

REALISM, LIBERALISM, VALUES, AND THE WORLD TRADE ORGANIZATION

PHILIP M. NICHOLS*

1. INTRODUCTION

The creation of the World Trade Organization¹ engendered a flurry of scholarly excitement, much of which focused on the dispute settlement mechanisms built into the organization's scheme.² The advent of the World Trade Organization also

* 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 The World Trade Organization came into existence on January 1, 1995. It was the culmination of over seven years of multilateral trade negotiations known as the Uruguay Round. The Uruguay Round constituted the most ambitious and most complex trade negotiations ever undertaken. See 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"). For an excellent history of the Uruguay Round, see JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND* (1995).

² See, e.g., Kenneth W. Abbott, *The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice*, 1992 COLUM. BUS. L. REV. 111 (1992); Claudio Cocuzza & Andrea Forabosco, *Are States Relinquishing Their Sovereign Rights? The GATT Dispute Settlement Process in a Globalized Economy*, 4 TUL. J. INT'L & COMP. L. 161 (1996); Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193 (1996); Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L L. 349 (1995); Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ, & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043 (1994); David A. Gantz, *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 ARIZ. J. INT'L & COMP. L. 7, 129 (1995); David W. Leebron, *An Overview of the Uruguay Round Results*, 34 COLUM. J. TRANSNAT'L L. 11, 14-16 (1995); Andreas F. Lowenfeld, *Remedies Along With Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477 (1994); Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555 (1996); Michael K. Young, Book Review, 90 AM. J. INT'L L. 160 (1996) (reviewing YUJI IWASAWA, *WTO NO FUNSO SHORI* [The Dispute

generated scholarly debate on the nature and future of the World Trade Organization. One such debate, concerning participation in the World Trade Organization by nongovernmental parties ("NGOs"), was published in an earlier volume of the *University of Pennsylvania Journal of International Economic Law*.³ This essay continues that debate.

The issue that initiated this debate was whether standing before World Trade Organization dispute settlement panels should be extended to include nongovernment parties. Currently, only member countries⁴ of the World Trade Organization may appear before such panels.⁵ In a provocative article published in the

Settlement of the World Trade Organization)].

³ See Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331 (1996); Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295 (1996); G. Richard Shell, *The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359 (1996).

⁴ Any "separate customs territory possessing full autonomy in the conduct of its external commercial relations," such as Hong Kong or Gibraltar, may also become a member of the World Trade Organization. Agreement Establishing the Multilateral Trade Negotiations [World Trade Organization], Apr. 15, 1994, art. XII(1), Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], 33 I.L.M. 13, 21 [hereinafter Charter]. This essay uses the term country as a term of convenience that is intended to include all members of the organization.

⁵ The primary organic document of the World Trade Organization is its charter, the Marrakesh Agreement Establishing the World Trade Organization. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1143 (1994) [hereinafter Final Act]. Several agreements are annexed to the Charter, including one which sets forth the procedure for the settlement of disputes among members of the World Trade Organization. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, *supra* note 4, Annex 2, 33 I.L.M. 112 (1994) [hereinafter Understanding]. The Dispute Settlement Body, composed of all of the members of the World Trade Organization who choose to participate, administers the settlement process. See *id.* para. 2.1. A member may bring a complaint against another member for a number of reasons, the most common of which is that an action by that member nullifies or impairs a benefit that is supposed to accrue to the complaining member pursuant to one of the trade agreements administered by the World Trade Organization. See *id.* para. 3.3. The members must consult with one another, but if consultation does not resolve the dispute, the complaining member may request that a panel hear its complaint. See *id.* para. 4.3. The panel, consisting of three persons selected by the World Trade Organization and agreed to by the parties, takes oral and written testimony from the disputants and from other concerned members of the Organization. The panel issues a report wherein it determines whether the complaint is

Duke Law Journal, Professor Richard Shell suggests that standing should be expanded. His suggestion is part of a larger vision that he has for the World Trade Organization, which he calls a "Trade Stakeholders Model."⁶ Specifically, the Trade Stakeholders Model "seeks to break the monopoly of states on international dispute resolution machinery and to extend the power to enforce international legal norms beyond states to individuals."⁷ The Trade Stakeholders Model also embraces "a vision of civic republican 'participatory legalism.'"⁸

Although I do not necessarily disagree with the concept that the World Trade Organization should avail itself of the expertise of "outside" persons and interest groups, I do have several concerns with respect to expansion of standing, which I outlined in the first essay that appeared in the above-referenced debate.⁹ Steve Charnovitz, who as director of the Global Environment and Trade Study at Yale University has made several important contributions to the understanding of the relationship between trade and societal values,¹⁰ followed with an essay that not only responded to my concerns regarding expansion of standing, but also advocated participation by interest groups in policymaking by the World Trade Organization.¹¹ Professor Shell concluded the debate with an essay that not only responded to Charnovitz and myself, but also criticized my proposal that suggested the World Trade Organization refrain from scrutinizing a country's action

justified. If so, it recommends action to be taken by the World Trade Organization. See *id.* paras. 8-16. Parties may appeal a panel report to an Appellate Body which sits in three-person panels chosen from a standing group of seven persons. See *id.* para. 17. The panel report, or the report of the Appellate Body, becomes final unless every member of the Dispute Settlement Body votes against adoption of the report. See *id.* para. 17.4. For a more thorough explication of the process, see Dillon, *supra* note 2, at 373-92; Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT'L L. (forthcoming 1996); Reitz, *supra* note 2, at 580-87.

⁶ See G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 910 (1995).

⁷ *Id.* at 915.

⁸ *Id.*

⁹ See Nichols, *supra* note 3, at 303-21.

¹⁰ See, e.g., Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT'L L.J. 459 (1994); Steve Charnovitz, *The World Trade Organization and Social Issues*, J. WORLD TRADE, Oct. 1994, at 17.

¹¹ See Charnovitz, *supra* note 3, at 340-48.

if that action reflects fundamental societal values and only incidentally impedes trade.¹²

Professor Shell had the last word in the debate concerning his proposal for expansion of standing and so it shall remain.¹³ In this essay I intend to accomplish two goals. First, I wish to clarify issues raised by Steve Charnovitz concerning the participation by nongovernment organizations in the policymaking process of the World Trade Organization. Second, I will respond to Professor Shell's criticisms of my suggestion for the World Trade Organization, and show that the theoretical underpinnings for international relations are not as limited as set forth in his essay.

2. PARTICIPATION BY INTEREST GROUPS IN POLICYMAKING BY THE WORLD TRADE ORGANIZATION

Steve Charnovitz advocates participation by nongovernmental organizations, which I shall refer to as interest groups,¹⁴ "in the work of the World Trade Organization."¹⁵ After discussing the involvement of interest groups in other international organizations¹⁶ and his dissatisfaction with the role of interest groups in both the GATT and the World Trade Organization,¹⁷

¹² See Shell, *supra* note 3, at 378-79; Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658 (1996).

¹³ I leave that debate with a concession and an observation. Professor Shell predicts business entities will someday have standing to bring complaints before the World Trade Organization's dispute settlement panels (which presumably would then be given a different name). See Shell *supra* note 6, at 902-03. If this occurs as Shell predicts, I concede that other interested, nonbusiness parties should also have access. I observe that Shell's discourse has changed slightly, from an emphasis on participation by individuals, to one of NGO participation. Compare Shell, *supra* note 6, at 915, with Shell, *supra* note 3, at 376.

¹⁴ In the study of international organizations, the term "nongovernmental organization" includes business entities. As I read Charnovitz, however, he does not include business entities. Hence my preference for the term "interest groups."

¹⁵ Charnovitz, *supra* note 3, at 331. Charnovitz ignores an argument for direct participation by individual citizens because "[n]obody . . . calls for such direct participation." *Id.* at 343. In fact, Professor Shell suggests just such participation. See Shell, *supra* note 6, at 915 (stating that the Trade Stakeholders Model seeks to "extend the power to enforce international legal norms beyond states to individuals").

¹⁶ See Charnovitz, *supra* note 3, at 335-37.

¹⁷ See *id.* at 337-40. In the environmental realm, with which Charnovitz is most concerned, the situation may not be as dire as he depicts. The Policy Dialogue on Trade and the Environment, which includes representatives of

Charnovitz discusses the need for interest group participation in the policymaking functions of the World Trade Organization. Unfortunately, Charnovitz structures much of his discussion of *policymaking* as a response to and criticism of my discussion of *standing* before World Trade Organization dispute settlement panels. As Charnovitz himself points out, however, standing and participation are distinct phenomena that raise separate issues; one can be extended to nongovernment parties without the other.¹⁸ In fact, I applaud the fact that “the door has been opened” to nongovernmental parties and suggest that “it is probable that some fine tuning could occur in these arrangements.”¹⁹

The fact that the disagreement that Charnovitz posits between ourselves is a faux disagreement does not mean that Charnovitz and I agree. In particular, I do not agree that participation in policymaking can be scrutinized in the context of issues that arise in a debate over standing. Scrutinizing participation through the lens of standing produces two dangers: first, progress will appear to occur as problems that are not really at issue are solved; and second, pertinent substantial issues will be ignored.²⁰ In this

environmental action groups, governmental and nongovernmental organizations, and the World Trade Organization, recently met in “a spirit of common purpose and collegiality.” Report, Second Meeting, Talloires, France 1 (Apr. 27-29, 1995) (on file with author). In general, the World Trade Organization has recently adopted guidelines “for improving transparency and furthering contacts” between the World Trade Organization and interest groups. *General Council Takes Steps to Further Relations with NGOs*, FOCUS (WTO Newsl.), June-July 1996, at 8.

¹⁸ See Charnovitz, *supra* note 3, at 340 (“These general issues are separable.”).

¹⁹ Nichols, *supra* note 3, at 308 n.57.

²⁰ In formal logic, the technique of setting up an argument that does not exist and then refuting that misrepresented argument is called the “straw man” fallacy. See DOUGLAS WALTON, *A PRAGMATIC THEORY OF FALLACY* 57 (1995). The straw man technique is fallacious because it leads to irrelevancies and because it precludes the development and resolution of the true issues of contention. See MADSEN PIRIE, *THE BOOK OF THE FALLACY* 160 (1985) (“The straw man is fallacious because he says nothing about the real argument.”); WALTON, *supra*, at 211 (stating that a straw man “could be a strong impediment to resolving [a] conflict of opinions. . . . [I]t would prevent proper maieutic insight into one’s own point of view from developing”).

This technique also creates the possibility that an argument will be mischaracterized. For example, Charnovitz states that “Nichols worries that the presence of NGOs would undermine ‘the apparent authority’ of governments, and thus their ability to negotiate trade policies.” Charnovitz, *supra* note 3, at 342. The passage that he cites actually reads “*expansion of standing will*

section, I will attempt to rectify the latter of these problems by identifying substantial issues raised by Charnovitz's proposal that interest groups take a more substantial role in the deliberations of the World Trade Organization. These issues involve comparing the World Trade Organization to other international organizations, examining the extent and quality of interest group participation, and exploring whether the inclusion of interest groups enhances or blunts democratic representation.

2.1. *If Every Other International Organization Jumps Off of a Roof, Should the World Trade Organization Follow?*

Charnovitz makes the intriguing argument that "NGOs are on solid legal ground in seeking greater transparency and participation in the WTO" because "[d]rawing on the expertise of NGOs is a hallmark of other intergovernmental organizations and institutions."²¹ The first part of this statement can be dismissed;²² what is intriguing is the comparative methodology that

undermine the apparent authority." Nichols, *supra* note 3, at 316 (emphasis added). Charnovitz also reports concern on my part that allowing NGO participation in policymaking would favor groups with greater resources. See Charnovitz, *supra* note 3, at 343. The passage that Charnovitz cites actually discusses the fact that creating another layer of adjudication through the expansion of standing would favor wealthier interest groups, which can fund additional litigation. See Nichols, *supra* note 3, at 318-19. Similarly Charnovitz reports concern on my part that interest group participation in policymaking could cause the World Trade Organization to move away from the pursuit of liberalized trade. See Charnovitz, *supra* note 3, at 343. The passage he cites discusses only the ramifications of expansion of standing. See Nichols, *supra* note 3, at 319-20.

²¹ Charnovitz, *supra* note 3, at 334-35.

²² The actions of other international organizations do not place interest groups on "solid legal ground." Interest groups are on "solid legal ground" because the Charter of the World Trade Organization allows the General Council of the World Trade Organization to "make appropriate arrangements for consultation and cooperation with non-governmental organizations." Charter, *supra* note 4, art. V(2). The organic documents of any international organization delimits its functions and authority. See Advisory Opinion No. 3, Agricultural Production and the International Labor Organization, 1922 P.C.I.J. (ser. B) No. 3, at 53-55 ("The answer to the question . . . must likewise depend entirely upon the construction to be given to the same treaty provisions from which, and from which alone, that Organization derives its existence and its powers."). The doctrine that an international organization has implied powers necessary to carry out its specified functions also bestows authority. See Advisory Opinion Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 182 (April 11) ("Under international law, the Organization [United Nations] must be deemed to have those powers which,

the statement implies. Indeed, Charnovitz makes several references to other international organizations, including the Organization for Economic Cooperation and Development, UNESCO, and the International Labour Organization.²³

Undisciplined comparison of international organizations is sometimes meaningless because international organizations are vastly dissimilar.²⁴ A commonly used taxonomy of international organizations categorizes organizations by their membership. Sovereign governments alone comprise the membership of intergovernmental organizations ("IGOs"); government agencies that are independent of the central government comprise transgovernmental organizations ("TGOs"); nongovernmental organizations comprise international nongovernmental organizations ("INGOs"); both governmental and nongovernmental members form hybrid INGOs; and what legal scholars generally refer to as multinational corporations are business international nongovernmental organizations ("BINGOs").²⁵ Even this simple taxonomy reveals differences between the mentioned international organizations: the International Labour Organization is a hybrid INGO, UNESCO is a TGO, and the OECD and World Trade Organization are IGOs. The fact that the International Labour Organization and UNESCO occupy categories different from the World Trade Organization raises questions about broad comparisons between the organizations.

Advocates of interest group participation may counter that the point of their efforts is to transform the World Trade Organization from an IGO to a hybrid INGO, and that any taxonomy based on membership will always preclude comparison. The point is valid, but does not mean that international organizations are identical or that comparison between disparate organizations

though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.".)

²³ See *infra* notes 24-28 and accompanying text (discussing comparisons).

²⁴ See GERHARD BEBR, DEVELOPMENT OF JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES 4-5 (1981) (suggesting that comparison of the GATT and the European Court of Justice is misleading).

²⁵ See CLIVE ARCHER, INTERNATIONAL ORGANIZATIONS 36-43 (1983). Another common method of classifying international organizations is by their purpose. See Michel Virally, *Definition and Classification of International Organizations: A Legal Approach*, in THE CONCEPT OF INTERNATIONAL ORGANIZATION 50, 58-64 (Georges Abi-Saab ed., 1981) (discussing various purposes an international organization might have).

is valid.

A far more sophisticated taxonomy explicated by Paul Taylor does not rely on membership but instead relies on the "theory" underlying each international organization.²⁶ Taylor divides explanations of international organizations into three groups: (1) "adjustment theories," which explain the responses of national governments to changes in the global environment; (2) "integration theories," which anticipate a refashioning of the traditional state-oriented system of international relations; and (3) "constitutional theories," which go beyond the state system and look toward new methods of ordering the world into a unified whole.²⁷

Taylor's taxonomy does not end with these broad divisions. For example, Taylor divides adjustment theories into different styles of intergovernmental cooperation in international organization: (1) coordination; (2) cooperation; (3) harmonization; (4) association; (5) parallel national action; and (6) supranationalism.²⁸ Taylor similarly divides integration theories and constitutional theories.²⁹

Taylor's work is useful for three reasons. First, it shows that international organizations can be differentiated on an intrinsic basis rather than by the nature of their memberships. Second, it illustrates the tremendous variety among international organizations. Most importantly, it raises serious questions about the validity of undisciplined comparisons of international organizations.

The age-old admonition parents give to their children, "if all

²⁶ Paul Taylor, *A Conceptual Typology of International Organization*, in *FRAMEWORKS FOR INTERNATIONAL CO-OPERATION* 12, 12 (A.J.R. Groom & Paul Taylor eds., 1990). Taylor's classification is not, of course, the only departure from the more standard taxonomies. Johan Galtung, for example, has devised a fascinating typology based on the degree of association an international organization's members have with a discernible territory. Johan Galtung, *Non-Territorial Actors: The Invisible Continent. Towards a Typology of International Organizations*, in *THE CONCEPT OF INTERNATIONAL ORGANIZATION*, *supra* note 25, at 67, 67-75. For reasons discussed above, I find a taxonomy based on the qualities of international organizations more useful than a taxonomy based on the nature of the organizations' memberships. See *supra* notes 23-25 and accompanying text.

²⁷ See Taylor, *supra* note 26, at 12-24.

²⁸ See *id.* at 12-13.

²⁹ See *id.* at 17-18, 21-24.

the other kids in the neighborhood jumped off of a roof, would you want to jump off too,” relies on the legitimate premise that all of the neighborhood children are similar in at least one respect: if they jump off of a roof, none of them will fly, but instead each will fall to the ground. Basing the argument for increased participation by interest groups in World Trade Organization policymaking on the fact that certain other international organizations allow such participation depends on establishing similarities between the World Trade Organization and those organizations. Comparative analysis cannot be reduced to a simple “me, too” argument.

Charnovitz makes several dubious comparisons. For example, he compares the World Trade Organization to the United Nations Economic and Social Council and to the Organization for Economic Cooperation and Development.³⁰ These two organizations, however, are easily distinguished from the World Trade Organization. Although both sometimes coordinate the negotiation of discrete treaties, neither conduct the type of rule creation or enforcement the World Trade Organization requires.³¹ Likewise, the International Labour Organization, which Charnovitz suggests as a model for the World Trade Organization,³² is also more successful at creating norms than at devising and enforcing binding regulations.³³ Comparison of a complaint brought by United States Senate restaurant workers in the

³⁰ See Charnovitz, *supra* note 3, at 343. Charnovitz does not explicitly state that the United Nations Economic and Social Council and the Organization For Economic Cooperation and Development are comparable to the World Trade Organization. Rather, he implies comparability by suggesting that the World Trade Organization can easily borrow procedures from the other organizations.

³¹ See *Russian OECD Application Received*, 13 Int'l Trade Rep. (BNA) 897 (May 29, 1996) (“[R]ecommendations and resolutions adopted by OECD countries on the issue are advisory, rather than binding . . .”).

³² See Charnovitz, *supra* note 3, at 335-36, 343.

³³ From the International Labour Organization's creation in 1919 until 1988, the United States adopted only eight conventions promulgated by the ILO. All were maritime conventions. The 144th convention promulgated by the ILO marked the first non-maritime convention that the United States adopted. See Tadd Linsenmayer, *U.S. Ends ILO Moratorium by Ratifying Two Conventions*, MONTHLY LAB. REV., June 1988, at 52, 52. In addition to Conventions, the International Labour Organization issues Recommendations which are not intended to be binding, but instead are to be “used as general guidelines for national policy and action.” Stephen I. Schlossberg, *United States' Participation in the ILO: Redefining the Role*, 11 COMP. LAB. L.J. 48, 51 (1989).

International Labour Organization with possible suits by domestic interest groups in the World Trade Organization³⁴ is nonsensical. The International Labour Organization does not participate in delicate and complex trade negotiations.³⁵

Finally, Charnovitz's discussion leaves little doubt that interest group participation has greatly furthered the resolution of international environmental issues. Unfortunately, perhaps because he bases his comments on issues that pertain to standing, his discussion does not provide insight as to whether the environmental regimes are comparable to the trade regime. What is true of international organizations, however, is true of international regimes. The structure and nature of international institutions matter, and in the absence of a rigorous treatment of structure, comparative analysis is suspect.

2.2. *Where to Draw the Line*

In my essay on standing, I suggest that the fact that nongovernmental parties do not appear before dispute panels acts as a buffer between decisionmakers and special interest groups. A great number of persons usually share the benefits of trade liberalization, while the parties harmed by liberalized trade, including those involved in inefficient industries that cannot survive competition and those who are collecting monopolistic or oligopolistic rents created by protectionist laws, are fairly concentrated.³⁶ If all parties had standing, narrow protectionist-oriented interest groups would be more likely to muster the resources necessary to appear before dispute panels than would the more numerous beneficiaries of trade liberalization.³⁷

Charnovitz transposes my arguments concerning standing in his discussion of participation in policymaking and states, "[t]he notion that the international trade regime should be a buffer

³⁴ See Charnovitz, *supra* note 3, at 354.

³⁵ See *infra* notes 46-48 and accompanying text (explaining why trade negotiations are laborious and complex).

³⁶ See Nichols, *supra* note 3, at 320; Charles K. Rowley & Robert D. Tollison, *Rent-Seeking and Trade Protection, in PROTECTIONISM AND STRUCTURAL ADJUSTMENT* 141, 151-52 (Heinz Hauser ed., 1986).

³⁷ See Rowley & Tollison, *supra* note 36, at 152 (stating that beneficiaries of trade liberalization lack incentives to gather information, organize, or vote); Shell, *supra* note 6, at 878-80 (stating that protected industries mobilize constituencies to preserve protectionist laws).

between the makers of trade policy and the public is an elitist view that should not find refuge in liberal governance.³⁸ Although extremely well-crafted and emotionally appealing, Charnovitz's argument is also irrelevant and incorrect.³⁹ At some point in a representative government, the chosen representative will act independently of the persons she represents. "Liberal governance" is replete with policymaking situations in which the public does not participate. For example, there are no institutional arrangements for interest groups to participate in cabinet meetings in the executive branch of United States government, or in Council of Ministers' meetings in the European Union, or in the United Nations Security Council's meetings. At some point participatory government ends and representative government takes over.

Where this transition occurs is critical, especially when it involves the participation of interest groups. Mancur Olson has demonstrated that extensive participation by interest groups in policymaking results in inefficiency, misallocation of resources, and slow economic growth.⁴⁰ This phenomenon eventually occurs even when the interest groups initially represent broad portions of the population, because achieving the groups' interests requires such groups to become focused.⁴¹ The United States' experience with interest group participation in commercial regulation is also instructive. Regulations that interest groups influence, such as the tax code, tend to be somewhat distorted.⁴² Regulations relatively uninfluenced by interest groups, such as those dealing with securities, tend to be much less distorted.⁴³

³⁸ Charnovitz, *supra* note 3, at 345.

³⁹ See WALTON, *supra* note 20, at 196 (stating "relevance is an important aspect of ad hominem as a fallacy").

⁴⁰ See MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 41-47 (1982).

⁴¹ See Mancur Olson Jr., *The Devolution of the Nordic and Teutonic Economies*, 85 AM. ECON. REV. 22, 25 (1995).

⁴² See ROBERT H. SALISBURY, *INTERESTS AND INSTITUTIONS: SUBSTANCE AND STRUCTURE IN AMERICAN POLITICS* 339 (1992) (stating that taxation has acquired many of its strange contours because of the pressures and demands of narrowly-based interest groups).

⁴³ See Alexander C. Dill, *Broker-Dealer Regulations Under the Securities Act of 1934: The Case of Independent Contracting*, 1994 COLUM. BUS. L. REV. 189, 253 (1994). The trade regime's experience with interest groups is also instructive. Indeed, the General Agreement on Tariffs and Trade came into

Although interest group participation will impose costs on the World Trade Organization's regulations, this does not mean that interest groups should never have a role in policymaking. If interest groups are to be allowed an extensive role in policymaking, however, then the benefits of such participation must outweigh the costs that the public will bear.

Against these costs, Charnovitz suggests two benefits of increased participation by interest groups in World Trade Organization policymaking. He suggests that interest group participation will do the following: (1) "prod" governments to negotiate more quickly and to better results; and (2) increase public support for trade liberalization.⁴⁴ These proposed benefits merit closer scrutiny.

2.2.1. *Faster and Better Results*

Charnovitz, to his credit, does not overstate the possibility that interest groups could produce more diligent negotiations; he couches his comments in words such as "could" and "might." His one piece of evidence to substantiate the claim that participation by interest groups will result in more effective negotiation is that during the seven years of Uruguay Round negotiations, interest groups played an active role in the negotiations of seven global

existence partly to avoid distortive pressures by interest groups. "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).

Charnovitz points out that the charter for the International Trade Organization, negotiated at the same time as the other Bretton Woods institutions but never finalized, allowed interest group participation. Charnovitz suggests that had the International Trade Organization come into existence, its creators would have allowed interest group participation. See Charnovitz, *supra* note 3, at 338-39. The persons who negotiated the International Trade Organization charter, however, are the same persons who administered the GATT. See Andreas F. Lowenfeld, Book Review, 89 AM. J. INT'L L. 663, 664 (1995) (reviewing ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993) and noting the club-like atmosphere of the early GATT). In its early years, the GATT allowed nongovernment parties to participate in the GATT process. See Nichols, *supra* note 3, at 305. If, as Charnovitz suggests, the GATT later terminated the early practice of allowing interest group participation, one must ask why it did so.

⁴⁴ See Charnovitz, *supra* note 3, at 341, 344-45.

environmental agreements.⁴⁵ The comparison between the Uruguay Round and the negotiation of these environmental accords, however, is spurious. Generally, multinational trade negotiations are not like any other form of international negotiation. Rather, the most-favored-nation principle, which mandates that any concession granted to one party must be extended to every other party, makes them more complex.⁴⁶ The Uruguay Round in particular was the most complex trade negotiation ever undertaken.⁴⁷ Moreover, unlike almost every other treaty, countries had to accept the results of the Uruguay Round in their entirety; countries could not reserve or refuse to abide by certain portions of the treaty.⁴⁸

The proposition that adding *more* participants to a negotiation will bring the negotiation to a more rapid conclusion is inherently

⁴⁵ See *id.* at 341 (citing Jessica Mathews, *The Great Greenless GATT*, WASH. POST, Apr. 11, 1994, at A19).

⁴⁶ See Nichols, *supra* note 3, at 316-17; see also GILBERT R. WINHAM, *THE EVOLUTION OF INTERNATIONAL TRADE AGREEMENTS* 52-56 (1992) (describing the complexity and difficulty of negotiating international trade agreements). The most-favored-nation principle makes negotiators reluctant to give concessions to one party, because they will lose leverage over other parties. See GILBERT R. WINHAM, *INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATIONS* 62 (1986).

⁴⁷ See *supra* note 1; Lowenfeld, *supra* note 2, at 477 ("The agenda for the Uruguay Round was massive, making it by far the most ambitious trade negotiation ever.").

⁴⁸ Most treaties contain a provision allowing a party to state that it will not be bound by a certain portion of that treaty, a practice that has become widespread in recent years. See FRANK HORN, *RESERVATIONS AND INTERPRETATIVE DECLARATIONS TO MULTILATERAL TREATIES* 2-4 (1988) ("[T]he phenomenon of reservations has developed into a problem of international law . . ."). The ability to carve out portions of a treaty obviously makes the process of negotiation easier, and acceptance of treaties more likely. See John King Gamble, Jr., *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 AM. J. INT'L L. 372, 372 (1980) ("Most arguments in favor of the liberal use of reservations have as their cornerstone the belief that the liberal admissibility of reservations will encourage wider acceptance of treaties."). The treaties that create and accompany the World Trade Organization, on the other hand, must be accepted as a whole — a party may not carve out any portion and refuse to abide by that portion. See Final Act, *supra* note 5, para. 4 ("[T]he WTO Agreement shall be open for acceptance as a whole."); Charter, *supra* note 4, art. XVI(5) ("No reservations may be made in respect of any provisions of this Agreement."); Wesley A. Cann, Jr., *Internationalizing Our Views Toward Recoupment and Market Power: Attacking the Antidumping/Antitrust Dichotomy Through WTO-Consistent Global Welfare Theory*, 17 U. PA. J. INT'L ECON. L. 69, 127 (1996) ("[S]ignatories must accept the Agreement 'as a whole.'").

suspect. The usual result is the converse, that more participants tend to lengthen negotiations.⁴⁹ In the absence of legitimate empirical information, this purported rationale for incurring the costs of interest group participation remains at issue.

In addition to suggesting that interest group participation will lead to quicker results, Charnovitz suggests that it will lead to better results. To support his assertion that the Uruguay Round produced flawed results, he relies on an assessment by Jeffrey Schott and Johanna Buurman which gave the Uruguay Round a grade of "B+."⁵⁰ Schott and Buurman published their insightful

⁴⁹ See Tom Farer, *New Players in the Old Game: The De Facto Expansion of Standing to Participate in Global Security Negotiations*, 38 AM. BEHAV. SCI. 842, 862-63 (1995) (noting that international organizations and interest groups have been granted access to international security negotiations, but predicting that continuous expansion of standing will overwhelm the process and hinder the creation of effective global solutions). Charnovitz states that "[o]ne reason why the Uruguay Round took so long to complete was because little occurred during extended periods of time as governments either stewed at each other or awaited national elections in individual countries." Charnovitz, *supra* note 3, at 341. John Croome's book-length discussion of the Uruguay Round negotiations reveals that there were times when formal negotiations were not conducted. CROOME, *supra* note 1, *passim*. During these periods there was much activity by the GATT Secretariat or by informal negotiating groups. See *id.* It should also be noted that the one example that Charnovitz provides — the dispute between the United States and the European Union over agriculture — occurred at the behest of special interest groups.

⁵⁰ See Charnovitz, *supra* note 3, at 341-42 n.51 (citing JEFFREY J. SCHOTT & JOHANNA W. BUURMAN, *THE URUGUAY ROUND: AN ASSESSMENT* 8 (1994)). As a general indictment of the trade regime Charnovitz cites an estimate by Mahbub ul Haq that "only seven percent of world production crossing national borders is subject to the trade liberalization rules of the GATT." Charnovitz, *supra* note 3, at 346 (citing *Overview*, in *THE UN AND THE BRETTON WOODS INSTITUTIONS: NEW CHALLENGES FOR THE TWENTY-FIRST CENTURY* 3, 5 (Mahbub ul Haq et al. eds., 1995)). Ul Haq provides no methodology for his estimate. His explanatory comments, however, shed much light on his estimate: "excluding as it does agricultural commodities, tropical products, textiles, services, capital flows, labour flows, intellectual property resources, etc." *Overview*, *supra*, at 5. These, of course, are the very subjects the Uruguay Round covered and the World Trade Organization continues to negotiate. In fact, in a later essay in the same anthology, ul Haq states that "[t]he recently concluded Uruguay Round of Multilateral Trade Negotiations may, however, change this situation." Mahbub ul Haq, *The Vision and the Reality*, in *THE UN AND THE BRETTON WOODS INSTITUTIONS: NEW CHALLENGES FOR THE TWENTY-FIRST CENTURY*, *supra*, at 26, 30. It is true, as Charnovitz points out, that stubborn pockets of protectionism remain — no one claims that the work of the trade regime is finished. The usual criticism of the trade regime is not, however, that it is as protectionist as implied by Charnovitz. Rather, the usual criticism is that the trade regime emphasizes free

and widely respected assessment under the auspices of the International Economic Institute. Their assessment takes as its standard of perfection a purely economic and commercially-oriented paradigm for world trade regulation; most of their criticisms of the Uruguay Round concern concessions to interest groups.⁵¹ As a baseline of perfection, Schott and Buurman's version of an "A+" agreement is probably not an agreement with which Charnovitz would be comfortable. Moreover, it almost certainly is not an agreement that could be achieved with extensive interest group participation.

If interest group participation yields the "best results," it will not be because the best results are economically efficient. Both Mancur Olson and common sense indicate that interest group participation will result in inefficiencies and misallocations.⁵² If interest group participation yields better results, it will be because those results more accurately reflect and satisfy the needs, desires, and wishes of the majority of persons who live under the regime created by those results.⁵³ This depends on whether interest

trade over other societal values. See Belina Anderson, *Unilateral Trade Measures and Environmental Protection Policy*, 66 TEMP. L. REV. 751, 751 (1993) ("[N]on-trade concerns are subordinate to trade concerns within the GATT framework."); Alberto Berhabe-Riefkohl, "To Dream the Impossible Dream:" *Globalization and Harmonization of Environmental Laws*, 20 N.C. J. INT'L L. & COM. REG. 205, 224 n.99 (1995) (describing World Trade Organization as a "regime that places trade uber alles"); Robert Howse & Michael Trebilcock, *The Fair Trade-Free Trade Debate: Trade, Labour and the Environment*, in ECONOMIC PERSPECTIVES ON INTERNATIONAL LAW (Alan O. Sykes & Jagdeep Bhandari eds., forthcoming 1996) (manuscript at 1, 2-3, on file with author) ("A visceral distrust of any or all demands for trade restrictions has impeded a careful analysis of the kinds of normative claims at issue . . ."); Nichols, *supra* note 12, at 700 ("That the trade regime gives primacy to trade is evidenced throughout the history of the GATT dispute settlement, as well as in the writings of officials and scholars closely allied with the General Agreement and the nascent World Trade Organization."); Shell, *supra* note 6, at 837 (stating that various models of trade management "seek to promote trade over other domestic and transnational values").

⁵¹ See Charnovitz, *supra* note 3, at 341-42 n.51 (citing SCHOTT & BUURMAN, *supra* note 50, at 8). Fortunately, there are less dogmatic assessments of the Uruguay Round, which generally are favorable. See, e.g., John H. Jackson, *Reflections on International Economic Law*, 17 U. PA. J. INT'L ECON. L. 17, 23 (1996) ("The Uruguay Round itself has been the most ambitious of the trade rounds under GATT, and would be a success with half of its achievements.").

⁵² See *supra* notes 40-41 and accompanying text.

⁵³ Satisfaction of needs, desires, and wishes is often but not always coincident with economic efficiency. See Nichols, *supra* note 12, at 704. For

group participation enhances the ability of the World Trade Organization to perceive and act upon those needs, desires, and wishes. I address that issue in a later section of this essay.⁵⁴

2.2.2. *Increased Public Support*

Charnovitz also suggests that interest group participation in policymaking will broaden public support for the World Trade Organization.⁵⁵ If this is true, it would easily justify the costs of interest group participation. Unfortunately, Charnovitz provides no evidence for this proposition, and his anecdotal statements deal entirely with the United States. A brief review of the literature reveals, however, that interest groups are not universally trusted outside of the United States.⁵⁶

Even with respect to the United States and Western Europe, where interest groups flourish,⁵⁷ I hesitate to accept the assertion

example, economists can construct arguments that promote the sale of human beings as efficient. See, e.g., Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 339 (1978) (suggesting elimination of restrictions "that prevent the market from operating freely in the sale of babies as of other goods"). Society does not countenance the sale of human beings, not because it is efficient or inefficient, but because it is wrong. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 376-77 (1990) (stating that slavery is economically defensible but intuitively wrong); see also STEVEN KELMAN, *WHAT PRICE INCENTIVES?: ECONOMISTS AND THE ENVIRONMENT* 29 (1981) (arguing that people make decisions on the basis of beliefs rather than economics).

⁵⁴ See *infra* notes 61-82 and accompanying text.

⁵⁵ See Charnovitz, *supra* note 3, at 347. Shell makes this point as well. See Shell, *supra* note 6, at 922-24.

⁵⁶ See, e.g., Marx V. Aristide & Laurie Richardson, *'Democracy Enhancements' — U.S. Style*, NACLA REP. ON THE AM., Jan.-Feb. 1994, at 35, 35 (arguing that under the guise of nongovernmental organizations, the United States channeled millions of dollars into Haiti to destabilize popular movements and to undermine Jean-Baptiste Aristide); Rebecca Dodd, *'Do-Goodism is Ruining This Country.'* WORLD PRESS REV., Mar. 1995, at 9 (reporting Rwandan concerns that nongovernment organizations are hindering Rwanda's post-war recovery). But see John Clark, *The State, Popular Participation, and the Voluntary Sector*, 23 WORLD DEV. 593, 593 (1995) (stating that nongovernmental organizations sometimes best represent the poorest sectors of developing countries).

⁵⁷ See Lester M. Salamon, *The Rise of the Nonprofit Sector*, FOREIGN AFF., July-Aug. 1994, at 109, 109-22 (documenting the increase in the number of nonprofit interest groups in the United States and Western Europe and suggesting that such groups may "permanently alter" the relationship between states and citizens).

that interest group participation increases public support without empirical validation of this hypothesis. An informal survey of thirty acquaintances and colleagues⁵⁸ reaffirmed my doubts regarding the assumption. Although twenty-three belonged to or supported financially interest groups or nonprofit nongovernment organizations, none knew whether their group participated in policymaking in any international organizations. Similarly, most did not know whether participation by their chosen organization would cause them to support the work of an international organization.⁵⁹

Although this informal survey lacks the rigor necessary to prove or disprove Charnovitz's hypothesis, it does suggest that the assumption that interest group participation in policymaking will increase public support for the World Trade Organization may not be as straightforward as Charnovitz implies. Indeed, without empirical data legitimately applicable to the World Trade Organization or a coherent theoretical rationale that takes into account the structure of the World Trade Organization, this issue too must be considered unresolved.

The participation of "special" interest groups also raises serious questions with respect to public support. In the United States, the participation of "special" interest groups generates disdain instead of support.⁶⁰ "Special interest group," however, is merely a term

⁵⁸ One in Moscow, one in Frankfurt, four in Canada, and the remainder in the United States.

⁵⁹ Four responded affirmatively, one said no, two refused to participate, and the remaining twenty-three felt they did not have sufficient information to answer the question.

⁶⁰ A Gordon S. Black poll taken May 1992 found:

74% of registered likely voters agreed that 'Congress is largely owned by the special interest groups,' 83% agreed that '[t]he special interest groups that give campaign contributions to candidates have more influence over the government than the voters,' and 85% agreed that '[s]pecial interest money buys the loyalty of candidates.'

Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1129 (1994); see also Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 29 (1985) ("[T]he American scheme of governance . . . is challenged on the grounds that it allows powerful private organizations to block necessary government action . . . the lawmaking process has been transformed into a series of accommodations among competing elites . . .") (citations omitted). Of course, the United States Congress and the World Trade Organization are not comparable institutions: members of the World Trade Organization are

of art and does not designate an identifiable subset of interest groups. Any attempt to preclude participation by interest groups on the grounds that the groups are "special interest groups" would raise troubling questions of fairness and normative bias.

2.3. *The Democracy of Interest Groups*

The possibility of increased participation by interest groups in World Trade Organization policymaking raises the question of whether interest groups enhance the democratic process. This question can be broken down into two issues: whether the creation of trade policy fails to reflect the goals of the majority of persons who live under that policy, and whether interest groups are democratic institutions.

2.3.1. *Failure of International Trade Policy*

Although I first suggested the question of a failure of democratic institutions in the context of government representation in a dispute,⁶¹ Charnovitz transposes the question to his discussion of participation by interest groups in policymaking.⁶² He then answers the question, stating that "many national governments fail to represent the interests of even a majority of their constituencies as periodically reflected by low approval ratings."⁶³ With that statement, he brushes aside the theoretical and empirical work of persons such as Robert Dahl, Seymour Martin Lipset, and Roland Pennock.⁶⁴ More importantly, he fails to respond to Daniel Verdier's exhaustive study on the relationship between democracy and international trade policy, in which Verdier concludes:

Voters control policymaking because elections provide policymakers with incentives to reproduce within their institutional microcosms the parametric structure of the

not elected officials and thus do not require campaign funding. Nonetheless, the data indicates a deep mistrust of special interest groups.

⁶¹ See Nichols, *supra* note 3, at 310 ("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."). I point out that this assumption is not valid. See *id.* at 312.

⁶² See Charnovitz, *supra* note 3, at 342.

⁶³ *Id.*

⁶⁴ See Nichols, *supra* note 3, at 311-12, n.78.

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.⁶⁵

Indeed, there were numerous avenues by which citizens and other entities provided input, through their governments, to the Uruguay Round.⁶⁶

Charnovitz suggests — without explaining why it is critical that these groups have a voice — that international interest groups do not have national governments to represent them in the World Trade Organization.⁶⁷ The list of organizations that he provides, however, indicates that the opposite may be true. The World Wildlife Federation has its base and a powerful lobby in Washington D.C.⁶⁸ The International Confederation of Free Trade Unions is an active member of the International Labour Organization,⁶⁹ which may work with the World Trade Organization on labor issues.⁷⁰ And the International Chamber of Commerce not only works directly with the World Trade Organization, but also works with a number of national govern-

⁶⁵ DANIEL VERDIER, *DEMOCRACY AND INTERNATIONAL TRADE: BRITAIN, FRANCE, AND THE UNITED STATES 1860-1990*, at 290 (1994); see also Nichols, *supra* note 3, at 312 n.79 (citing and discussing Verdier).

⁶⁶ See Nichols, *supra* note 3, at 305-07 & nn.48-55.

⁶⁷ See Charnovitz, *supra* note 3, at 343.

⁶⁸ See Zygmunt J.B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and its Consequences*, 19 U. MICH. J.L. REFORM 805, 822 n.58 (1986).

⁶⁹ See Schlossberg, *supra* note 33, at 77-78; Berta Esperanza Hernandez Truyol, *Out in Left Field: Cuba's Post-Cold War Strikeout*, 18 FORDHAM INT'L L.J. 15, 57 (1994).

⁷⁰ See *The European Commission: This Week In Europe*, M2 Presswire, July 26, 1996, available in LEXIS, News Library, Curnws File ("WTO activity in this field could support the work of the International Labour Organisation, the [European] Commission argues. . .").

ments.⁷¹

In short, it cannot be argued that there is a broad failure by governments to represent the interests of constituencies and of interest groups.⁷² A better argument for interest group participation, then, must be found in the possibility that such participation will enhance representation of persons in the World Trade Organization.

2.3.2. *Enhancement of Representation through Interest Groups*

At best, interest groups act as the analogue of a class in litigation: they allow a large number of persons with a proportionally smaller interest in a matter to deal on an equal basis with a small number of entities whose concentrated interest is proportionally greater. Charnovitz and others have shown that interest groups have carried out this function quite well in the area of environmental regulations.⁷³ Given, however, that trade negotiations are not entirely comparable to environmental negotiations, and that they are vulnerable to misuse by interest groups to different degrees, one cannot assume that interest groups will be as efficacious in trade policymaking.

In the first place, interest groups are not necessarily democratic or independent. In general, interest groups are not accountable in a formal sense to the constituencies they purport to represent, and often the leadership of these groups is not selected by that constituency.⁷⁴ In some countries interest groups simply cannot

⁷¹ See Jon Marks, *Trade's Global Police Force*, FIN. TIMES, May 8, 1996, *Exporter* at 16 (describing the International Chamber of Commerce).

⁷² Ironically, Charnovitz provides examples of domestic representation of constituent interests in the United States. While attempting to demonstrate that the founders of the liberal trade regime favored public participation, Charnovitz provides three pieces of evidence, each from the United States, extolling the virtue of public participation in *domestic* policymaking on international trade issues. See Charnovitz, *supra* note 3, at 345-46 & nn.70-71. Presumably, once an agenda was agreed upon at the domestic level, a government representative would advocate that agenda in the international arena.

⁷³ See Charnovitz, *supra* note 3, at 335-37; A. Dan Tarlock, *The Role of Non-Governmental Organizations in the Development of International Environmental Law*, 68 CHI.-KENT L. REV. 61 (1992).

⁷⁴ Cf. Paul Hirst, *Quangos and Democratic Government*, 48 PARLIAMENTARY AFF. 341, 341-42 (1991) (reporting serious concerns created by the fact that quasi-independent nongovernmental organizations in Britain are not elected and

be democratic or independent; their very survival depends on succumbing to pressure from the government.⁷⁵

Moreover, the quality and legitimacy of an interest group is not *bona fide* simply because the group is not associated with a government. Any entity that has money can create an interest group.⁷⁶ While this may not be a problem in the context of environmental policymaking,⁷⁷ it has become a problem in general.⁷⁸ Any effort, however, by the World Trade Organization to screen out illegitimate or manufactured interest groups will engender troubling questions of subjectivity and normative bias.⁷⁹

Finally, Charnovitz neither raises nor resolves the fundamental paradox of interest group participation in the process of governance: "interest groups solve collective action problems, but they bring destructive factionalism . . . in their wake."⁸⁰ Again, the differences in regimes compound the problem. Arguably, interest groups involved in international environmental regulation represent the interests of the majority, and provide a necessary counterweight to narrowly-defined groups that would exploit the

therefore not accountable). It must be repeated that interest group representation does not constitute participatory government in the Burkean sense; it is representative government with a selected, rather than elected, representative.

⁷⁵ See, e.g., David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 494 (1994) (stating that the nongovernment organization movement in Indonesia "cannot (or not yet) be taken as the opening of a democratic space, given the extent to which the movement must abjure politics and allow itself to be co-opted so as not to be destroyed").

⁷⁶ See SUSAN B. TRENTO, *THE POWER HOUSE: ROBERT KEITH GRAY AND THE SELLING OF ACCESS AND INFLUENCE IN WASHINGTON* 86-87, 196-97, 200 (1992) (providing examples of the instant creation of interest groups).

⁷⁷ Actually, there is some evidence that it is a problem. See Lynette Lamb, *Deceptive Associations*, UTNE READER, Jan.-Feb. 1992, at 18 (reporting on false public interest groups, including groups that posture as pro-environment but are actually funded by commercial interests opposed to environmental regulations).

⁷⁸ See *Public Interest Pretenders*, 59 CONSUMER REP. 316, 316-18 (1994) (documenting advocacy groups that are fronts for, funded by, or controlled by corporations or trade associations).

⁷⁹ The fact that the United Nations or other international organizations that interact with interest groups may not have encountered this problem is irrelevant. The World Trade Organization will present businesses and protectionist groups with a much different set of incentives than the United Nations.

⁸⁰ Lillian R. Bevier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1273 (1994).

commons for their own benefit.⁸¹ Conversely, in the context of international commercial regulation, it can be argued that interest groups are unlikely to represent the general interest and are more likely to represent narrowly defined groups.⁸² If the latter premise is true — and Charnovitz presents no argument that it is not — then participation by interest groups could increase factionalism and decrease the degree to which the resulting regulations represent the majority of persons governed by those regulations.

2.4. *Participation by Interest Groups in Policymaking by the World Trade Organization*

In the end, Charnovitz and I do not disagree that the World Trade Organization should benefit from the input of entities other than its own members. I am troubled, however, by the lack of a rational basis for participation by interest groups. Unfortunately, an argument that is structured on issues that arise in the context of standing provides only shallow justification. This essay should not be interpreted as an argument that the World Trade Organization could never benefit from interest group participation. Indeed, I believe that it could. Instead this essay presents three issues that are fundamental to a discussion of interest group participation in policymaking within the World Trade Organization. Those issues are: (1) the comparability of the World Trade Organization to international organizations and regimes that have successfully integrated interest groups into policymaking; (2) the extent of participation that can be sustained by the World Trade Organization; and (3) whether interest group participation enhances or inhibits representation of the majority's opinions and desires. Resolution of these three issues would contribute significantly to the creation of a rigorous argument in favor of interest group participation in policymaking.

⁸¹ African citizens might question this premise. See JONATHAN S. ADAMS & THOMAS O. MCSHANE, *THE MYTH OF WILD AFRICA: CONSERVATION WITHOUT ILLUSION* xii-xviii (1992) (discussing differences between the views of western environmental groups and citizens of Africa).

⁸² See Rowley & Tollison, *supra* note 36, at 152 (stating that beneficiaries of trade liberal factions lack incentives to organize); Shell, *supra* note 6, at 878-79 (stating that uncompetitive producers "mobilize labor and other constituencies to protect them from foreign competition").

3. PROFESSOR SHELL'S CRITICISM OF A PROPOSED EXCEPTION TO WORLD TRADE ORGANIZATION SCRUTINY

In his concluding contribution to our debate, Professor Shell reconsiders his earlier, tepid approval of my proposal for the creation of a doctrine that would exempt certain government practices from scrutiny by the World Trade Organization. Shell's criticism of my proposal hinges on two arguments: first, that it rests on an invalid theoretical underpinning; and second, that it represents a retreat from legalism and thus could damage the liberal trading system. In this section, I argue that by characterizing institutionalism as an iteration of realism Shell paints too stark a picture of the theoretical landscape of international law. I also show that the proposed exception affirms, rather than retreats from, the concept that dispute settlement within the World Trade Organization is more legalistic than it was under the GATT. Finally, I reiterate safeguards that I originally proposed to protect the liberal trade system.

To summarize my proposal, the trade agreements annexed to the Charter of the World Trade Organization act as templates against which the laws and actions of countries can be evaluated. When a country's action violates a trade agreement, or when the action nullifies or impairs a benefit promised under a trade agreement, the suffering country may ask the World Trade Organization to review the offending country's action and provide assistance in obtaining relief. Decisions made by panels convened under the GATT very much favored trade over other values. Dispute settlement under the GATT, however, was flexible and allowed for negotiation of panel decisions. Continuation of a one-sided approach by the World Trade Organization, which possesses a more rigid dispute settlement system, endangers the viability of the liberal trading system. I suggest that the World Trade Organization should interpret its organic documents to exempt from scrutiny actions by members that reflect underlying societal values and only incidentally impede trade.⁸³

3.1. *Theoretical Constructs and Contrasts*

Shell presents a dichotomy between two competing schools of

⁸³ See Nichols, *supra* note 3, at 300-02.

international relations theory: realism and liberalism. According to Shell, realism "views states as the primary actors in world affairs and treats all states as autonomous, self-interested, and animated by the single-minded pursuit of power."⁸⁴ Under liberalism, on the other hand, "nations are neither conceived of as autonomous, self-maximizing actors, nor are they considered the ultimate actors on the international stage."⁸⁵ "Rather, private individuals, businesses, and interest groups" comprise the essential actors.⁸⁶

Although Shell does not do so, this characterization could just as easily apply to the traditional dichotomy that once paralyzed international law theory. The realist view posits that states are the only actors in international law. Idealists, on the other hand, believe that international law transcends states and will ultimately lead to a legalistic world government.⁸⁷ The stalemate between these two competing theories contributed to the intellectual impoverishment of international law in the years following the Second World War.⁸⁸ Moreover, neither theory accurately describes the way that countries and other entities actually behave.⁸⁹

⁸⁴ Shell, *supra* note 3, at 364 (citation omitted).

⁸⁵ *Id.* at 367 (citing Shell, *supra* note 6, at 847 & n.85).

⁸⁶ *Id.* at 367 (citing Linda C. Reif, *Multidisciplinary Perspectives on the Improvement of International Environmental Law and Institutions*, 15 MICH. J. INT'L L. 723, 737 (1994) (book review)).

⁸⁷ See, e.g., RICHARD FALK, *REVITALIZING INTERNATIONAL LAW* xii-xvii (1989).

⁸⁸ Cf. MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 464-76 (1989) (describing competing theories in international law).

⁸⁹ Sixteen years ago, David Kennedy set out the theoretical contradictions inherent to both schools of thought. See David Kennedy, *Theses About International Law Discourse*, 23 GERMAN Y.B. INT'L L. 353 (1980). A state cannot be internally absolute, as realist doctrine maintains, and at the same time be externally social. See *id.* at 361. On the other hand, an issue is not "international" until the interests of states collide. See *id.* at 362. Yet, idealists assign states a secondary or nonexistent role. Empirical indictment of the realist doctrine is abundant; in this debate the International Labour Organization has been used several times for that very purpose. See, e.g., Shell, *supra* note 3, at 372; see also Kennedy, *supra*, at 362-64 (setting out manifestations of realist contradiction). Empirical assessment of idealism is not as easy, because the means by which private actors supposedly manipulate the government are secretive. An excellent study by Alessandro Bonanno, Douglas Constance, and Mary Hendrickson, however, uses the mass of evidence generated by the corruption investigations in Italy as a means of examining the relationship

Fortunately, international law theory is no longer limited to these two choices. David Kennedy and Chris Tennant identify “a dramatic increase during the past two decades in the volume of scholarly work that aims to rethink the foundations of international law and to respond to recent trends in political, social and legal theory.”⁹⁰ They have compiled a thirty-page bibliography of papers that depart from traditional theories of international law, which they refer to as “New Stream” theories.⁹¹ These theories do not constitute a single, cohesive argument; rather, they take a variety of approaches and import concepts from a variety of disciplines.⁹²

Similar to international law theory, international relations theory is no longer limited to the choice between cynical realism or idealistic utopianism. One alternative is institutionalism, the study of regimes. “Regimes are principles, norms, rules, and decision-making procedures around which actor expectations converge.”⁹³ Institutionalists are particularly interested in the

between a very large transnational corporation (“TNC”) and a government. Alessandro Bonanno et al., *Global Agro-Food Corporations and the State: The Ferruzzi Case*, 60 *RURAL SOC.* 274 (1995). A specific purpose of their study was to determine whether the state continues to have relevance in the modern global political and economic system. See *id.* at 274; see also *id.* at 275-79 (discussing various theories regarding relevancy of states). After reviewing the empirical data, they conclude that “[i]n the interaction between TNCs and the state, clearly TNCs control and limit the action of the state. However, this control is only partial as the state retains powers which it uses to oppose TNCs.” *Id.* at 289. In other words, idealism does not fully explain reality.

⁹⁰ David Kennedy & Chris Tennant, *New Approaches to International Law: A Bibliography*, 35 *HARV. INT’L L.J.* 417, 418 (1994).

⁹¹ *Id.* at 431-60.

⁹² Some of these writers are public international law scholars, while others focus on specific issues, such as the environment, nationalism, or trade. Others come from legal sociology, comparative law, or legal philosophy. Still others use insights from anthropology, economics, and feminism. See *id.* at 418-19.

Kennedy’s own scholarship on international law utilizes the techniques of critical legal studies. See Carl Landauer, Book Review, 30 *HARV. INT’L L.J.* 287 (1989) (reviewing DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987)).

⁹³ STEPHEN D. KRASNER, *STRUCTURAL CONFLICT: THE THIRD WORLD AGAINST GLOBAL LIBERALISM* 4 (1985). The connections between institutionalism and international law are abundant. See Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT’L L.* 335, 406-41 (1989). Institutionalism is now at the forefront of international law theory. See W. Michael Reisman, Book Review, 85 *AM. J. INT’L L.* 205, 206 (1991) (describing regime theories as “the current rage in the United States”).

formation of regimes, factors that lead to the persistence or demise of regimes, categorization of regimes, and the consequences of regimes.⁹⁴

Professor Shell, of course, is fully versed in the theory of international law. In the current debate, however, he describes institutionalism as "an iteration of realism."⁹⁵ While institutionalism does have roots in realist theory,⁹⁶ Shell's earlier characterization of institutionalism as a departure from realism is more accurate.⁹⁷ Indeed, one reason for the development of institutionalism was that realists could not explain the continued vitality of international organizations after the end of the cold war and the demise of U.S. hegemony.⁹⁸ Institutionalists provided the answer: regimes matter because they shape actors' behavior in ways that are inconsistent with an analysis of actors' relative powers.⁹⁹

Many institutionalist scholars have remained true to the realist roots of institutionalism and treat states as the primary actors in international relations or law.¹⁰⁰ This is not, however, the definition of institutionalist theory. Recent work in institutionalism includes a variety of actors other than states in international relations.¹⁰¹ Alec Stone proposes a continuum of regimes and

⁹⁴ See Anne-Marie Slaughter, Book Review, 89 AM. J. INT'L L. 454, 454-55 (1995) (discussing the thrust of REGIME THEORY AND INTERNATIONAL RELATIONS (Volker Rittberger ed. 1993)).

⁹⁵ Shell, *supra* note 3, at 366 (footnote omitted); see also Shell, *supra* note 6, at 858 ("Like realism, regime theory treats states as autonomous actors in the international arena and focuses on state behavior as the key variable in analyzing international relations.") Shell uses the older label "regime theory" for institutionalism.

⁹⁶ See Susan Strange, *Cave! Hic Dragones: A Critique of Regime Analysis*, 36 INT'L ORG. 479, 491-93 (1982) (explicating and criticizing realist roots of institutionalism).

⁹⁷ See Shell, *supra* note 6, at 860; see also Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 218-19 (1993) (characterizing institutionalism as a "challenge" to realism).

⁹⁸ See Burley, *supra* note 97, at 218-19. The realist explanation for international organizations was that they were maintained at the behest of a hegemon. See, e.g., ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 8-10 (1984).

⁹⁹ See Slaughter, *supra* note 94, at 454.

¹⁰⁰ See Burley, *supra* note 97, at 218.

¹⁰¹ See SUSAN STRANGE, *STATES AND MARKETS* 199-200 (1988); see also Virginia Haufler, *Crossing the Boundary Between Public and Private: Internation-*

actors, including actors other than nations.¹⁰² Indeed, although he does not make this claim, Paul Taylor's taxonomy of international organizations represents an excellent example of such work. It focuses solely on the nature of the institution and the underlying theory of an organization, and presents a spectrum of organizations, from those composed solely of nations to those in which nationhood is irrelevant.¹⁰³

Shell's characterization of liberalism denies nations a primary role in international relations and law.¹⁰⁴ I agree wholeheartedly with Shell that realism does not fully describe the world as it is. If, as Shell suggests, I were to locate "all 'societal values' squarely within nation-states and nowhere else,"¹⁰⁵ then I would blind myself to the myriad international, transnational, and local societal values.¹⁰⁶ Further, if, as Shell suggests, I found international organizations in which nations share power with nongovernmental entities "inconceivable,"¹⁰⁷ then I would blind myself to many of the more interesting international organizations that have come into existence in this century.¹⁰⁸ Realism shuts one eye to the world as it actually exists.

Shell's liberalism, however, is equally blind; it simply closes the other eye. By excluding nations as significant international actors, liberalism suffers exactly the same deficiencies as realism. It refuses to see a portion of the world as it actually exists.¹⁰⁹

al Regimes and Non-State Actors, in REGIME THEORY AND INTERNATIONAL RELATIONS, *supra* note 94, at 94.

¹⁰² See Alec Stone, *What is a Supranational Constitution?: An Essay in International Relations Theory*, 56 REV. POL. 441, 470-74 (1994).

¹⁰³ See *supra* note 26 and accompanying text.

¹⁰⁴ Shell, *supra* note 3, at 367; see also *id.* at 370 ("[T]he Trade Stakeholders Model sees individuals and groups — not states — as the primary actors in international relations.").

¹⁰⁵ Shell, *supra* note 3, at 371.

¹⁰⁶ Of course, I do not. See Nichols, *supra* note 3, at 299 ("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.").

¹⁰⁷ Shell, *supra* note 3, at 371-72.

¹⁰⁸ Again, I do not. See Nichols, *supra* note 3, at 300 (discussing the International Labour Organization and INTELSAT, and distinguishing them from the World Trade Organization).

¹⁰⁹ An excellent student note in the *Harvard Law Review* chides realists and idealists for the exclusive nature of their theories and suggests that both explain, at various times, the reality of international law. See Note, *Developing Countries and Multilateral Trade Agreements: Law and the Promise of Develop-*

Shell's theoretical perspective may be closer to mine than his writing suggests. Although he states on several occasions that his model "sees individuals and groups — *not states* — as the primary actors in international relations,"¹¹⁰ he speaks elsewhere of business interests joining government in the international arena.¹¹¹ He also states that his model "seeks to break the monopoly of states on international dispute resolution machinery,"¹¹² which could be interpreted as leaving a role for governments. Creating such a role for the state would represent an intriguing departure from traditional liberalism, in which "the state is conceived of as the agent for particular domestic constituencies' interests, not as a self-motivated actor seeking power or political stability."¹¹³ This departure holds exciting possibilities, and could herald the incorporation of institutionalist elements into liberalism.

Nonetheless, Shell correctly observes that the "differences between [our] views can better be summarized as a difference in theoretical approach."¹¹⁴ Under his approach, the World Trade Organization cannot be an organization of nations and ideally will evolve into a "World Union" similar to the European Union.¹¹⁵ On the other hand, I am willing to accept that the World Trade Organization is an organization of nations and place it near one end of Taylor's taxonomy. While I also accept that there are a multitude of other forms of international organizations, I am not forced to believe that change from one form to another is inevitable, or even always desirable. I have the luxury of critically evaluating the proposed changes, and measuring them against the internal coherence of the organization and the realization of potential benefits.

ment, 108 HARV. L. REV. 1715, 1730 (1995).

¹¹⁰ Shell, *supra* note 3, at 370 (emphasis added); see *id.* at 367 ("Under liberalism, nations are neither conceived of as autonomous, self-maximizing actors, nor are they considered the ultimate actors on the international stage."); Shell, *supra* note 6, at 877 (describing "reduction in the status of the state" under liberalism).

¹¹¹ See Shell, *supra* note 6, at 885.

¹¹² *Id.* at 915.

¹¹³ *Id.* at 877.

¹¹⁴ Shell, *supra* note 3, at 371.

¹¹⁵ See *id.* at 373 (suggesting "the EU as a possible source of inspiration for what the WTO *can become*" (emphasis in original)). Shell does not use the term "World Union."

3.2. *Legalism and Dispute Settlement*

Professor Shell suggests that my proposal would “turn the clock backward instead of forward on trade governance.”¹¹⁶ By this, I presume that he means that my proposal is a retreat from the movement toward legalism that he carefully describes.¹¹⁷ I disagree; it is only because the dispute system has become more legalistic that an exception, such as the one I propose, is required.

The dispute settlement system under the GATT was almost identical to that set forth in the World Trade Organization’s Understanding on Dispute Settlement,¹¹⁸ with one critical difference. Under both systems, panel reports are meaningless until adopted by the parties to the GATT or the members of the World Trade Organization. Under the GATT, adoption required the consensus of all voting parties, which meant that a losing party could block with its single vote the adoption of a panel report. The possibility that a losing party could block the adoption of a panel report created a certain degree of flexibility in the system and lent it an almost diplomatic nature.¹¹⁹

Under the World Trade Organization’s system, the process is the reverse. Panel reports are automatically adopted unless all voting members vote *against* adoption. This has led most observers, including Professor Shell, to characterize the process as more legalistic than that which occurred under the GATT.

As I have noted, with legalism comes rigidity. Members¹²⁰ can no longer negotiate once a panel has indicated that their actions violate a trade agreement or nullify or impair the benefits of another member. Their choice is more stark: comply with or defy the regulation.

If not overdone, this legalistic rigidity is beneficial.¹²¹ No legal system can survive, however, if it becomes overly rigid.

¹¹⁶ *Id.* at 362.

¹¹⁷ See Shell, *supra* note 6, at 894.

¹¹⁸ See Understanding, *supra* note 5.

¹¹⁹ See Nichols, *supra* note 5, at 100.

¹²⁰ Setting aside for one moment the differences in theoretical underpinnings, this would be true regardless of whether members are countries, individuals, interest groups, or other nongovernment entities.

¹²¹ For example, businesses and policymakers can make better predictions about how the World Trade Organization will act, and thus can make more effective decisions concerning their future actions.

Courts in the United States create exceptions to statutes and constitutions on a regular basis; there is a body of court-created exceptions and interpretations to virtually every constitutional amendment.¹²² Indeed, two hundred years of constitutional governance may not have been possible without this judicially created flexibility.¹²³ In short, I suggest that the World Trade Organization adopt this exception not as a retreat from legalism, but rather as an enhancement and acknowledgment of its more legalistic dispute resolution system.¹²⁴

3.3. *Use of the Exception to Circumvent Trade Liberalization*

Professor Shell's remaining criticism of the proposed exception is that it "would encourage domestic protectionist groups to meticulously draft domestic laws favoring domestic industries to give these laws an appearance of being 'primarily' directed at a legitimate 'underlying societal value.'"¹²⁵ This argument often arises against proposals to balance nontrade issues against trade issues: proposals to deal with the environment, labor, and even corruption have been attacked as actual or possible guises for protectionist activity.¹²⁶

Because Professor Shell fails to explain why he finds the safeguard I suggest to be neither "persuasive [nor] principled,"¹²⁷ I can only briefly repeat it. Placing a real burden of proof on the party claiming the exception would preclude parties from claiming

¹²² See Alan Brownstein, *How Rights are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 868 (1994).

¹²³ See generally Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943) (discussing the need for law to flex to accommodate societal interests).

¹²⁴ Once again, the differences in theoretical perspective between Professor Shell and myself must be emphasized. Professor Shell would cure the perceived ills of the World Trade Organization by admitting into the process the "real" actors in international relations, who would then achieve the desired results. I, on the other hand, suggest that the regime itself be changed in order to both survive and to yield the optimal results.

¹²⁵ Shell, *supra* note 3, at 379. Shell deserves credit for avoiding the trap of arguing that *countries* would enact protectionist legislation; he remains true to the mettle of liberalism.

¹²⁶ See, e.g., Frances Williams, *Labour Rights Plea to WTO*, FIN. TIMES, June 12, 1996, at 7 ("Many developing countries, especially in Asia, fear discussion of labour standards in the WTO would serve as a pretext for the use of trade sanctions aimed at removing their cheap-labour advantage.")

¹²⁷ Shell, *supra* note 3, at 379.

societal values where none existed.¹²⁸ Shell also contends that an international tribunal is incapable of discerning societal values.¹²⁹ To the contrary, discerning values is commonplace in international tribunals, including those that were convened under the GATT.¹³⁰

4. CONCLUSION

The World Trade Organization will engender debate for many years. Although the debate between Richard Shell, Steve Charnovitz, and myself could be characterized as one concerning standing and participation, an equally valid and critical point of contention is whether the membership or the form of the organization has more bearing on its functioning. Shell and Charnovitz present excellent and convincing cases for membership as an important aspect of the World Trade Organization. In doing so, however, I fear that they slight the importance of form and the nature of the international trade regime.

Steve Charnovitz bases his justifications for interest group participation in policymaking on an argument concerning standing. Unfortunately, that argument structure leads his justifications away from the form of the World Trade Organization, and thus away from fundamental issues. Similarly, by adopting a liberal perspective that emphasizes actors over form, Professor Shell blinds his analysis to the possibility that organizations of nations may be viable, and thus he too unnecessarily restricts the scope of his analysis. In this essay, I supply a

¹²⁸ See Nichols, *supra* note 3, at 301-02. In other words, the party that brought the complaint would not be required to prove or disprove the existence of societal values; instead, the burden rests with the party defending its actions to prove the existence of a societal value and that its actions reflected that value. See Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1107 (1989) (suggesting that inquiry into intent in the United States works "by allocating burdens of proof between the individual and the state"). International tribunals have much experience at discerning values. See *infra* note 130. It would be very difficult for a protectionist government to fabricate societal values out of whole cloth.

¹²⁹ See Shell, *supra* note 3, at 379.

¹³⁰ See Nichols, *supra* note 3, at 301 n.35 (citing Norway, Restrictions on Imports of Apples and Pears, June 22, 1989, GATT BISD 36th Supp. 306, 321 (1990)). In determining whether custom is a binding source of international law, tribunals must determine whether a customary behavior is considered obligatory. The sources used in the determination are similar, if not identical, to those used to determine societal values. See Nichols, *supra* note 12, at 717.

perspective that is missing from both Charnovitz's and Shell's arguments. Simply put, I provide an institutional counterweight to their membership arguments.