongovernment parties — would be a fundamental change to the World Trade Organization rather than a simple procedural modification.

2. THE WORLD TRADE ORGANIZATION IS AN ORGANIZATION OF NATIONS

Providing standing to nongovernment entities is not a simple procedural change; rather, it goes to the very essence of the GATT and the World Trade Organization — entities conceived of and designed as forums in which governments, not private parties, formulate trade policy. This emphasis on governmental interaction can be demonstrated both historically and operationally.

The GATT — which endured for almost fifty years — was an orphan of the proposed International Trade Organization.⁴⁰ In

⁴⁰ The General Agreement was pieced together as a stopgap measure to bridge the period between the end of negotiations among the industrialized nations and the ratification of the International Trade Organization charter by those nations. Thus, the General Agreement was never conceived of as a treaty, but was instead an agreement acceded to through a Protocol of Provisional Application. Moreover, the negotiating power that Congress conferred upon the United States executive branch regarding this temporary measure specifically excluded any reference to an international organization. In fact, all references to an international organization were deleted from the General Agreement. The United States Senate eventually failed, because of sovereignty concerns, to ratify creation of the International Trade Organization. The “temporary” General Agreement became the means to regulate international trade policy for the ensuing fifty years. For excellent histories of

turn, the International Trade Organization was to serve as the third leg of a global economic tripod forged at Bretton Woods in the waning years of World War II.⁴¹ Although the U.S. Congress killed the International Trade Organization,⁴² the other two legs — the International Monetary Fund and the International Bank for Reconstruction and Development (better known as the World Bank) — became principal actors in the global economic order.⁴³ Most notably, the Bretton Woods negotiations were conducted at the highest levels of government and involved critical issues regarding the sovereignty of those nations.⁴⁴ Even today, the International Monetary Fund limits membership to sovereign countries; member governments appoint its managers; and only

the General Agreement and its evolution into the foremost international trading body, see ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 49-52 (2d ed. 1990); JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 36-53 (1969).

Interestingly, one of the reasons that the negotiators of the International Trade Organization felt a need for an interim agreement was to protect the delicate bargain that had been struck from the influences of special interest groups. William Diebold, who has been closely involved in trade negotiations, reports that “I was told that Will Clayton said that ‘we need to act before the vested interests get their vests on.’ Whether he really said that, I don’t know, but it makes the point.” William Diebold, *Reflections on the International Trade Organization*, 14 N. ILL. U. L. REV. 335, 336 (1994).

⁴¹ See Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT’L L. 349, 352 (1995) (discussing “the three legs upon which the new multilateral economic system should rest”). Interestingly, Peter Sutherland, the first Director-General of the World Trade Organization, has spoken of the World Trade Organization as one of the Bretton Woods institutions, even though it was created in 1995, almost fifty years after the two other Bretton Woods institutions. See Peter Sutherland, *Open For Trade: The First Three Months of the WTO*, FOCUS: WORLD TRADE ORGANIZATION NEWSLETTER (Info. & Media Relations Div. of the WTO, Geneva), Mar.-Apr., 1995, at 12, 13.

⁴² See Ruth E. Olson, *GATT — Legal Application of Safeguards in the Context of Regional Trade Arrangements and Its Implications for the Canada-United States Free Trade Agreement*, 73 MINN. L. REV. 1488, 1491 (1989) (“When the United States Congress failed to ratify the International Trade Organization, the negotiating countries reverted to the GATT as an existing legal framework.”) (footnote omitted).

⁴³ A full history of the Bretton Woods negotiations, while fascinating, is beyond the scope of this essay. For a truly interesting historical treatment, see ARMAND VAN DORMAEL, *BRETTON WOODS: BIRTH OF A MONETARY SYSTEM* (1978) (tracing the history of the Bretton Woods system, including its success and failure).

⁴⁴ See *id.* at 168-223.

governments receive lending assistance.⁴⁵ Similarly, sovereign nations own the World Bank; those nations that manage the Bank appoint the governors; and the Bank makes or arranges for loans only to governments or government related entities.⁴⁶

The World Trade Organization is the culmination of eight years of multinational negotiations.⁴⁷ The Uruguay Round negotiations, like those at Bretton Woods, took place at the intergovernmental level. The participating countries, however, did solicit comments from business, other nongovernmental entities, and the public in general. For example, a variety of U.S. agencies — including the United States Trade Representative, the Department of State, the Department of Commerce, and the International Trade Commission — solicited public comments on issues such as environmental implications of the Uruguay Round,⁴⁸ the impact of the Uruguay Round on various industries,⁴⁹ the integration of various industries into the GATT,⁵⁰

⁴⁵ See 4 INTERNATIONAL ORGANIZATIONAL SERIES, THE INTERNATIONAL MONETARY FUND xiii-xvi (Anne C.M. Salda ed., 1992).

⁴⁶ See BAREND A. DE VRIES, REMAKING THE WORLD BANK 8-10 (1987). The IMF and the World Bank have been the subject of their share of criticism. Interestingly, that criticism includes lack of transparency and democracy as well as lack of independent appeals for private groups affected by IMF and World Bank activity. See John Cavanaugh et al., *Introduction: From Bretton Woods to Chiapas*, in BEYOND BRETTON WOODS: ALTERNATIVES TO THE GLOBAL ECONOMIC ORDER xii, xv (John Cavanaugh et al. eds., 1994).

⁴⁷ These negotiations — launched on September 20, 1986, in Punta del Este, Uruguay, substantially concluded on December 15, 1993, and formally concluded in Marrakesh, Morocco on April 15, 1994 — are cumulatively referred to as the “Uruguay Round” of multilateral negotiations. See JEFFREY J. SCHOTT & JOHANNA W. BUURMAN, THE URUGUAY ROUND: AN ASSESSMENT 3 (1994). For a thorough history of the negotiations between 1986 and 1992, see THE GATT URUGUAY ROUND: NEGOTIATING HISTORY (Terence P. Stewart ed., 1993).

⁴⁸ See, e.g., United States Trade Representative, Report on Environmental Issues in the Uruguay Round Agreements, 59 Fed. Reg. 9802 (1994) (announcing notice and request for public comment).

⁴⁹ See, e.g., International Trade Commission, Potential Impact on the U.S. Economy and Industries of the GATT Uruguay Round Agreements, 59 Fed. Reg. 15218 (1994) (announcing the institution of an investigation of and calling for public submissions on the Uruguay Round’s effect on various sectors of the national economy); Department of Commerce, National Telecommunications and Information Administration, Comprehensive Examination of U.S. Regulation of International Telecommunications Services, 58 Fed. Reg. 4846 (1993) (announcing notice of inquiry and request for comments); International Trade Commission, Probable Economic Effect of Multilateral Removal of Trade Barriers on Imports of Sugar, Meat, Peanuts, Cotton, and Dairy

and the reduction or elimination of tariffs on particular goods.⁵¹ Congress, which does not have negotiating powers, also actively solicited public comment⁵² and promulgated its own views.⁵³ Other major trading countries elicited public input in a similar manner. In Canada, for example, the Department of Finance, the International Trade Tribunal, and the Department of External Affairs and International Trade each held public hearings on trade negotiations.⁵⁴ Established trading nations were not alone in receiving public input. Emerging economies also utilized various methods of obtaining inputs from entities outside of the government.⁵⁵

Products, 55 Fed. Reg. 28467 (1990) (announcing institution of investigation and notice of hearing).

⁵⁰ See, e.g., Committee for the Implementation of Textile Agreements, Request for Public Comments on the Integration of the Textiles and Clothing Sector into the GATT 1994, 59 Fed. Reg. 26212 (1994) (requesting information of the ramifications of integrating textiles into the Uruguay Round Agreements); Department of Commerce, International Trade Administration Exporters' Textile Advisory Committee, Open Meeting, 55 Fed. Reg. 49099 (1990) (discussing Uruguay Round negotiations).

⁵¹ See, e.g., Department of State, Advisory Committee on International Investment, Meeting, 56 Fed. Reg. 43832 (1991) (announcing notice of meeting); Office of the United States Trade Representative, Uruguay Round Negotiations on Tariff and Non-Tariff Measures, 54 Fed. Reg. 38311 (1989) (announcing notice of public hearings and request for written comments); International Trade Commission, Intent to Hold MTN Field Hearings, 53 Fed. Reg. 47589 (1988) (announcing notice of intent to hold hearings); Office of the United States Trade Representative, Trade Policy Staff Committee, Articles Being Considered for Possible Duty Removal, 53 Fed. Reg. 30920 (1986) (announcing notice and schedule of public hearings).

⁵² See, e.g., *Uruguay Round of Multilateral Trade Negotiations: Hearings before the Subcomm. on Trade of the House Comm. on Ways and Means*, 103d Cong., 1st Sess. 2 (1993) (reprinting a press release announcing hearings).

⁵³ See, e.g., H.R. REP. No. 64, 102d Cong., 1st Sess., pt. 1, 4 (1991) (stating that U.S. negotiators must address "environmental concerns, health and safety standards, labor and industry adjustment . . . and worker rights").

⁵⁴ See, e.g., Department of Finance, Invitation to Submit Comments on Proposed Tariff Reductions on Manufacturing Inputs, 128 C. Gaz. 2790 (pt. I 1994) (inviting public comment on proposed tariff reductions); Canadian International Trade Tribunal, Competitiveness of the Canadian Cattle and Beef Industries, 126 C. Gaz. 3681 (pt. I 1992) (announcing notice of public hearings); see also External Affairs and International Trade Canada, North American Free Trade Negotiations, 125 C. Gaz. 2698 (pt. I 1991) (noting in its solicitation of comments that the International Trade Advisory Group on International Trade provided advice on Uruguay Round negotiations).

⁵⁵ See, e.g., Ashok V. Desai, *The Politics of India's Trade Policy*, in DOMESTIC POLITICS AND THE URUGUAY ROUND 91, 96-102 (Henry R. Nau

Nonetheless, although governments paid heed to the comments and concerns of private entities, the actual Uruguay Round negotiations were undertaken by and among governments, and not by the citizens whom those governments represent.⁵⁶

Given the results of these negotiations, Professor Shell's focus on dispute resolution is understandable.⁵⁷ The World Trade

ed., 1989) (noting that while India's trade agreements are negotiated by elected officials, many groups, including consumers, have inputs); J. Ray Kennedy & Roberto Giannetti da Fonseca, *Brazilian Trade Policy and the Uruguay Round*, in *id.* at 29, 40-42 (stating that industry, trading companies, and agriculture "have some influence over government decisions" regarding the Uruguay Round); Kim Kihwan & Chung Hwa Soo, *Korea's Domestic Trade Politics and the Uruguay Round*, in *id.* at 135, 145 ("[N]ongovernmental actors have considerable access to the core of the trade policymaking system, the executive branch. They can present their case to officials from the relevant ministry, both formally and informally, and at various levels.").

⁵⁶ See generally Arthur Dunkel, 'Trade Policies for a Better Future' and the Uruguay Round, in TRADE POLICIES FOR A BETTER FUTURE: THE 'LEUTWILER REPORT,' THE GATT AND THE URUGUAY ROUND 1, 1 (1987) (describing the Uruguay Round as "the most far-reaching, comprehensive and significant multilateral trade negotiation ever undertaken" and noting that "the magnitude of this enterprise will pose a formidable challenge to the participants in terms of their imagination, farsightedness and political will").

⁵⁷ In fairness, it should be noted that Shell also suggests that nongovernmental parties should play a role in policymaking. See Shell, *supra* note 37, at 922. Such, however, is already the case. Although countries will not allow others to bargain in their place, the GATT, almost since its inception, worked closely with, consulted, and even considered motions by international nongovernmental organizations such as the United Nations, the IMF, and the International Chamber of Commerce ("ICC"). See, e.g., Committee on Technical Barriers to Trade, GATT BISD 39th Supp. 448, 448 (1993) (stating "seven international organizations are invited to attend meetings of the Committee in an observer capacity"); Committee on Customs Valuation, GATT BISD 39th Supp. 396, 396 (1993) (listing representatives of four countries that are not parties to the GATT but which do attend meetings, as do the Customs Co-operation Council, the IMF, and UNCTAD); Report (1981) of the Committee on Technical Barriers to Trade, GATT BISD 28th Supp. 34, 34 (1982) (stating that IMF, UNCTAD, ISO, IEC, and FAO/WHO attend meetings); Italian Import Deposit, Report of the Working Party, Oct. 21, 1971, GATT BISD 21st Supp. 121, 122 (1975) (thanking the representatives of the IMF for the "statement on Italy's balance of payments and measures taken to restore equilibrium in the country's economy and external position"); International Trade Centre UNCTAD/GATT, Report of the Joint Advisory Group, Nov. 25, 1968, GATT BISD 16th Supp. 98, 98 (1969) (stating that "experts and advisers in the field of trade information and trade promotion from a large number of countries and inter-governmental organizations participated in the meeting"); Trade and Customs Regulations: Certificates of Origin, Marks of Origin, Consular Formalities, Nov. 17, 1956, GATT BISD 5th Supp. 102, 102 (1957) (stating that a working party considers proposals

Organization will perform at least three functions: surveillance of member countries' trade policies;⁵⁸ negotiation of substantive international trade policies and regulations;⁵⁹ and resolution of disputes between members concerning those trade policies.⁶⁰ Review of trade policy occupies a low-profile position in debate over trade regulation. On the other hand, because negotiating trade policy inherently involves a yielding of sovereignty,⁶¹ it is

from the ICC); Customs Administration: Nationality of Imported Goods, Oct. 23, 1953, GATT BISD 2d Supp. 53, 53-54 (1954) (noting that parties to the GATT vote on a motion submitted by the ICC); Balance-of-Payments Quantitative Restrictions: Consultation Procedure Under Article XII:4(a), June 20, 1949, 2 GATT BISD 89, 93 (1952) (stating "consultations under paragraph 4(a) of Article XII involve very close co-operation with the International Monetary Fund").

The World Trade Organization appears to continue this practice. The charter of the World Trade Organization states that "[t]he General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those" undertaken by the World Trade Organization. Charter, *supra* note 6, art. V(1), 33 I.L.M. at 1146. The charter goes on to state that the World Trade Organization may also "make appropriate arrangements for consultation and cooperation with non-governmental organizations." *Id.* art. V(2), 33 I.L.M. at 1146. Although it is probable that some fine tuning could occur in these arrangements, structurally the door has been opened. The real, and significant, change that Shell calls for is the expansion of standing to include nongovernment parties.

⁵⁸ The primary mechanism of surveillance is the Trade Policy Review Mechanism. See Trade Policy Review Mechanism, Agreement Establishing the World Trade Organization, reprinted in GATT SECRETARIAT, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, THE LEGAL TEXTS Annex 3 (1994) [hereinafter LEGAL TEXTS]. Trade policy review was previously conducted pursuant to a Decision by parties to the GATT. See Functioning of the GATT System, Apr. 12, 1989, GATT BISD 36th Supp. 403, 405 (1990).

⁵⁹ Two legislative bodies — the Ministerial Conference which meets at least every two years and the General Council which meets at all times in between — carry out the functions of the World Trade Organization. See Charter, *supra* note 5, art. IV, 33 I.L.M. at 1145. One function of the legislative bodies will be to "provide the forum for negotiations among its Members concerning their multilateral trade relations." *Id.* art. III(2), 33 I.L.M. at 1145; see also Nichols, *supra* note 10, at 691-93 (discussing the policymaking role of the WTO); Patterson & Patterson, *supra* note 3, at 42 (discussing legislative process in the World Trade Organization).

⁶⁰ See *supra* note 7; *infra* notes 68-70 and accompanying text.

⁶¹ See John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1232-33 (1992) ("Issues formerly thought to be well within the exclusive terrain of national sovereignties, such as exchange rates and taxing policies, now must be examined for their impact on trade liberalization or barriers.")

unlikely that member countries would be willing to entrust negotiations involving sovereignty to any entity other than themselves. Thus, only dispute resolution remains as an area for nongovernment party involvement. Moreover, dispute resolution is the most visible point of contact between private parties and the functioning of the World Trade Organization and thus is a significant area of concern for the stakeholder proposal.

The creation of the World Trade Organization effected a significant change in the nature of dispute resolution. Since 1955, disputes between countries that cannot be resolved through consultation have been referred to dispute panels.⁶² Panels receive submissions and hear arguments both from representatives of the disputing governments and from interested third party countries.⁶³ The panel then rules on the applicability of the appropriate trade agreement to the dispute and recommends what action the GATT or World Trade Organization should take.⁶⁴ Within the GATT, dispute resolution was a mediative process.⁶⁵ Dispute panel decisions became final only after the parties to the GATT adopted them by consensus. Since consensus requires an absence of negative votes, any country — even the party losing before a panel — could veto a panel ruling.⁶⁶ This dynamic explicitly encouraged political accommodation.⁶⁷

The dispute resolution process under the World Trade Organization reverses the process of decision adoption. Panel

⁶² See JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 63 (1990) (discussing the arbitration-oriented process utilized by GATT dispute panels since 1955).

⁶³ See Understanding, *supra* note 7, arts. 10-12, 33 I.L.M. at 1232-34.

⁶⁴ See HUDEC, *supra* note 40, at 92; JACKSON, *supra* note 40, at 63; Rosine Plank, *An Unofficial Description of How a GATT Panel Works and Does Not*, J. INT'L ARB., Dec. 1987, at 53.

⁶⁵ See JACKSON, *supra* note 40, at 65 n.5.

⁶⁶ See *id.* at 65. "Consensus comes close to [but is not] unanimity. It is, rather, a state of non-objection, a resigned let-it-go." Pierre Pescatore, *The GATT Dispute Settlement Mechanism: Its Present Situation and Its Prospects*, J. INT'L ARB., Mar. 1993, at 35.

⁶⁷ See Fred L. Morrison, *The Future of International Adjudication*, 75 MINN. L. REV. 827, 838 (1991) ("The relative success of the GATT mechanism has been because of, not in spite of, its recognition of a political role in the process."). Frequently, the result of this mediative process was palatable to both disputing countries. See Plank, *supra* note 64, at 88-92 (describing how contracting parties act on a panel report).

decisions — or appellate decisions⁶⁸ — will automatically be adopted unless all of the votes are *against* adoption.⁶⁹ In other words, whereas under the GATT system the sole vote of the losing party could prevent adoption of a panel decision, under the World Trade Organization system the sole vote of the winning party can force adoption. It cannot, however, be argued that this dramatic change indicates that governments are no longer concerned with the dispute settlement process. If anything, the additional weight placed upon panel reports makes the dispute settlement process even more critical to the functioning of the World Trade Organization and to the substantive rights of member nations.⁷⁰

The fact that the World Trade Organization is an organization of nations, and that dispute resolution has been and will continue to be a process among nations, does not necessarily mean that expansion of standing to include nongovernment entities is a bad idea. It does mean that expansion of standing is more than a mere procedural change, and is a suggestion that should be neither lightly made nor blithely taken. Indeed, expansion of standing presents several issues that demand close scrutiny and careful thought.

3. GOVERNMENT REPRESENTATION OF CONSTITUENCIES

Professor Shell's suggestion of expanding standing beyond member nations implicitly assumes that national governments do not adequately represent the interests of all of their constituencies. The capacity of democratic governments to represent the values of their constituencies is especially pertinent to a discussion about trade disputes because the bulk of world trade, and therefore the

⁶⁸ The Understanding on dispute resolution provides the right to an appeal before an appellate board of trade judges. See Understanding, *supra* note 7, art. 17, 33 I.L.M. at 1236.

⁶⁹ See *id.* art. 16, 33 I.L.M. at 1235; Nichols, *supra* note 10, at 700.

⁷⁰ Indeed, the United States has proposed a five-judge panel that will review decisions against the United States. If, within a five year period, these judges determine that three negative decisions exceed the scope or authority of the World Trade Organization, then Congress will consider a resolution to withdraw from the World Trade Organization altogether. See S. Res. 16, 104th Cong., 1st Sess. (1995) (World Trade Organization Dispute Settlement Review Commission Act), 141 CONG. REC. S176, S176 (daily ed. Jan. 5, 1995); see also Terry Atlas, *Job Worries at Root of GATT Fears; Many Prefer Security of Present to Future Potential*, CHI. TRIB., Nov. 7, 1994, at C1 (describing the panel).

majority of trade disputes,⁷¹ occurs between democratic countries.⁷²

There is much anecdotal criticism of government.⁷³ From a more disciplined and analytical perspective, political theory also teaches that democratic institutions are not perfect.⁷⁴ There is little consensus on what democracy is,⁷⁵ how the process works,⁷⁶ or which of the various democratic models is most effective.⁷⁷ Nonetheless, the mainstream consensus is that democratic governments do function to fairly assess, evaluate, and coordinate various societal values and goals.⁷⁸ This is true of

⁷¹ See Robert E. Hudec et al., *A Statistical Profile of the GATT Dispute Settlement Cases: 1948-1989*, 2 MINN. J. GLOBAL TRADE 1, 29-30 (1993) (reporting that only 17 of 207 cases did not involve either the United States or European Union nations).

⁷² See *Democracy and Growth: Why Voting is Good for You*, ECONOMIST, Aug. 27, 1994, at 15 (stating that "nearly all of the world's richest countries are . . . democratic"); see also John F. Helliwell, *Empirical Linkages Between Democracy and Economic Growth*, 24 BRIT. J. POL. SCI. 225, 233-35 (1994) (finding a significant correlation between national wealth and democracy, and a positive effect of increased income on democracy).

⁷³ See virtually any statement by virtually any opposition candidate in virtually any election year.

⁷⁴ See, e.g., Phillippe C. Schmitter, *Dangers and Dilemmas of Democracy*, J. DEMOCRACY, Apr. 1994, at 57, 62-63 (listing problems with democratic institutions, including oligarchic nonaccountability, free riding, policy recycling, nonaccountable necessary institutions, and transnational interdependence).

⁷⁵ See GIOVANNI SARTORI, *THE THEORY OF DEMOCRACY REVISITED* 257-75 (1987) (devoting 18 pages to not answering the question of what democracy is).

⁷⁶ See Charles R. Beitz, *Procedural Equality in Democratic Theory: A Preliminary Examination*, in LIBERAL DEMOCRACY: NOMOS XXV 69 (J. Roland Pennock & John W. Chapman eds., 1983) (arguing that different commentators have various opinions on the specific procedures required in a political system in order for a country to be considered a "democracy").

⁷⁷ See, e.g., Kaare Strom, *Democracy as Political Competition*, in REEXAMINING DEMOCRACY 27, 28, 34 (Garry Mark & Larry Diamond eds., 1992) (describing a debate among Seymour Martin Lipset, who argues that effective democracy is a competition for political office, Crawford Macpherson, who argues that democracy is oligopolistic, and Jane Mansbridge, who argues that democracy is adversarial).

⁷⁸ See ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 106-18 (1989) (discussing the distinctive characteristics of a democratic process of government through an analysis of the assumptions and criteria of a democratic political order); SEYMOUR MARTIN LIPSET, *POLITICAL MAN* 27 (expanded ed., 1981) (stating that a democracy without an underlying value system will result in chaos); J. ROLAND PENNOCK, *DEMOCRATIC POLITICAL THEORY* 159 (1979) (stating that "democracy tends to 'maximize' the values of liberty and equality

trade policy as well.⁷⁹

The fact that existing democratic institutions are not perfect allows for some refinement of the assumption underlying Shell's suggestion. Professor Shell's suggestion could be ascribed not to an implicit assumption that governments do not balance values, but instead to an assumption that the World Trade Organization will do so more effectively, and therefore the governed should indicate their preferences directly to the World Trade Organization. Indeed, Shell hints that this is his assumption when he characterizes his model as "participatory governance," in contrast to the World Trade Organization's use of representative democracy.⁸⁰

Scholars of democratic theory, however, argue that participatory governance is impossible on a global scale. Robert Dahl points out the fundamental paradox of the large political systems necessary to deal with transnational problems:

In very small political systems a citizen may be able to participate extensively in decisions that do not matter much but cannot participate much in decisions that really matter a great deal; whereas very large systems may be able to cope with problems that matter more to a citizen, the opportunities for the citizen to participate in and greatly influence decisions are vastly reduced.⁸¹

and . . . respect for persons").

⁷⁹ After an exhaustive study of the relationship between democracy and trade policy, Daniel Verdier concludes:

Voters control policymaking because elections provide policymakers with incentives to reproduce within their institutional microcosms the parametric structure of the electorate. Voters signal to their elected representatives the balance between particular and general goals that they wish to see struck by the legislative process. Voter control is indirect, since voters do not choose the outcome; rather, they create the incentive structure that motivates politicians to legislate in accordance with voter concerns. In short, if electors do not necessarily choose policies, they *do* choose the decision rules by which lawmakers make policies.

DANIEL VERDIER, *DEMOCRACY AND INTERNATIONAL TRADE* 290 (1994).

⁸⁰ See Shell, *supra* note 37, at 914.

⁸¹ Robert A. Dahl, *A Democratic Dilemma: System Effectiveness Versus Citizen Participation*, 109 *POL. SCI. Q.* 23, 28 (1994).

Although it is beyond peradventure that the World Trade Organization will be required to balance interests that affect the entire world, it is difficult to envisage a scheme that could equitably allow for direct participation by all of the citizens of the world. Moreover, on a purely empirical level, the policy of subsidiarity in the European Union,⁸² and the appeal of “states’ rights” rhetoric in the United States,⁸³ indicate a popular desire to keep value balancing as close to local levels as possible.

The best case for Professor Shell’s assumptions lies with nondemocratic members of the World Trade Organization. While these countries are not involved in a significant number of trade disputes, they should not be ignored, particularly given the likelihood that the People’s Republic of China will become a member of the World Trade Organization.⁸⁴ It is possible that in nondemocratic countries certain constituencies are not allowed a voice in the balancing of values.⁸⁵ To the extent that this is true, however, the same factors that preclude those constituencies from participation at the national level will also preclude participation at the international level. It is unlikely, for example, that

⁸² Subsidiarity is the policy of handling issues such as taxation, regulation, and providing public security at a local decentralized level of government. See CENTRE FOR ECONOMIC POLICY RESEARCH, MAKING SENSE OF SUBSIDIARITY: HOW MUCH CENTRALIZATION FOR EUROPE? 3-4, 19-23 (1993); George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994) (explaining and analyzing the strengths and weaknesses of the principle of subsidiarity and concluding that “it ‘fits’ the European Community at its present juncture”).

⁸³ See, e.g., Helen Dewar, *Senate Votes to Repeal Helmet Laws*, WASH. POST, June 22, 1995, at A1 (discussing the Senate’s continued efforts to take power from the federal government and give it to the states).

⁸⁴ See Tony Walker, *Survey of China*, FIN. TIMES, Nov. 20, 1995, at 3 (discussing China’s progress in gaining World Trade Organization membership). But see *Knock, Knock*, ECONOMIST, Jan. 13, 1996, at 72 (indicating that although China has “made much progress in the past year or so” there are still problematic issues, such as human rights and intellectual property protection, that block its entry into the World Trade Organization).

⁸⁵ It is only possible, not certain, that nondemocratic countries exclude constituencies from the value balancing process. Even nondemocratic regimes tend to represent their constituencies to some degree, particularly when such regimes wish to be considered legitimate. See J. Roland Pennock, *Political Representation: An Overview*, in REPRESENTATION: NOMOS X 3, 6-8 (J. Roland Pennock & John W. Chapman eds., 1968) (“All regimes obtain legitimacy by being in some degree representative or at least convincing their subjects that they are.”).

a group of human rights activists would be allowed to leave Burma to participate in a proceeding in Geneva, or, having somehow done so, would find a comfortable reception waiting at home.⁸⁶

Proponents of expanded standing may counter that, because constituencies in nondemocratic regimes cannot speak for themselves, the need to allow somebody else to speak for them is especially critical. This, however, already occurs within the existing system. For example, both France and the United States have proposed that the World Trade Organization consider labor rights.⁸⁷ The rights of groups with little power, such as children and forced laborers, are of special concern to the two countries.⁸⁸ Part of the impetus for this concern is the desire to protect high paying jobs in democratic countries. Part of the impetus for this concern is the altruistic belief that some practices are morally wrong.⁸⁹ But regardless of the impetus, the governments of France and the United States have synthesized and balanced a number of values in order to arrive at their positions. Moreover, nontrade values that benefit nonconstituents are represented, *through governments*, at the World Trade Organization.

4. PLACING TRADE POLICY IN THE ADVERSARIAL ARENA

The expansion of standing not only belies the reality of how

⁸⁶ See Ted Bardacke, *Red Cross Office in Burma to Shut*, FIN. TIMES, June 20, 1995, at 10 (“[T]he Burmese government has become less sensitive to international complaints about human rights conditions in the country, as foreign investment . . . has poured in.”); Philip Shenon, *Burma Unlikely to Free Dissident When Detention Term Ends*, N.Y. TIMES, June 3, 1995, at A3 (reporting that Burma threatens to keep human rights activist imprisoned indefinitely); James Strachan, *How to Spend It: The Dark Side of the Sun*, FIN. TIMES, June 10, 1995, at VI (describing use of political and other prisoners as human minesweepers). Burma was a party to the General Agreement, see GATT 1947, *supra* note 1, 61 Stat. at A8, 55 U.N.T.S. at 188, and is a signatory to the World Trade Organization charter, see Final Act, *supra* note 5, 33 I.L.M. at 1131.

⁸⁷ See Bhushan Bahree, *U.S. Renews Controversial Bid to Tie Labor Principles to Trade Privileges*, WALL ST. J., Apr. 5, 1995, at A9 (discussing U.S. attempts to link labor standards with world trade privileges); Guy de Jonquières & Robert Taylor, *France to Push Workers’ Rights in WTO*, FIN. TIMES, Feb. 2, 1995, at 4 (reporting France’s effort to encourage members of the EU to “link workers’ rights and labour standards with the conduct of international trade”).

⁸⁸ See Bahree, *supra* note 87, at A9.

⁸⁹ See *id.*

trade policy is determined, but also could force the creation of trade policy even further into the public consciousness. The resulting loss of its low profile might prove disastrous for free trade.

Several facts indicate the dangers that publicity may have upon efforts to liberalize trade. First, although the overall economic effect is usually beneficial, liberalization of trade policy usually hurts some constituency.⁹⁰ Wolfgang Stolper and Paul Samuelson identify the constituencies in a given economy that are most likely to be harmed by trade liberalization.⁹¹ Ronald Rogowski, in turn, builds upon this foundation a theory that predicts domestic responses to various proposals for liberalized trade.⁹² Not surprisingly, Rogowski also predicts that those constituencies likely to be harmed by free trade will collaborate to oppose trade liberalization at the national level.⁹³ The rancorous debates over ratification of the North American Free Trade Agreement and the Uruguay Round support Rogowski's predictions.⁹⁴ Indeed, the unusual political coalitions which opposed ratification of those agreements⁹⁵ indicate a shortcoming in Rogowski's analysis: he predicts opposition to free trade solely on economic grounds, whereas much of the opposition actually stemmed from ideological sources. Whatever the reason for a

⁹⁰ See, e.g., Robert C. Shelburne & Robert W. Bednarzik, *Geographic Concentration of Trade-Sensitive Employment*, MONTHLY LAB. REV., June 1993, at 3, 10 (demonstrating differing impacts of trade-related unemployment across geographic areas).

⁹¹ See Wolfgang F. Stolper & Paul A. Samuelson, *Protection and Real Wages*, 9 REV. ECON. STUD. 58, 72 (1941) (demonstrating that trade liberalization harms owners and users of scarce factors and resources in a society).

⁹² See RONALD ROGOWSKI, *COMMERCE AND COALITIONS: HOW TRADE AFFECTS DOMESTIC POLITICAL ALIGNMENTS* 1-16, 163-64 (1989).

⁹³ See *id.* at 4-5 (describing how "beneficiaries of change will try to continue and accelerate [the domestic political process], while the victims of the same change will endeavour to retard or halt it . . . as the desire and the means for a particular political preference increase, the likelihood grows that political entrepreneurs will devise mechanisms that can surmount the obstacles to collective action"); see also Charles K. Rowley & Robert D. Tollison, *Rent-Seeking and Trade Protection*, in PROTECTIONISM AND STRUCTURAL ADJUSTMENT 141, 151-52 (Heinz Hauser ed., 1986) (noting that trade protection results from political activity of "losers" from free trade).

⁹⁴ See Sol Mosher, *The Politics of World Trade*, LEGAL TIMES, Dec. 26, 1994, at 20.

⁹⁵ See *id.* (describing the unusual coalition that opposed the North American Free Trade Agreement).

position, however, it is abundantly clear that sorting out a national trade policy can be a contentious affair.

A second fact suggesting the harmful effect of thrusting trade into the adversarial arena is that once trade policy determination leaves the national arena, it tends to fall from public view. For example, the passions within the United States that were generated by the debate over the ratification of the North American Free Trade Agreement were not fully replicated in the debate over ratification of the Uruguay Round.⁹⁶ The actual functioning of the World Trade Organization has generated even less interest than the ratification of the Uruguay Round. Indeed, the negotiation of trade regulations captures more attention than the adjudication of disputes under those regulations.⁹⁷

With these two facts in mind — that trade liberalization will usually harm some domestic constituencies and that attention to trade policy declines after determination of trade policy leaves the national arena — at least three problems can be predicted to arise if standing expands to include nongovernment entities. First, expansion of standing will undermine the apparent authority, and thus the ability, of nations to negotiate trade policies. Trade negotiation is one of the primary functions of the World Trade Organization.⁹⁸ Multilateral trade negotiations are, by their very nature, delicate and time consuming processes.⁹⁹ Multilateral trade negotiations are not like any other type of international negotiations; they are made especially complicated by the Most Favored Nation principle, which requires that any concession granted to one country must automatically extend to every other party.¹⁰⁰ Because of this principle, negotiators are reluctant to

⁹⁶ See Gerald F. Seib, *Debate on GATT Recalls Nafta Battle in Many Ways, But the Passion Is Gone*, WALL ST. J., July 14, 1995, at A12 (noting that the “GATT debate hasn’t hit a Nafta-like fever pitch in the public arena”).

⁹⁷ See Richard N. Cooper, *Trade Policy Is Foreign Policy*, 9 FOREIGN POL’Y 18 (1972) (noting how international trade policy is considered “low foreign policy” and receives little national attention).

⁹⁸ See *supra* note 59 and accompanying text.

⁹⁹ See GILBERT R. WINHAM, *THE EVOLUTION OF INTERNATIONAL TRADE AGREEMENTS* 52-56 (1992) (describing the delicacy and complexity of trade agreement negotiation).

¹⁰⁰ The Most Favored Nation principle is defined in the General Agreement:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation . . . , any advantage,

proffer concessions, and must evaluate whether the advantages gained by offering the concession to one country are worth the loss in leverage over other countries.¹⁰¹ The Most Favored Nation requirement also causes countries to be very reluctant to enter into negotiations unless the delicate balances they achieve will be final.¹⁰² Indeed, fast track negotiating authority in the United States¹⁰³ is predicated upon the notion that other countries are unlikely to negotiate unless the resulting agreements are immune from congressional amendment.¹⁰⁴

Expansion of standing would undoubtedly lead to the spectacle of domestic constituencies opposing the positions of the governments that are supposed to represent those constituencies.¹⁰⁵

favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

GATT 1947, *supra* note 1, art. I(1), 61 Stat. at A12, 55 U.N.T.S. at 196, 198.

¹⁰¹ See GILBERT R. WINHAM, *INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION* 62 (1986) (explaining the negotiating tactics of exchanging concessions).

¹⁰² See *id.* at 58-90.

¹⁰³ For a brief, but excellent, description of fast track negotiating authority, see Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 143-44 (1992). Fast track negotiating authority imposes limits on the executive's scope of negotiating powers in exchange for an agreement by Congress to severely curtail its ability to amend the resulting ratification agreement and implementation legislation. See *id.* Far from limiting public input into the negotiations, Koh argues that "[i]n the typical situation, the Executive Branch develops an initial strategy for negotiating with our trading partners, but the amended Fast Track process encourages the President to alter that strategy over time through consultation with private industry groups and through dialogue with a Congress." *Id.* at 165; see also Alan F. Holmer & Judith H. Bello, *The Fast Track Debate: A Prescription for Pragmatism*, 26 INT'L LAW. 183, 184-86 (1992) (describing the U.S. fast track procedures and its applications).

¹⁰⁴ See Harold Hongju Koh, *Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha*, 18 N.Y.U. J. INT'L L. & POL. 1191, 1200-01 (1986) (contending that congressional refusal to authorize advance negotiating authority made trading partners reluctant to negotiate with the United States in the 1970s); Koh, *supra* note 103, at 148 (explaining that fast track negotiating authority enhances presidential credibility).

¹⁰⁵ It is not difficult to envision possible scenarios. The European Union, for example, plans to ban the importation of furs taken from animals that were caught in leg hold traps. See Caroline Southey, *EU Warns of Fur Trap Ban*, FIN. TIMES, Mar. 5, 1996, at 5. On the other hand, Wise Use, which consists of a group of very well-monied environmental nongovernment organizations, vehemently opposes almost all environmentally friendly legislation. See Mary

The outcomes of such clashes — and the impact of such clashes upon the domestic politics of member countries — would be unpredictable. Allowing private parties that were not successful when values and goals were balanced at the national level to have standing before dispute settlement parties would create an irreconcilable dissonance for countries engaged in the delicate process of trade negotiation. Countries would face one position at the negotiating table and another in tribunals. In turn, this would create uncertainty about a country's true position and cause reluctance by trading partners to negotiate with that country.

The second harm raised by the expansion of standing is inequity. Advocating a position in a domestic forum costs time, effort, skill, and money.¹⁰⁶ Likewise, advocating a position in an international forum is not free from significant costs.¹⁰⁷ Only those interest groups whose resources were not exhausted at the domestic level could take advantage of standing before the World Trade Organization. In other words, rather than resulting in a democratization of trade policymaking, expansion of standing

L. Gallagher, *Wise Use or Wise Marketing*, PLANNING, Jan. 1996, at 4; Kevin Carmody, *Environmental Backlash — Big Bucks Behind It*, SACRAMENTO BEE, June 25, 1995, at F2. The U.S. government also has indicated that it opposes the ban on importation of leg-caught fur. See *European Commission to Propose Delay in Banning Some Fur Imports Until 1997*, 12 Int'l Trade Rep. (BNA) 1972 (Nov. 29, 1995). If the United States changed its position and agreed to the legality of the ban, it would almost certainly ask for some concession in exchange. If standing were extended to nongovernmental entities, it is likely that Wise Use would seek on its own, or would join the action of another group seeking to have the ban ruled to be violative of a trade agreement. If Wise Use was successful, the United States would nonetheless retain the quid pro quo for its concession. This clash would appear at best to be a coincidence and at worst to be collusive. In either case, the European Union would be less likely to deal with the United States in the future.

This, of course, is but one example. As the World Trade Organization explores the intersections between trade and other social values and goals, hundreds of issues will arise on which governments will be required to take positions. To the extent that democracy works, these positions will reflect a consensus of or synthesis of the values of citizens.

¹⁰⁶ See Barbara A. Phillips & Anthony C. Piazza, *The Role of Mediation in Public Interest Disputes*, 34 HASTINGS L.J. 1231, 1242 (1983) (stating that public interest litigation is costly and time consuming).

¹⁰⁷ For example, advocating a position in the World Trade Organization dispute resolution process includes the consultation, panel, interim panel review, and appellate review stages. See Understanding, *supra* note 7, arts. 4, 6, 12, 15-17, 20, 33 I.L.M. at 1228-38. To complete this process, no less than hundreds of hours of skilled advocates are needed over the course of an entire year, at the bare minimum.

might instead be a boon to a select group of well-monied interest groups.

Determining which constituencies could appear before a panel adjudicating a dispute also raises questions of equity. The environmental movement provides a good example of the difficulties created by expanded standing. Although a precise numerical count is impossible, the United States alone is home to literally thousands of groups with environmental orientations.¹⁰⁸ Similarly, hundreds, if not thousands, of international nongovernmental organizations and nationally based nongovernmental organizations deal with environmental issues at the international level.¹⁰⁹ Believing that any one of these environmental groups could speak for all of them would display a profound ignorance of the environmental movement. In the rawest of terms, significant differences exist between recreationalists, conservationists, and preservationists.¹¹⁰ At the same time, a trade dispute panel cannot possibly hear from thousands of groups. The process of winnowing down this list to a manageable group of parties will involve normative and evaluative decisions that will be, at best, judgmental and, at worst, arbitrary.¹¹¹

Finally, and most seriously, expansion of standing might cause the World Trade Organization to move away from, or be unable to pursue, the goal of free trade. It can be argued that the low public profile of international trade policy has been one of the largest contributors to trade liberalization over the past fifty years.

¹⁰⁸ See, e.g., Joel Bleifuss, *The Grassroots Are Greener*, UTNE READER, July-Aug. 1994, at 78 (claiming that an information clearinghouse organization works with over 8,000 environmental groups).

¹⁰⁹ See CALIFORNIA INSTITUTE OF PUBLIC AFFAIRS, WORLD DIRECTORY OF ENVIRONMENTAL ORGANIZATIONS 17-28, 91-164 (Thaddeus C. Trzyna ed., 1989) (categorizing environmental organizations by area of interest and nationality).

¹¹⁰ Recreationalists press for immediate use of environmental resources, conservationists press for future use of environmental resources, and preservationists press for preservation of environments. See Philip M. Nichols, *Trade, Values and Differentiating Trade Sanctions: A Commentary on the Free Trade-Fair Trade Debate*, in ECONOMIC ANALYSIS OF INTERNATIONAL LAW (Alan O. Sykes & Jagdeep S. Bhandiri eds., forthcoming July 1996).

¹¹¹ Indeed, unless Professor Shell proposes to extend standing to any and all who seek it, including individuals, then he is not really advocating a system of participatory government. He is instead proposing a system in which representation by governments will be replaced with representation by special interest groups.

Although trade liberalization usually increases aggregate welfare, it must survive a serious gauntlet from conception to implementation. Both the beneficiaries of inefficient industries that could not survive competition and the recipients of monopolistic and oligopolistic rents that are created by protectionist laws generally oppose free trade.¹¹² Frequently, these interest groups are extremely adept at mobilizing resources against the implementation of trade liberalizing policies.¹¹³ In contrast, the beneficiaries of trade liberalization are far more diffuse and may not fully realize the benefits they gain from free trade.¹¹⁴ These diffuse and unknowing beneficiaries are less likely to mobilize resources to advocate implementation of free trade and oppose protectionist measures.¹¹⁵ Based on this reasoning, Daniel Verdier notes that the President, who is responsible to the entire nation, is generally more supportive of trade liberalization than Senators or Representatives who are more vulnerable to special interest constituencies within their jurisdictions.¹¹⁶

The international trade regime provides a buffer between the makers of trade policy and special interest groups. Having sorted out trade policy issues at the national level, bureaucrats are free to cooperate with other governments to maximize national and global welfare without the intrusion of special interests.¹¹⁷

¹¹² See Rowley & Tollison, *supra* note 93, at 143 (stating that artificial rents result from government intervention “designed to protect incumbent monopolists from rent-removing competitive entry”).

¹¹³ See Shell, *supra* note 37, at 878-79 (stating that uncompetitive producers “mobilize labor and other constituencies to protect them from foreign competition”).

¹¹⁴ See Rowley & Tollison, *supra* note 93, at 152 (noting that beneficiaries of trade liberalization lack incentives to gather information, organize, or vote).

¹¹⁵ See *id.* at 151; see also Atlas, *supra* note 70, at C1 (“A person who loses his job because of import competition knows [why he lost his job] . . . but the guys on both sides of his house don’t necessarily know that their jobs exist, in part, because their employer is an exporter.”) (quoting Robert McNeill, who heads the Emergency Committee for American Trade).

¹¹⁶ See VERDIER, *supra* note 79, at 275 (arguing that Congress needed the President’s help to “keep special interests at bay”).

¹¹⁷ See Kenneth W. Abbott, *The Trading Nation’s Dilemma: The Functions of the Law of International Trade*, 26 HARV. INT’L L.J. 501, 517 (1985) (describing the differential pressures faced by bureaucrats and elected officials). Although remnants of protectionism remain frustratingly stubborn, it cannot be denied that efforts to liberalize trade have been very successful. “The various rounds of multilateral trade negotiations have reduced tariffs to overall levels at which they no longer create a serious obstacle to trade.” Claus-Dieter

Allowing special interest groups to have standing before dispute settlement panels would obviate that buffer and subject policymakers to another level of protectionist pressure from special interest groups.

This pressure would be exacerbated by the mobilization of special interest resources that might be engendered by expanding standing to include those groups. Proceedings before dispute panels would present enticing avenues for blocking trade liberalization. Success before a panel could result in an immediate scaling back of trade liberalization, and thus would be worthy of special effort by a protectionist interest group. Even if protectionist groups were unsuccessful, however, the panel proceedings themselves would evoke the emotional commitment inherent in a trial. Whereas victories by special interest groups would immediately impede trade, losses might become rallying cries for later — and much more extensive — damage to the international trading system.¹¹⁸

5. COMPARISON OF THE WORLD TRADE ORGANIZATION TO THE EUROPEAN UNION

Professor Shell uses the European Union as a template for the

Ehlermann, *The International Dimension of Competition Policy*, 17 FORDHAM INT'L L.J. 833, 840 (1994). Indeed, much of the global prosperity since the 1940s can be attributed to the liberalization of trade rules. See JAGDISH BHAGWATI, PROTECTIONISM 7-9 (1988) (refuting alternate explanations to trade liberalization for post-war income growth); ANNE O. KRUEGER, PERSPECTIVES ON TRADE AND DEVELOPMENT 206-12 (1990) (estimating, for example, that removing exchange controls could cause the value of Turkish manufacturing output per unit of new investment to “almost double”).

¹¹⁸ Rather than one Tuna/Dolphin decision every 40 years, the World Trade Organization might be faced with 40, or even 400, every year. See Belina Anderson, *Unilateral Trade Measures and Environmental Protection Policy*, 66 TEMPLE L. REV. 751, 751 (1993) (reporting environmentalists' vigorous condemnation of the Tuna/Dolphin decision and noting that some groups “even called for reconsideration of the entire trade regime”). The Tuna/Dolphin decisions ruled that the United States' practice of barring the importation of tuna from countries that killed more than 1.25 times the number of dolphins killed by the U.S. tuna fleet violated the General Agreement. Notably, the two Tuna/Dolphin decisions, which did not reflect predominant values of some countries, including the United States, never became GATT law. See Nichols, *supra* note 110 (noting that the decision of the dispute resolution panel was never submitted for the approval of the contracting parties and therefore never became GATT law).

future of the World Trade Organization.¹¹⁹ Comparisons between the World Trade Organization and the European Union are inevitable and, at times, useful.¹²⁰ For purposes of standing, however, comparisons between the European Union — which in some cases allows private entities to have standing before the European Court of Justice — and the World Trade Organization are meaningless.

The critical difference between the two entities is found in their names. The European *Union* is a union. Its functions transcend simple trade; it also facilitates social, political, and regulatory integration.¹²¹ Economic integration must be distinguished from economic cooperation; the hard lesson of the European Union is that economic integration is not possible without each of these other forms of integration.¹²² A mere desire for economic integration, however, will not necessarily lead to social integration. Of the approximately seventy regional trading arrangements,¹²³ none has achieved the level of integration found in the European Union. Observers attribute the European Union's integration not to extant laws or economic policies, but instead to a commonality of values, experiences, and perspectives.¹²⁴ Simply stated, the European Union is integrated because, among other things, it is integratable.

The World Trade *Organization* is an organization, not a

¹¹⁹ See Shell, *supra* note 37, at 922.

¹²⁰ See, e.g., Claus-Dieter Ehlermann, *State Aid Control in the European Union: Success or Failure*, 18 FORDHAM INT'L. L.J. 1212, 1213 (1995) (explaining that GATT subsidies code drew from the experience of European Union state aid controls).

¹²¹ See STEPHEN WEATHERILL & PAUL BEAUMONT, EC LAW 23 (1993) ("The aspirations of the Union . . . encompass economic, social and political matters.").

¹²² Cf. Nichols, *supra* note 10, at 706-07 ("[I]t is no more possible to extricate an economy from the social mores in which it is embedded than it is to pull all of the bones out of a living chicken.").

¹²³ See Richard Harmsen & Michael Leidy, *Regional Trading Arrangements*, in 2 INTERNATIONAL TRADE POLICIES: THE URUGUAY ROUND AND BEYOND 88, 107-16 (Naheed Kirmani et al. eds, 1994) (documenting 68 agreements, ranging from promises of economic cooperation to complete economic union).

¹²⁴ See Philip Allott, *The European Community Is Not the True European Community*, 100 YALE L.J. 2485, 2492 (1991) ("[D]emocracy . . . [as a] system for communalizing all socially significant decisionmaking in accordance with a society's highest values . . . has come to seem natural and normal to most people in Western Europe.").

union. The goal of the World Trade Organization is to facilitate economic cooperation, not economic integration,¹²⁵ and certainly not political or social integration. Moreover, the 128 constituency countries of the World Trade Organization¹²⁶ are located throughout the globe. While exploring societal and cultural differences is beyond the scope of this article, it is safe to assume that the European commonalities are not replicated on a panglobal scale.¹²⁷

The European Court of Justice also differs markedly from dispute settlement panels and from the Dispute Settlement Body, which administers those panels.¹²⁸ The European Court of Justice is a permanent institution, distinct and independent of other European Union institutions. The fifteen members of the European Court of Justice serve renewable six-year terms,¹²⁹ enjoy lifetime immunity,¹³⁰ and cannot be removed from the

¹²⁵ See, e.g., Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking, reprinted in LEGAL TEXTS, *supra* note 58 (referring to "harmony," "coherence," and "cooperation").

¹²⁶ A year after its birth, the World Trade Organization has 112 members, plus another 16 which have not yet converted their old GATT memberships, but have joined the World Trade Organization in all but name. See *Knock*, *Knock*, *supra* note 84, at 74. The waiting list of countries that have applied for World Trade Organization membership now stands at 27. See *id.*

¹²⁷ In fact, one need not travel too far from Europe to find a culture that does not share the European commonalities. Turkey, which is strategically vital and economically important to Europe, is consistently denied membership in the European Union because of, among other things, a lack of common values. See John Barham, *Survey of Turkey: The Customs Union with Europe*, FIN. TIMES, Jan. 22, 1996, at 26. It is possible that Turkey, which does share some European values and 41% of whose citizens consider the country to be European, John Barham, *The Customs Union With Europe: Rumbles in the East as the Gate Opens*, FIN. TIMES, Jan. 22, 1996, at 25, will join the European Union and will become even more culturally integrated with Europe. While welcoming increased stability in Turkey, those who have stood in the silent streets of Konya during noon prayers, or who have enjoyed the shade of the little villages outside Kayseri, or who have celebrated nightly feasts of Ramadan by Lake Van, will be saddened.

¹²⁸ See Understanding, *supra* note 7, art. 2, 33 I.L.M. at 1226 ("The Dispute Settlement Body is hereby established to administer these rules and procedures and . . . the consultation and dispute settlement provisions of the covered agreements.")

¹²⁹ See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 167.

¹³⁰ See Protocol on the Statute of the Court of Justice of the European Economic Community, Apr. 17, 1957, art. 3, 298 U.N.T.S. 147, 148 (1958),

bench except for extreme cause.¹³¹ The Court has jurisdiction over a number of direct actions.¹³² The Court also has jurisdiction, at the request of a litigating party, to issue rulings regarding interpretation of European Union law in proceedings that originated and will terminate in domestic courts.¹³³ This means of jurisdiction accounts for “roughly half” of the privately initiated proceedings brought before the European Court of Justice,¹³⁴ and is the avenue through which the Court most often has refined its jurisprudence.¹³⁵

In contrast, the Dispute Settlement Board consists of the General Council — the legislative assembly of the organization — functioning under a different name.¹³⁶ The dispute settlement panels themselves are created on an ad hoc basis.¹³⁷ Parties to a dispute may, but need not, appeal a decision of a dispute panel to the Appellate Body, which consists of seven appointees with four-year terms who hear appeals in three-judge panels.¹³⁸ A

amended by 22 OJ Eur. Comm. No. L291/9 (1979).

¹³¹ See *id.* art. 6, 298 U.N.T.S. at 148-49.

¹³² These include direct actions: against a member state for failure to fulfill an obligation under various treaties or derived legislation; by the Council of Ministers for annulment of a European Union measure; by a Member state or a European Union institution against another institution for failure to take a required action; and against penalties imposed by the Union or for damages against the Union. See JOXERRAMON BENGOETXEA, *THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE: TOWARDS A EUROPEAN JURISPRUDENCE* 14-15 (1993).

¹³³ See *id.*

¹³⁴ Most of these proceedings are brought under article 177 of the EEC Treaty. See *id.*

¹³⁵ See *id.* (“This indirect action has been the main source of clarification and development of EC law.”).

¹³⁶ See Charter, *supra* note 6, art. IV(3), 33 I.L.M. at 1145. While it is functioning as the Dispute Settlement Body, the General Council may take on a different chairperson. See *id.*

¹³⁷ See Understanding, *supra* note 7, art. 6(1), 33 I.L.M. at 1230 (providing for the establishment of a dispute resolution panel “[i]f the complaining party so requests”).

¹³⁸ See *id.* art. 17, 33 I.L.M. at 1236. The rotation of Appellate Body members is coordinated so that three members will always be available. See *id.* art. 17(1), 33 I.L.M. at 1236. Judges of the Appellate Body must represent the World Trade Organization membership and include “recognized” experts in law, international trade, and the subject matter in dispute. See *id.* art. 17(3), 33 I.L.M. at 1236. Jurisdiction of the Appellate Body is limited to “issues of law covered in the panel report and legal interpretations developed by the panel.” *Id.* art. 17(6), 33 I.L.M. at 1236.

dispute settlement panel may be convened when a member country feels that any benefit accruing to it directly or indirectly under one of the trade agreements annexed to the World Trade Organization Charter is being nullified or impaired.¹³⁹

Dispute settlement panels are an integral, and integrated, component of the trade regulation process. Historically, panels proceeding under the General Agreement were consciously circumspect in their proceedings.¹⁴⁰ A core principle by which the panels operated was that their role was simply "to make findings regarding [the] interpretation and application"¹⁴¹ of the trade instruments, even when the issue involved a provision that was facially not viable or was widely disliked.¹⁴² This principle led at least one panel to caution that its ruling should be taken merely as an interpretation of the existing provisions, and should have no bearing on negotiations involving the provision in question.¹⁴³

¹³⁹ See *id.* arts. 3(3), 23, 33 I.L.M. at 1227, 1241. The trade agreements annexed to the World Trade Organization Charter are: the Multilateral Agreement on Trade in Goods, which includes the General Agreement as amended and now known as GATT 1994, see Charter, *supra* note 6, Annex 1A, 33 I.L.M. at 1154; the General Agreement on Trade in Services, see *id.* Annex 1B, 33 I.L.M. at 1167; and the Agreement on Trade-Related Aspects of Intellectual Property, see *id.* Annex 1C, 33 I.L.M. at 1197.

¹⁴⁰ See Andreas F. Lowenfeld, *Remedies Along With Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 479 (1994) (stating that dispute settlement under GATT primarily "aim[ed] at lowering tensions, diffusing conflicts, and promoting compromise").

¹⁴¹ Canada, Import Restrictions on Ice Cream and Yoghurt, Dec. 5, 1989, GATT BISD 36th Supp. 68, 85 (1990).

¹⁴² See *id.* at 85 (discussing member nations' dissatisfaction with, and efforts to revise the terms of, GATT Article XI:2(c)(i), an exception to the article under which the United States brought the dispute against Canada). The understanding, of course, was that the broader issues would then be discussed by all of the parties to the General Agreement, who could then debate those issues and modify the trade agreements as appropriate. Indeed, although many have applauded the fact that Mexico declined to proffer the contentious Tuna/Dolphin panel decision for a vote by the parties to the General Agreement, that decision has also been criticized. "[T]he Panel Report affected all members of the General Agreement and failure to move forward on the report was blocking progress on the larger debate regarding the relationship between trade development and environmental protection." Stanley M. Spracker & David C. Lundsgaard, *Dolphins and Tuna: Renewed Attention on the Future of Free Trade and Protection of the Environment*, 18 COLUM. J. ENVTL. L. 385, 386 n.7 (1993) (attributing argument to the European Community).

¹⁴³ See European Economic Community, Regulation on Imports of Parts and Components, May 16, 1990, GATT BISD 37th Supp. 132, 199 (1991)

By contrast, the European Court of Justice is not restricted to an interpretive role, but exercises discretion over the substantive development of binding principles. As two European commentators note:

The Court of Justice plays a significant role in the development of the European Communities, to some extent comparable with the role of the Supreme Court in the early years of the United States of America. Both are constitutional courts charged with the preservation and the development of the law in a new society.¹⁴⁴

It would be difficult to make such a grandiloquent claim for dispute settlement panels.

Although the European Court of Justice and World Trade Organization dispute panels both hold hearings and resolve disputes, dispute settlement panels are not courts and are not meant to be courts. To have standing to appear before the European Court of Justice is to have standing to appear before a court; to have standing to appear before a World Trade Organization dispute panel is not. It is fair, of course, to argue in the hypothetical that effective international trade governance requires the creation of a true international trade court, but that is a much different — and much more hypothetical — argument than is the debate over standing before dispute resolution panels. Neither expansion of standing nor an increase in the formal trappings of the Dispute Settlement Body, however, will transform that Body into a true court. The creation of a court would require the creation of a new and distinct organ in the World Trade Organization. Moreover, the many arguments against expanding standing before dispute settlement panels would be equally applicable to standing before such a court.

(noting concurrent negotiations over the administration of anti-dumping laws and emphasizing that its task was limited to interpreting “the existing provisions of the General Agreement”).

¹⁴⁴ HENRY G. SCHERMERS & DENIS F. WAELBROECK, *JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES* 1 (5th ed. 1992) (footnote omitted).

6. CONCLUSION: DEMOCRATIZING THE WORLD TRADE ORGANIZATION

There can be little doubt that the World Trade Organization shall and should deal with the interface between trade and other global issues. Its forays into the realm of social regulation, however, must for the moment be circumscribed. When the concept of sovereignty has lost all utility, when cultural differences have been minimalized, and when all societies have roughly the same set of values, then perhaps it will be possible and desirable for the World Trade Organization to shoulder Shell's proposed role as arbiter of social policy. At the present time, however, the World Trade Organization would collapse under the weight of societal differences, and the benefits of trade liberalization would be lost.¹⁴⁵

Similarly, calls for expanding the scope of standing before World Trade Organization dispute resolution panels should be heeded with caution. If, in the course of the World Trade Organization's evolution, a body of international trade law applicable to individuals develops, then expanded standing may become desirable. At the moment, however, such calls are suspect. Far from "democratizing" the process, expanded standing could create a forum only for well-monied special interest groups. In all likelihood, those groups would be more concerned with protecting their advantaged positions than in working for the common good.

The World Trade Organization is not the undemocratic institution that Professor Shell depicts; rather, it is a form of democracy with which Professor Shell is unhappy.¹⁴⁶ None-

¹⁴⁵ Alternatively, if the World Trade Organization were able to formulate and impose a social charter, the organization would lose legitimacy in the eyes of those cultures whose values the charter transgressed. As a result, the World Trade Organization would ultimately lose both its viability as an international organization and the benefits of trade liberalization.

¹⁴⁶ Shell's unhappiness with the World Trade Organization's form of democracy is somewhat surprising. The one country-one vote system that Shell castigates as "relatively primitive," Shell, *supra* note 37, at 922, is no different from that used in the U.S. Senate, or in the European Union's Council of Ministers. Indeed, Professor Robert Hudec has argued, albeit in a different context, that international negotiation of trade policy is no less "democratic" than the creation of policy through the ordinary legislative process. Robert E. Hudec, "Circumventing" *Democracy: The Political Morality of Trade Negotiations*,

theless, the fact that the World Trade Organization is democratic does not mean that it is perfect. The international trade regime has been roundly criticized for myopically exalting trade above other social values.¹⁴⁷ The impulse to legitimize the World Trade Organization by bringing its decisions into line with prevailing values (within reasonable moral bounds) is laudable. Popular perception of the World Trade Organization as illegitimate could threaten the organization's ability to function, even to the point of collapse.¹⁴⁸

In order best to protect other interests — including societal values — it is not, however, standing that should be expanded, but rather the composition of the dispute settlement panels themselves that should be changed. The Understanding on Dispute Settlement tilts composition of panels towards trade experts and, in practice, panels have been composed entirely of trade bureaucrats and scholars.¹⁴⁹ However, by stating that “[p]anel[s] shall be composed of well-qualified governmental and/or nongovernmental individuals, *including*” — as opposed to “limited to” — various types of trade experts, the Understanding does allow room for nontrade experts to sit on panels.¹⁵⁰ This window must be taken advantage of; experts in fields other than trade must be added to dispute resolution panels. While the majority of panel members should continue to be trade experts, there also must be thoughtful interpretation of and proper attention given to nontrade values by those most qualified to make such contributions. In a dispute that involves trade restrictions on products produced by child labor, for example, an official from the International Labour Organization could be included on the panel;

25 N.Y.U. J. INT'L L. & POL. 311, 312 (1993) (comparing the legitimacy of negotiated trade and domestic legislation).

¹⁴⁷ See Robert Howse & Michael J. Trebilcock, *The Fair Trade-Free Trade Debate: Trade, Labour and the Environment*, in ECONOMIC ANALYSIS OF INTERNATIONAL LAW, *supra* note 110 (“[F]ree traders have, in general, been too cavalier in their summary rejection of arguments that trade, environment, and labour should be linked.”); Nichols, *supra* note 10, at 700.

¹⁴⁸ See Nichols, *supra* note 10, at 707-09. Howse and Trebilcock put it far more prosaically: “If international trade law simply rules out of court any trade response to the policies of other countries, however abhorrent, then there will be an understandable, and dangerous, temptation to declare that international trade law is an ass.” Howse & Trebilcock, *supra* note 147, at 3.

¹⁴⁹ See Understanding, *supra* note 7, art. 8(1), 33 I.L.M. at 1231.

¹⁵⁰ *Id.* (emphasis added).

in a dispute over an environmental measure, an international environmental scholar could join the panel.

The World Trade Organization inherits from the GATT a world in which trade plays a vital role. Because trade is a central activity in human endeavors, the World Trade Organization must not turn a blind eye toward trade's connection with other social issues. Myopia, however, is cured not by changing *what* the eye is shown, but instead by changing *how* the eye sees. Changes in the World Trade Organization ultimately will depend not on who comes before its dispute panels, but instead on who makes the decisions.