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LINKAGES AND GOVERNANCE: NGOs AT THE
WORLD TRADE ORGANIZATION

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1. INTRODUCTION

This Article explores the role of the World Trade Organization (“WTO”) as part of an emerging system of international governance. I focus on a set of inescapable linkages from the trade regime, to other policy issues and goals, such as environmental protection. I further argue that the future success and effectiveness of the World Trade Organization depends not only on its ability to effectively manage these linkages but also on its capacity

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to simultaneously absorb the lessons of welfare economics, competition theory, public choice analysis, federalism, and other analytic tools that underpin these linkages. I note, in particular, that with a broader, more interdisciplinary understanding of its role, the WTO¹ might come to see that its current hostility toward non-governmental organizations ("NGOs") is misplaced and harmful to the performance and public legitimacy of the international trading system.

2. AN INTERDISCIPLINARY FRAMEWORK FOR UNDERSTANDING TRADE LINKAGES

The WTO has emerged as a central element of the world's international economic management structure.² This system, which also includes the World Bank, the International Monetary Fund ("IMF"), and a growing series of regional trade regimes, provides a mechanism for addressing international economic interdependence and for promoting economic interactions that offers the promise of maximizing social welfare across the planet.³ International economic institutions have taken on a special importance in the post-Cold War era as international relations have evolved beyond a narrow focus on politico-military affairs. "Security" today involves a set of economic issues and other variables that combine to reflect a general diminishment of the threat of war.⁴ A number

¹ This phrase suggests a personification of the WTO that refers to the participants in the international trading system, including the staff of the WTO and the national representatives that guide the organization. A prior article based on the same conference has been previously published. See Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. OF INT'L ECON. L. 123 (1998) [hereinafter Esty, NGOs].

² See PITOU VAN DIJCK & GERRIT F. FABER, CHALLENGES TO THE NEW WORLD TRADE ORGANIZATION 24 (1996); see also THE WORLD TRADING SYSTEM: CHALLENGES AHEAD (Jeffrey J. Schott ed., 1996) (presenting a collection of papers from the June 1996 Conference on World Trade Policy that focuses on new issues facing the WTO); John Jackson, *Reflections on Constitutional Changes to the Global Trading System*, 72 CHI. KENT L. REV. 511, 519-20 (1996) [hereinafter Jackson, *Reflections*] (relating the WTO to international economic regulation and GATT).

³ For discussions of the global trade system, see ROBERT GILPIN, THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS 171 (1987); JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT (1994); JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF ECONOMIC RELATIONS (2d ed. 1997); Jackson, *Reflections*, *supra* note 2, at 512-15.

⁴ Daniel C. Esty, *Pivotal States and the Environment*, in UNITED STATES STRATEGY AND THE PIVOTAL STATES: TESTING AN INTELLECTUAL HY-

of academic disciplines can provide theoretical guidance in determining the type of governance structure needed to manage international economic relations.

2.1. *Welfare Economics*

The triumph of market economics is now apparent around the world. Economists, however, have long understood that economic systems do not operate efficiently without regulatory structures to prevent externalities and other market failures.⁵ Market failure will occur without mechanisms to internalize externalities, such as pollution, and the use of “collective action” to manage common resources. This failure will reduce the allocative efficiency of the economic system and result in reduced social welfare, environmental degradation, and over-exploitation of shared resources.⁶ Thus, for the WTO to realize the potential benefits of trade and investment liberalization, it must find ways to ensure that market failures do not plague international economic relations.

POTHESIS (Paul Kennedy et al. eds., 1998). For discussions of the changing definition of “security”, see Jessica T. Mathews, *Power Shift*, FOREIGN AFF., Jan.-Feb. 1997, at 50-51; Jessica Tuchman Mathews, *Redefining Security*, FOREIGN AFF., Spr. 1989, at 162; Norman Myers, *Environment and Security*, FOREIGN POL’Y, Spr. 1989, at 23; Richard H. Ullman, *Redefining Security*, INT’L SECURITY, Summer 1983, at 129.

⁵ See generally WILLIAM J. BAUMOL & WALLACE E. OATES, *THE THEORY OF ENVIRONMENTAL POLICY* (1978) (presenting a theoretical analysis of the interaction between economics and the environment); ANDRÉ DUA & DANIEL C. ESTY, *SUSTAINING THE ASIA PACIFIC MIRACLE: ENVIRONMENTAL PROTECTION AND ECONOMIC INTEGRATION* (1997).

⁶ See generally DUA & ESTY, *supra* note 5 (explaining how and why market failures cause environmental harm and economic inefficiency which result in welfare losses). See, e.g., MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 28 (1965) (discussing the “tendency of small groups towards a suboptimal provision of collective goods”); Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244-45 (1968) (discussing the “Tragedy of Freedom in a Commons”); Carol Rose, *The Comedy of the Commons: Custom, Commerce and Inherently Public Property*, 53 U. CHI. L. REV. 711, 711-13 (1986) (discussing the “conundrum of public property” in a society that values exclusive property rights); Gordon Tullock, *Federalism: Problems of Scale*, 6 PUB. CHOICE 19, 25-28 (1969) (discussing the optimal size of government to internalize externalities).

2.2. *Regulatory Federalism*

The growing literature on regulatory federalism reinforces the suggestion that the WTO, as the centerpiece of the international economic management structure, must play a regulatory role and contain economic interactions with rules designed to prevent market failure. The American work on federalism⁷ and the European Union's work on subsidiarity⁸ suggest that to be effective, regulatory intervention must occur on a scale commensurate with the scope of either the externality to be addressed, the public good to be provided, or the open access resource to be managed.

The fact that certain environmental issues and regulatory questions are global in scale requires that some international body play a leadership role. While other institutions, such as the World Bank or an as-yet-not-created Global Environmental Organization, could carry the burden of regulating and generating the requisite collective action, there is no presently existing body as well positioned as the WTO to ensure that market failures do not plague the global economy. Moreover, international environmental problems and challenges relating to the management of the global commons, such as the looming threat of climate change due to greenhouse gas emissions, the challenge of protecting the biological diversity of the planet, the depletion of fisheries across the seven seas, and trans-boundary spillovers of acid rain, continue to grow on a daily basis.

⁷ See generally Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE J. ON REG. 23 (1996) (advocating for a decentralized approach to environmental regulation); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996) [hereinafter Esty, *Revitalizing*] (arguing for centralized environmental regulation); Richard B. Stewart, *International Trade and Environment: Lessons from the Federal Experience*, 49 WASH. & LEE L. REV. 1329 (1992) (providing an analytical structure on issues of law and policy presented by trade-related environmental regulation).

⁸ For discussions of subsidiarity, see George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994); Denis J. Edwards, *Fearing Federalism's Failure: Subsidiarity in the European Union*, 44 AM. J. COMP. L. 537 (1996); Paul D. Marquardt, *Subsidiarity and Sovereignty in the European Union*, 18 FORDHAM INT'L L.J. 616 (1994); Joel P. Trachtman, *L'Etat C'est Nous: Sovereignty, Economic Integration and Subsidiarity*, 33 HARV. INT'L L.J. 459 (1992); W. Gary Vause, *The Subsidiarity Principle in European Union Law—American Federalism Compared*, 27 CASE W. RES. J. INT'L L. 61 (1995).

2.3. *Regulatory Failure*

While market failures are pervasive, so too are regulatory failures. Government intervention to prevent market failure can be unsuccessful for many reasons.⁹ “Structural failures” arise when issues are dealt with on the wrong geographic scale.¹⁰ Given the weakness of the global governance structures, intervention on a scale sufficient to internalize global-scale externalities poses special difficulties.¹¹ Regulatory effectiveness and efficiency also require basic scientific and technical competence and a capacity to overcome public choice failures.¹² Regulatory failures can be found at every level of government, but are especially common at the international level.¹³ Since the WTO cannot avoid playing a regulatory role, it must find ways to strengthen its performance to avoid widespread failure while in its regulatory mode.

3. THE CHALLENGE OF “TRADE AND” DECISION-MAKING AT THE WTO

The keepers of the Global Agreement on Tariffs and Trade (“GATT”) have done much to promote improved social welfare

⁹ See generally J. CLARENCE DAVIES & JAN MAZUREK, *POLLUTION CONTROL IN THE UNITED STATES: EVALUATING THE SYSTEM* (1998) (evaluating and analyzing government pollution policy with the goal of preserving successful environmental policy and reforming the failures); MARK LANDRY ET AL., *THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS FROM NIXON TO CLINTON* (1994) (seeking “to uncover the mistaken premises that have clouded and distorted debate about environmental policy and have led the EPA to make some poor policy decisions”); Esty, *Revitalizing*, *supra* note 7, at 577-99 (arguing that unclear property rights within the environmental arena cause market failures in this area).

¹⁰ Esty, *Revitalizing*, *supra* note 7, at 587-97 (explaining why regulation at the “wrong” level of government causes “structural” failure).

¹¹ For discussions of structural mismatch, see generally John B. Braden, *The Economics of Environmental Policy-making in a Multi-layer Government Structure*, in RECENT ECONOMIC AND LEGAL DEVELOPMENTS IN EUROPEAN ENVIRONMENTAL POLICY (Filip Abraham et al. eds., 1995) (considering “the allocation of regulatory powers over environmental protection between local and central governments”); Esty, *Revitalizing*, *supra* note 7, at 587-99 (noting the difficulty of taking into account all the positive and negative externalities of a given environmental regulation).

¹² See Esty, *Revitalizing*, *supra* note 7, at 585-87 (noting that technical welfare losses may arise from miscalculations of environmental risks and administrative costs).

¹³ See VAN DIJCK & FARBER, *supra* note 2; Jackson, *Reflections*, *supra* note 2, at 512-14 (examining when governments should regulate in the context of market failure).

through trade liberalization.¹⁴ Through successive rounds of trade negotiations, the international trading system has reduced tariffs, established widely followed principles for economic interaction, and created a well functioning dispute resolution system.¹⁵

Unfortunately, the WTO, like the GATT before it, has performed less effectively in dealing with "trade and" issues such as environmentally-related trade disputes. Beyond the narrow trade realm, the WTO's authority is often questioned. The organization lacks the capacity to make decisions on environmental issues and other non-trade subjects when dealing with problems that require expertise.¹⁶ As stated, the ideal international governance structure would not force the WTO to make environmental decisions or other regulatory judgments outside its zone of established competence. Such tasks are better left to a Global Environmental Organization.¹⁷ The prospect, however, of a functioning international environmental management structure emerging in the near future is bleak. The WTO, by default, must play a regulatory

¹⁴ See JACKSON, THE WORLD TRADING SYSTEM, *supra* note 3, at 7 ("[T]he liberalization of trade and financial flows promoted by this postwar system, sometimes broadly called the Bretton Woods System, had progressed far enough to foster an unprecedented surge of trade and to demonstrate the economic benefits that flow from such liberalization."); see also Barry Eichengreen & Peter B. Kenen, *Managing the World Economy under the Bretton Woods System: An Overview*, in MANAGING THE WORLD ECONOMY: FIFTY YEARS AFTER BRETTON WOODS, 3-7, 21-27 (Kenen, ed. 1994).

¹⁵ See VAN DIJCK & FABER, *supra* note 2, at 24; JACKSON, THE WORLD TRADING SYSTEM, *supra* note 3; Jackson, *Reflections*, *supra* note 2, at 519-20 (discussing the current structure of the WTO); cf. Jeffrey Dunoff, *Institutional Misfits: The GATT, The ICJ and Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043, 1063-66 [hereinafter Dunoff, *Misfits*] (criticizing GATT dispute resolution).

¹⁶ See DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 115 (1994) [hereinafter ESTY, GREENING THE GATT] (noting that environmentalists question GATT's policy of making environmental judgments); Dunoff, *Misfits*, *supra* note 15, at 1063-65 (stating that in trade/environment conflicts, the dispute resolution process is biased against environmental interests); Jeffrey L. Dunoff, "Trade And": *Recent Developments in Trade Policy and Scholarship—and Their Surprising Political Implications*, 17 NW. J. INT'L L. & BUS. 759, 763 (1996-97) [hereinafter Dunoff, "Trade And"] (arguing that GATT is not equipped to review national environmental priorities).

¹⁷ See ESTY, GREENING THE GATT, *supra* note 16, at 73-98 (arguing for a Global Environmental Organization); see also Daniel C. Esty, *The Case for a Global Environmental Organization*, in MANAGING THE WORLD ECONOMY: FIFTY YEARS AFTER BRETTON WOODS 287 (Peter B. Kenen ed., 1994) [hereinafter Esty, *The Case*] (arguing the same).

role in the environmental realm and perhaps in other areas as well.

The WTO faces a further challenge to its ability to fairly and openly make regulatory judgments. Few outside the world of trade experts understand how the WTO operates. This lack of public understanding is exacerbated by the WTO's closed nature.¹⁸ Because the procedures of the international trading system, particularly dispute resolution activities, are not transparent, many outside observers suspect that the process is potentially biased in favor of producer interests and trade principles. The WTO thus faces challenges both to the procedural fairness of its activities and to the substantive fairness of its decisions.

All international bodies with governance responsibilities face an additional challenge. This challenge is related to their perceived lack of representation of and responsiveness to the communities around the world that must live with their decisions. Political science literature views decisions made at a great distance from ordinary citizens as creating a "democratic deficit."¹⁹ As the WTO takes a larger and more visible role as an international decision-making body, its representativeness will be increasingly scrutinized.

In sum, the *legitimacy* of the WTO as an international entity is questionable. In the United States, few question Congress' authority to make regulatory decisions or the courts' ability to interpret those rules in actual cases.²⁰ Parallel efforts by the WTO to set forth rules for international economic interaction and to interpret such principles through dispute resolution procedures

¹⁸ See ESTY, GREENING THE GATT, *supra* note 16, at 35-36 (describing the claims of special interest groups that the GATT and NAFTA are secretive and harmful deals); Esty, NGOs, *supra* note 1, at 128 (describing the public misperception that the WTO is secretive in nature); Ralph Nader, *Free Trade and the Decline of Democracy*, in THE CASE AGAINST FREE TRADE: GATT, NAFTA, AND THE GLOBALIZATION OF WORLD POWER (1993).

¹⁹ Naomi Roht-Arriaza, *The Committee on the Regions and the Role of Regional Governments in the European Union*, 20 HASTINGS INT'L & COMP. L. REV. 413, 420 (1997) (discussing the emergence of and desire to remedy a democratic deficit in the EU); see generally Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 NW. J. INT'L L. & BUS. 1014, 1038 (1996-97) (describing how "democratic deficit" undercuts the effectiveness of a global network).

²⁰ See Esty, NGOs, *supra* note 1, at 127 n.18 (noting that the U.S. Supreme Court is rarely criticized for making trade and environment decisions despite the fact that it has no more knowledge on those subjects than the WTO, which is often criticized for deciding such matters).

have led to firestorms of protest.²¹ The WTO cannot perform its coordinating role under these conditions.

4. NGOS AND WTO LEGITIMACY

Most officials within the international trading system, both those who are part of the WTO Secretariat and those in Geneva who represent national interests, believe that greater participation by NGOs in the work of the WTO would harm the international trading system.²² There are, however, important reasons to believe that a more open WTO process, which would include greater participation by a wider range of groups, would enhance the effectiveness and legitimacy of the WTO. Specifically, NGOs might sharpen WTO regulatory performance by providing competition to the government officials that currently carry out these responsibilities.²³ Additionally, NGOs could help address the representation issues raised when decisions made in Geneva have global effects.²⁴

4.1. *NGOs' Cooperation with the WTO*

Decision-making by the WTO, in interpreting the rules of international trade, is both inevitable and essential. As noted above,

²¹ The recent furor in the United States over the shrimp-turtle decision follows prior distress generated by the infamous tuna-dolphin dispute and other "trade and environment" cases. See, e.g., *Trade: WTO Shrimp-Turtle Ruling Will Not Halt U.S. Protection Efforts, Barshefsky Vows*, 68 DAILY ENVTL. REP. (BNA) at A-4 (Apr. 9, 1998) (reporting U.S. Trade Representative Barshefsky's reaction to an adverse WTO ruling); David Vogel, *Reconciling Free Trade with Responsible Regulation*, ISSUES SCI. & TECH., Fall 1995, at 73, 76-78 (discussing the tuna-dolphin dispute).

²² For examples of the argument against broader participation of NGOs, see Jagdish Bhagwati & T.N. Srinivasan, *Trade and the Environment: Does Environmental Diversity Detract from the Case for Free Trade?*, in FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 159, 195-96 (Jagdish Bhagwati & Robert Hudec eds., 1996) [hereinafter Bhagwati & Srinivasan]; Philip M. Nichols, *Realism, Liberalism, Values, and the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 851, 851-72 (1996) (expressing concerns about expanding the role of NGOs in WTO dispute settlement panels). Cf. William M. Reichert, Note, *Resolving the Trade and Environment Conflict: The WTO and NGO Consultative Relations*, 5 MINN. J. GLOBAL TRADE 219, 237-243 (1996) (arguing in favor of consultative relations between NGOs and the WTO).

²³ See Esty, *NGOs*, *supra* note 1, at 135-37 (arguing that the public would be better served if NGOs became more involved in WTO decisions).

²⁴ For discussions of representation issues, see *id.* at 128.

the results of the WTO's trade liberalization efforts will be diminished if it fails to address issues such as the threat of environmental externalities. Nevertheless, WTO decisions inescapably raise questions about loss of sovereignty and a lack of democracy. The organization can develop links to dispersed citizens around the world in whose interests it carries out trade liberalization efforts by involving NGOs more formally in the operation of the WTO. NGOs, often more successfully than governments, maintain relationships with individual citizens who care about various issues that may be under consideration either directly or indirectly within the WTO.²⁵ Individuals, for example, who care about the protection of endangered species are far more likely to get information about the impact of trade on endangered species through the World Wildlife Fund than through their own national governments.²⁶ It makes sense for World Wildlife Fund officials to be included in WTO discussions that might concern the preservation of species.

World Wildlife Fund officials who monitor events at the WTO would then be able to report back to their members around the world about the activities occurring in Geneva. If trusted NGO sources produce regular reports explaining WTO operations, the public will come to better understand how the WTO works and makes decisions.²⁷ Environmental activists may still disapprove of some outcomes, but the sense of arbitrariness and obscurity currently attached to WTO decisions might partially abate.

A further step toward addressing the WTO's democratic deficit would be taken if NGO representatives at the WTO were allowed to go beyond observation of the discussions taking place in Geneva and were permitted to make submissions representing their views.²⁸ Hearing NGO views in the context of dispute reso-

²⁵ See Esty, *NGOs*, *supra* note 1, at 131-32 (describing the shortcomings of government representation of public interests).

²⁶ See *id.* at 132.

²⁷ Cf. Ann Marie Clark, *Non-Governmental Organizations and Their Influence on International Society*, 48 J. INT'L AFF. 507, 518-21 (1995) (describing the role NGOs can play in providing for the public exchange of information); Esty, *NGOs*, *supra* note 1, at 134 (describing the role NGOs can play in sharing information about the WTO with the public); Paul Ghils, *International Civil Society: International Non-Governmental Organizations in the International System*, 44 INT'L. SOC. SCI. J. 417 (1992).

²⁸ For a discussion of the NGOs' ability to represent transnational interests, see PAUL WAPNER, *ENVIRONMENTAL ACTIVISM AND WORLD CIVIC*

lution efforts or general governing council discussions poses little threat to the deliberations of these bodies and would offer the potential for better informed decision-making.²⁹ Indeed, when "trade and" issues are being addressed, it is clear that outside perspectives would enhance WTO deliberations.³⁰

Not only do NGOs offer specific substantive area expertise that cannot possibly be found within the small Secretariat of the WTO, but non-governmental entities also represent, in a way that governments cannot, the richness and diversity of civil society.³¹ While traditional international relations theory focuses on state-to-state relations, more modern learning about international affairs highlights the more complex set of actors on the global stage.³² A more inclusive approach to environmental groups and other NGOs would allow the WTO to hear voices that it might otherwise miss if it limits discussions to those in official capacities. The opportunity to strengthen the substantive foundation for WTO decision-making is clear. In addition, the opportunity to fold NGO perspectives into the WTO would help to broaden the

POLITICS (1995) (describing four different NGOs and their international involvement). See Esty, *NGOs*, *supra* note 1, at 131 (arguing that NGO participation would allow minority voices to be heard); see also, Wendy Schoener, Note, *Non-governmental Organizations and Global Activism: Legal and Informal Approaches*, 4 IND. J. GLOBAL LEGAL STUD. 537, 564-66 (1997) (describing NGOs' contribution to an Argentine human rights organization).

²⁹ See Esty, *NGOs*, *supra* note 1, at 143-47 (describing the benefits of NGO participation in WTO activities).

³⁰ See ESTY, GREENING THE GATT, *supra* note 16, at 115-16 (describing how the GATT might benefit in environmental issues by seeking environmental experts); Dunoff, *Misfits*, *supra* note 15, at 1063-66 (discussing GATT's closed decision-making process and its lack of environmental expertise); Dunoff, "Trade And," *supra* note 16, at 763-64 (questioning WTO expertise as it expands into new substantive areas).

³¹ See Esty, *NGOs*, *supra* note 1, at 132; see also Barbara J. Bramble & Gareth Porter, *Non-Governmental Organizations and the Making of US International Environmental Policy*, in THE INTERNATIONAL POLITICS OF THE ENVIRONMENT 313, 315-322 (Andrew Hurrell & Benedict Kingsbury eds., 1992) (providing an example of the diversity in characteristics of different environmental NGOs).

³² For discussions of the evolving conceptions of states' roles, see MARVIN S. SOROOS, BEYOND SOVEREIGNTY: THE CHALLENGE OF GLOBAL POLICY 75-119 (1986) (describing the actors and the roles they play in shaping global policy). See generally STATE SOVEREIGNTY AS SOCIAL CONSTRUCT (Thomas J. Biersteker & Cynthia Weber eds., 1996) (providing different examples of state sovereignty); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2604-41 (1997) (describing the evolution of international law).

base of the organization's decision-making structure.³³ Indeed, the presence of NGO perspectives would help to mitigate the public choice distortions that might otherwise arise because some of the national representatives in Geneva are sent by governments that are not fully democratic.³⁴ Moreover, the presence of NGO representatives permits the intensity of public preferences to be registered in a way that national government representation cannot.³⁵

An expanded role for NGOs, particularly environmental groups, in the workings of the international trading system, would not only address public choice problems that might otherwise diminish the legitimacy of WTO decision-making, but would offer the prospect of broader political support for trade and investment liberalization. Specifically, the coalition in support of freer trade is often narrow, especially in the United States. Prospects for trade liberalization may be strengthened by ensuring that environmentalists feel comfortable within the pro-free-trade camp. Also, since the environmental community represents a critical swing constituency in trade debates,³⁶ from the perspective of political economy, it is logical to try and make them feel welcome in the pro-free trade camp.

³³ See Esty, *NGOs*, *supra* note 1, at 132-33.

³⁴ See *id.*; see also ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW 166-67 (1991) (describing how a lack of public discussion allows for the circumvention of "grey area trade restrictions").

³⁵ For a discussion of how public preference can be undermined, see Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 75 (1990).

³⁶ A number of environmental NGOs supported NAFTA after their inclusion in the negotiation process. See JOHN J. AUDLEY, GREEN POLITICS AND GLOBAL TRADE: NAFTA AND THE FUTURE OF ENVIRONMENTAL POLITICS 64-92 (1997) (discussing the ability of environmental groups to have a formalized role in trade policy by posing a credible threat to NAFTA's success); ESTY, GREENING THE GATT, *supra* note 16, at 27-28 (discussing the critical role of environmental NGOs in the NAFTA negotiations); Frederick M. Abbott, *Foundation-Building for Western Hemispheric Integration*, 17 NW. J. INT'L L. & BUS. 900, 924-26 (1996-7); Daniel C. Esty, *Environmentalists and Trade Policy-making*, in REPRESENTATION OF CONSTITUENT INTERESTS IN THE DESIGN AND IMPLEMENTATION OF U.S. TRADE POLICY (Alan V. Deardorff & Robert M. Stern eds., 1998).

4.2. *NGOs as Competition at the WTO*

An expanded role for NGOs at the WTO would not only provide the "connective tissue" that could bring WTO decision-makers into closer contact with their public, but it might also provide intellectual competition that would improve the effectiveness of the WTO as a regulatory body.³⁷ The need for intellectual competition is especially acute in the environmental domain. Environmental decision-making is marked by uncertainty, technical complexity, and the dynamic nature of the natural environment. Good environmental policy-making requires that the prevailing wisdom be constantly re-examined. In this respect, multiple perspectives provide an opportunity to triangulate on the truth.³⁸ Given the difficulty of identifying optimal environmental policies, it is useful to have competing entities trying to develop better policy analysis, strategies, and tools. This competition is likely to improve decision-making and to make environmental policy-making more efficient.³⁹

I argue for a new type of "regulatory competition." Relying on horizontally-arrayed governments to compete with each other in the environmental policy domain offers very limited prospects for innovation or efficiency.⁴⁰ I believe that non-government entities are better positioned to play the role of intellectual competi-

³⁷ See Esty, *NGOs*, *supra* note 1, at 135-37 (discussing the benefits of competition to WTO decision-making).

³⁸ See generally Esty, *Revitalizing*, *supra* note 7, at 578-80 (presenting a discussion of the many technical dimensions of environmental policy-making and thus the value of having multiple policy efforts existing simultaneously).

³⁹ See Esty, *NGOs*, *supra* note 1, at 135-37 (referring to the benefits of competition in WTO decision-making).

⁴⁰ For discussions of "traditional" regulatory competition, see William A. Fischel, *Fiscal and Environmental Considerations in the Location of Firms in Suburban Communities*, in *FISCAL ZONING AND LAND USE CONTROLS* 119 (Edwin S. Mills & Wallace E. Oates eds., 1975) (commenting on this phenomenon as it applies to land use); Wallace E. Oates & Robert M. Schwab, *Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing*, 35 J. PUB. ECON. 334 (1988) (describing competition among jurisdictions for mobile capital); Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 538-40 (1997) (discussing interstate and federal competition in economic regulation); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (discussing the problems presented by federal and local government expenditures on public goods).

tors.⁴¹ By bringing to bear competing data, information, theoretical assumptions, divergent perspectives on the current environmental reality, and alternative approaches to addressing problems, NGOs force government officials to reassess and justify their own policy choices. NGOs are well established as environmental policy competitors in the national realm, at least in the United States.⁴² Bringing the same competitive pressures to bear internationally promises to yield real dividends.

Intellectual competition is likely to be particularly helpful when the WTO is asked to deal with "trade and" issues in which its own expertise is limited. The WTO staff is made up of trade experts, oriented toward the promotion of trade liberalization and having a world view shaped by the principles of orthodox economics. This shared sense of purpose and intellectual underpinning create a powerful trade-focused culture.⁴³

One might imagine that national governments could bring competing analyses to bear at the WTO. Most of the government officials assigned to the WTO, however, also have trade backgrounds, and share the assumptions and training that mark the WTO staff.⁴⁴ NGOs, on the other hand, bring a more diverse set of assumptions and theoretical approaches to the questions facing the WTO. In addition, NGOs are often more nimble and entrepreneurial than government officials, allowing them to move

⁴¹ See Esty, *NGOs*, *supra* note 1, at 136 (comparing NGOs and governments as intellectual competitors).

⁴² See Esty, *NGOs*, *supra* note 1, at 136; see also Elizabeth Dowdeswell & Steve Charnovitz, *Globalization, Trade, and Interdependence*, in *THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY* 91, 99 (Marian R. Chertow & Daniel C. Esty eds., 1997) (describing possible future roles for NGOs in developing environmental policy); Dunoff, "Trade And," *supra* note 16, at 763-64 (raising questions of the WTO's ability to deal with environmental issues).

⁴³ For discussions of the liabilities implicated by the WTO's moving beyond trade issues, see GATT Report by the Chairman of the Group on Environmental Measures and International Trade presented to the Contracting Parties at the Forty-Ninth Session, GATT B.I.S.D. (40th Supp.) at 75 (1992-3); Dunoff, *Misfits*, *supra* note 16, at 1063-66; Dunoff, "Trade And," *supra* note 16, at 762-64.

⁴⁴ See Esty, *NGOs*, *supra* note 1, at 136 (discussing the narrow "trade" perspective of both WTO staff and the national government officials who are assigned to this body).

quickly to bring new thinking to the fore, and to re-shape debates.⁴⁵

In addition to the "horizontal" policy competition that would be engendered by giving NGOs a broader role at the WTO, the organization would also benefit from a greater degree of "vertical" competition. Specifically, global decision-making should be both infused with and challenged by the best thinking from national decision processes and lower levels of government. When issues are played out across multiple levels of government, the prospect that "wrong" answers will be agreed upon and persist over time is reduced. The competing levels of government act as a system of checks and balances.⁴⁶ In this regard, richer "WTO politics" would not only improve WTO decision-making, but would also help to compensate for inadequate national trade policy debates and weak national trade policy-making.

5. NGOs AS SPECIAL INTEREST GROUPS

The argument against giving non-governmental organizations a broader role in the decision-making processes of the WTO usually focuses on the risk that these groups will act as narrow special interest groups and manipulate the policy outcomes of the WTO.⁴⁷ Such fears are exaggerated.⁴⁸

⁴⁵ See *id.* at 136-37 (comparing NGOs to governments as intellectual competitors and idea generators).

⁴⁶ See Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 5 THE WRITINGS OF JAMES MADISON 17, at 23 (Gaillard Hunt ed., 1904); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 247 n.134 (1985) (stating that the Federalist enterprise was conceived of as a way to "erect a strong bulwark of individual rights" against overbearing state governments); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1444-51 (1987) (discussing Federalism and vertical divisions of power); Esty, *NGOs*, *supra* note 1, at 137 (discussing the benefits of horizontal and vertical competition).

⁴⁷ See Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295, 318-20 (1996) [hereinafter Nichols, *Extension*]; Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957, 963 (1996) (discussing alternative marketplace regulators in light of the decline of state control).

⁴⁸ See Esty, *NGOs*, *supra* note 1, at 139 (stating that the fears of NGOs' manifestations at the WTO are overblown since many other special interests already are present at the WTO); *but see* Arvind Subramanian, *Trade Measures for Environment: A Nearly Empty Box?*, 15 WORLD ECONOMY 135 (1992) (suggesting that the trade system is at constant risk of "capture" by special interests, including environmental groups).

The threat of special-interest driven policy distortions does not arise equally across all of the roles that NGOs might play at the WTO. Notably, allowing NGOs to observe WTO processes, including Council meetings and dispute resolution proceedings, offers the potential for significant benefits at little risk.⁴⁹ Permitting NGOs to watch and report on WTO activities would improve the public's understanding of the international trading system and reduce the obscurity of WTO decision-making.⁵⁰ The fact that NGOs witness trade issue debates is not likely to create any risk of special interest manipulation within the WTO. There is some risk that NGOs, with more knowledge of how a particular WTO decision process is unfolding, will go to their national governments and exert pressure to affect the outcome. In many respects, such lobbying at the national level already takes place, though only by a subset of the special interest community (producer interests) who happen to have inside information about WTO proceedings.⁵¹

The issue of whether NGOs should be allowed to participate in WTO activities raises harder questions, but I do not think the risks tip the balance toward exclusion. Allowing NGOs to make submissions to dispute resolution panels, for example, would likely help inform the decision-making process and minimize the risk that the decision-makers would be unduly influenced. Similarly, allowing NGOs to present their views during Council debates would only sway decision-makers if the arguments were thoughtful and well-informed.

Some WTO observers suggest that more open procedures would make it more difficult for governments to intentionally lose a case where domestic political pressures are forcing them to advance a protectionist point of view. This, however, cannot

⁴⁹ See Esty, *NGOs*, *supra* note 1, at 144-45 (outlining arguments for NGO observation of the WTO).

⁵⁰ For a discussion of the importance of transparency, see J. Oloka-Onyango, *Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa*, 26 CAL. W. INT'L L.J. 1 (1995) (discussing economic and human rights on the African continent).

⁵¹ See Nichols, *Extension*, *supra* note 47, at 319-20 (pointing out that the buffer between makers of trade policy and special interest groups allows cooperation among governments without the intrusion of special interest groups); Nichols, *Realism*, *supra* note 22, at 860 (suggesting that the fact that NGOs do not appear before dispute panels acts as a buffer between decision makers and specific interest groups); Petersmann, *supra* note 34 (describing how users of "grey area trade policies" circumvent open and informed public discussion).

serve as a defense for keeping NGOs and the broader public in the dark about WTO activities. Indeed, obscurity in decision-making almost always produces more severe public choice distortions than transparent processes where the relevant assumptions and views are available for all to see.⁵²

Some of the resistance to allowing environmental groups into the WTO clearly arises from a fear that most NGOs are protectionist by nature.⁵³ Yet while some environmental groups do not seriously view free trade as a policy goal, many others do.⁵⁴ There are already a great number of protectionist interests that operate within the walls of the WTO, representing a variety of producer interests.⁵⁵ Environmental groups might therefore represent a countervailing force that would actually promote free trade.

Other WTO observers argue that the increased presence and participation of NGOs in the WTO would disrupt the operations of the organization as an intergovernmental body. Specifically, Nichols argues that the presence of NGOs might lead to confusion as to who is speaking for whom.⁵⁶ This argument carries little weight. If a French environmental group offers a particular view, does this imply that the French government backs the opinion presented? Decision-makers at the national level learned long ago to sort out the perspectives advanced by various interest groups.⁵⁷ Likewise, fears that environmentalists would not be held accountable for the positions they advance are fundamentally overblown. Groups that make inaccurate, irresponsible, or foolish statements will find their credibility rapidly eroded. NGOs

⁵² See Esty, *NGOs*, *supra* note 1, at 140 (describing the benefits of transparent decision-making processes).

⁵³ See *id.* at 139 (describing free traders' fears); Reichert, *supra* note 22, at 220-21 (discussing the "divergent perspectives" of environmentalists and free trade advocates).

⁵⁴ The NAFTA negotiations exemplify this. See ESTY, *GREENING THE GATT*, *supra* note 16, at 28 (addressing the role of environmentalists in the NAFTA debates); Esty, *Environmentalists and Trade Policy-making*, *supra* note 36; see also Audley, *supra* note 36, at 35 (indicating that certain environmental groups are more receptive to trade issues).

⁵⁵ See generally Esty, *NGOs*, *supra* note 1, at 138 (describing trade officials balancing between specialized interests and general public interests).

⁵⁶ See Nichols, *Extension*, *supra* note 47, at 316-18 (describing how extending standing to NGOs could create uncertainty about a country's position in dispute settlements).

⁵⁷ See Esty, *NGOs*, *supra* note 1, at 142.

that offer thoughtful perspectives will enhance their reputations and be looked to more regularly and with greater seriousness through time.

Another source of concern about allowing NGOs into the WTO decision-making process is that it gives them “two bites at the apple.”⁵⁸ Specifically, NGOs may shape national decision-making processes and, if they are unhappy with the outcome at that level, they can then go to the WTO and attempt to obtain another outcome. This tension between national and international decision-making processes is, however, a good thing. Some governmental decisions are made without regard to important positions that might have been considered but for public choice deficiencies in the national decision-making process.⁵⁹ Moreover, some debates are best conducted at the international level where the full spectrum of the views that might inform the outcome of those debates can be aired.⁶⁰

Other observers argue that a greater role for NGOs at the WTO might exacerbate the existing bias toward Northern viewpoints and further weaken the voice of those advancing the needs of the developing world.⁶¹ While perhaps more “Northern” environmental groups would be able to afford a presence in Geneva than groups from developing countries, the “Northern” representatives would not necessarily speak with a united “developed” country perspective.⁶² Moreover, the advantage of a physical

⁵⁸ *Id.* at 140.

⁵⁹ See generally Hovenkamp, *supra* note 35, at 75 (discussing one person, one choice).

⁶⁰ See generally Esty, *NGOs*, *supra* note 1, at 141 n.77 (referring to NGOs such as Amnesty International and the World Wildlife Fund which are international in scope); Leon Gordenker & Thomas G. Weiss, *Pluralizing Global Governance: Analytical Approaches and Dimensions*, in *NGOs, THE UN AND GLOBAL GOVERNANCE* 17, 27-28 (Thomas G. Weiss & Leon Gordenker eds., 1996) [hereinafter Gordenker & Weiss] (“A main function of formal coalitions of NGOs is to develop as far as possible or to harmonise [sic] common positions for issues.”); Michael H. Posner & Candy Whitome, *The Status of Human Rights NGOs*, 25 COLUM. HUM. RTS. L. REV. 269, 270-72 (1994) (indicating that NGOs “have helped to transform the debate from a restrained diplomatic discourse among governments to a more urgent and real confrontation”).

⁶¹ But see Reichert, *supra* note 22, at 244-46 (arguing that a partnership approach between developed country NGOs and developing country NGOs is the best solution for achieving environmental goals in developing countries).

⁶² See Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 AM. J. INT’L L. 231, 232 (1997) (advancing that “wealthy states with relatively stringent envi-

presence in Geneva is diminishing as modern information technologies allow groups throughout the world to monitor and contribute to WTO debates.⁶³ It is important to remember that much of the participation of NGOs in the WTO will be as observers rather than as lobbyists, making fears of NGO distortion inapplicable.⁶⁴

Those who oppose NGO participation in the WTO fear that the organization will be overwhelmed on a practical level. What if, the critics ask, hundreds of NGOs descend on the modest WTO headquarters?⁶⁵ Again, this fear seems exaggerated. The number of NGOs that are tracking trade and environment issues is quite limited. Even if all of them arrived in Geneva, they could be accommodated in a small observers section at any meeting. Furthermore, NGOs have been included in international decision-making processes with no ill effect.⁶⁶

6. DELINEATING NGO ROLES

The benefits of NGO participation in and the risks of special interest manipulation of the international trading system vary depending upon the particular WTO activity. In defining appropriate roles for NGOs at the WTO, it is worth examining separately the multiple places within the international trading system in which environmental groups and others might participate.

6.1. *Dispute Resolution*

Allowing NGOs to observe dispute resolution proceedings would reduce the mystery surrounding the WTO and the international trading system. If environmental groups were to understand how the WTO made these quasi-judicial decisions, they

ronmental" standards drive the trade-environment agenda); *but see* Gordenker & Weiss, *supra* note 60, at 25 (explaining how technological advances have expanded global communities beyond mere geographic borders).

⁶³ See Esty, *NGOs*, *supra* note 1, at 142.

⁶⁴ For a description of how NGOs might participate, see *id.* at 143-47.

⁶⁵ For a discussion of practical concerns raised, see *id.* at 142-43.

⁶⁶ Many UN conferences such as the 1994 Cairo Population Conference, the 1995 Beijing Woman's Conference, and the 1996 Copenhagen Conference on Human Habitats have involved non-governmental organizations. See *id.* at 143 n.85; see also Chiara Giorgetti, *The Role of Nongovernmental Organizations in the Climate Change Negotiations*, 9 *COLO. J. INT'L ENVTL L. & POL'Y* 115, 126-36 (1998) (discussing the role of NGOs in the UN Framework Convention on Climate Change).

would have less criticism about national sovereignty being overridden by 'faceless international bureaucrats' in Geneva.⁶⁷ For instance, the U.S. courts have well-established procedures for *amicus curiae* filings that do not disrupt, and by most accounts actually enhance, judicial decision-making. Within the WTO, this type of contribution would add to the diversity of views available to the decision-makers and thus to the legitimacy of their decisions.⁶⁸

The key to avoiding manipulation of dispute panels lies not in keeping NGOs out of the meetings, but rather in establishing a clear bar on *ex parte* contacts with the panel members or WTO staff handling a particular dispute.⁶⁹ The risk of distortion comes not from "on the record" meetings but from behind-the-scenes lobbying and cajoling of dispute resolution panel members. Thus, the key to avoiding special interest distortion of WTO dispute resolution lies in formalizing WTO dispute settlement procedures. The trading system might be made more transparent, systematic, consistent, and fair by dispelling the myth that dispute resolution proceedings are negotiations and by making the process more judicial by including a structured opportunity for NGO observation and submissions. What goes on in "open court" is almost never a problem. Official filings placed on a public docket, for all to rebut if they see fit, will hardly corrupt the WTO's decision-making process, but rather may serve to sharpen its debates.

6.2. *Legislative Mode*

Keeping NGOs out of the WTO General Council meetings or the sessions of the Committee on Trade and Environment serves little purpose. Again, there is considerable benefit to be had by allowing non-governmental organizations to observe these proceedings: Developing public understanding of the workings of the international trading system, bringing a diversity of opinions and greater expertise to bear on WTO decisions, and increasing the legitimacy of WTO decision-making are all potential benefits.⁷⁰ The presence of NGOs in public sessions poses little danger of causing manipulated WTO "legislative" decisions. The real

⁶⁷ Esty, *NGOs*, *supra* note 1, at 128.

⁶⁸ *See id.* at 144-45 (describing the role NGOs could play in broadening information available to the WTO).

⁶⁹ *See id.* at 145.

⁷⁰ *See id.* at 145-46.

risk of manipulation exists not during open debate but rather during private meetings that occur outside these public discussions. Excluding NGOs from the formal sessions does little to prevent these "behind-closed-doors" influences.⁷¹ Again, the answer to fears of public interest manipulation lies in establishing more formal WTO administrative rules and procedures. WTO staff should be required to disclose the sources of information that they rely upon when making decisions. It would be helpful, moreover, to adopt general disclosure requirements for all WTO staff and perhaps national representatives in Geneva such as indicating the special interest groups with whom the official has had contact. In addition, a log of meetings, meals, trips, or any other inducement provided by special interest groups should be disclosed.

Fundamentally, as the WTO's role in global governance expands (as it inevitably must), the public has a right to expect that the organization will operate so as to provide some guarantee of the integrity and legitimacy in its choices. This almost certainly entails a commitment to create a body of administrative rules and procedures and to adhere to principles of administrative law. In fact, the most important "linkage" that the WTO needs might well be to the field of administrative law. Operating within a formal structure, NGOs can serve as watchdogs over the processes of global governance while posing little risk of endangering the system.

6.3. *Trade Negotiations*

To the extent that the WTO serves as a forum for multilateral trade negotiations, the argument for exclusion of NGOs has greater merit. Trade negotiations represent a form of diplomatic transaction that benefits from a degree of secrecy.⁷² Often, it is easier to bargain if those who stand to lose are not privy to the negotiations. Nevertheless, some negotiation sessions, particularly those which involve formal speeches, could be opened to NGOs at little risk.⁷³ Many recent international environmental

⁷¹ Cf. Nichols, *Realism*, *supra* note 22, at 860 (suggesting that NGOs serve as a "buffer between decision-makers and special interest groups" when appearing before dispute panels).

⁷² See Esty, *NGOs*, *supra* note 1, at 146.

⁷³ The U.S. Trade Act of 1974 provides an example of consultation mechanisms in trade policy. See 21 AM. JUR. 2D *Customs Duties and Import Regula-*

negotiations have included NGO observers at formal sessions without ill effect.⁷⁴ Again, having NGOs available to transmit information back to their members could provide real value as a mode of outreach and help to establish the credibility, openness, and legitimacy of the WTO as an institution.⁷⁵ And, when necessary, government officials could still meet behind closed doors to make the deals required to produce trade agreements.

7. CONCLUSION

The World Trade Organization has a critical role to play in international economic management. A more open WTO decision-making process that includes non-governmental entities, operating both as intellectual competitors to and support mechanisms for governments, offers the promise of strengthening the international trading system, thereby enhancing the WTO's legitimacy, authority, and effectiveness. More transparent decision-making processes within the international trading system would widen the information available to the WTO when making "trade and" decisions and would thereby improve its capacity to provide the right answer.

Improved decision-making, greater authority, and enhanced legitimacy would all help the WTO to quell the fear of "globalization" growing around the world. We cannot avoid having some decision-making processes shift, at least in part to the global scale, and we cannot survive without the WTO playing a role in international economic governance. But, we must find ways to diminish the threat that this broadened WTO role poses to our tradition of democracy and to our sense of representativeness and fairness. Part of the answer lies in improved WTO mechanisms and procedures—refining the existing system by reference to the learning that is available in the fields of welfare economics, public choice theory, federalism, and administrative law,

tions § 20 (1981); see also Jonathan I. Miller, Comment, *Prospects for Satisfactory Dispute Resolution of Private Commercial Disputes Under the North American Free Trade Agreement*, 21 PEPP. L. REV. 1313, 1319 n.33 (1994) (discussing private sector consultations during NAFTA negotiations).

⁷⁴ See Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L. L. 451, 534 (1993) (describing how the Climate Change Convention allows for NGO observers at the Conference of the Parties); see generally RICHARD N. GARDNER, *NEGOTIATING SURVIVAL: FOUR PRIORITIES AFTER RIO* (1992).

⁷⁵ See Esty, *NGOs*, *supra* note 1, at 126-28, 134-35.

among other disciplines. These linkages offer the promise of more sophisticated international scale governance, a more analytically rigorous trade policy-making process, and a greater capacity to optimize outcomes across multiple goals, such as trade liberalization and environmental protection.

NGOs can also help to ensure that the public both feels connected to and actually is connected to these more distantly made decisions. And, while the risk of protectionist capture of the WTO by environmental groups and other NGOs is not imaginary, lobbying disclosure rules better address any prospect of special interest manipulation of WTO decision-making processes than exclusion of NGOs from the activities of the international trading system.