

THE TRADE STAKEHOLDERS MODEL AND PARTICIPATION BY NONSTATE PARTIES IN THE WORLD TRADE ORGANIZATION

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1. INTRODUCTION

On January 17, 1996, the World Trade Organization (“WTO”) handed down its first legal decision¹ since it began operations on January 1, 1995.² The case, which Brazil and Venezuela brought against the United States, challenged regulations of the U.S. Environmental Protection Agency (“EPA”) setting higher Clean Air Act emissions standards for imported gasoline than are applied to similar, domestically produced fuels.³ The WTO panel ruled that the EPA regulations violated the prohibition of the General Agreement on Tariffs and Trade (“GATT”) against domestic laws that discriminate in favor of domestic products against imports.⁴

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¹ See Paul Blustein, *WTO Ruling Draws Fierce Criticism*, WASH. POST, Jan. 19, 1996, at F3; David E. Sanger, *World Trade Group Orders U.S. to Alter Clean Air Act*, N.Y. TIMES, Jan. 18, 1996, at D1, D6.

² “Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steady growing volume of real income and effective demand,” over 125 states created the WTO on April 15, 1994. GATT Secretariat, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, *reprinted in* 33 I.L.M. 1125, 1144 (1994) [hereinafter Final Act]. The first day of WTO operation was January 1, 1995. See David E. Sanger, *U.S. Threatens \$2.8 Billion of Tariffs on China Exports*, N.Y. TIMES, Jan. 1, 1995, at 14.

³ See Bhushan Bahree, *WTO Panel Rules Against U.S. in Dispute Over Gasoline Norms*, WALL ST. J., Jan. 18, 1996, at A11. The Clean Air Act required U.S. producers to meet standards based on emissions of gasoline they produced in 1990. See Sanger, *supra* note 1, at D6. Meanwhile, many foreign producers, who did not have equivalent records documenting their 1990 production, were forced to comply with the average U.S. standard, which was a higher standard than some U.S. refiners had to meet. See *id.*

⁴ See Sanger, *supra* note 1, at D6. Specifically, the EPA regulations at issue violated the GATT “National Treatment” provision set forth in Article III. The National Treatment provision states:

Unlike a ruling of a U.S. court in such a sensitive, environmental case, the WTO opinion was not published or released so that those interested could see and evaluate the panel's legal reasoning.⁵ Nor did interested environmental groups, American gasoline producers, or South American gasoline exporters have an opportunity to participate in — or even observe — the panel's proceedings.⁶ Under WTO procedures, the panel met, heard arguments, considered briefs from the states involved, and, with the help of the WTO's legal office, wrote its decision.⁷ All of this activity took place behind closed doors.

Assuming the United States loses its appeal of the decision,⁸ the only avenue by which the United States can avoid compliance

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use.

The Protocol of Provisional Application of the General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, art. III, 61 Stat. A3, A18, 55 U.N.T.S 187, 206.

⁵ See Bahree, *supra* note 3, at A11 (noting the report was released only to the countries that were parties to the case and would not be circulated to other WTO member states until January 29, 1996).

⁶ For a discussion of the lack of participation by nongovernmental organizations in the WTO decisionmaking and policymaking processes, see G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 847 & n.85 (1995) (describing unsuccessful efforts by the United States during the Uruguay Round negotiations to "reform the existing closed nature of GATT panel proceedings").

⁷ See Bahree, *supra* note 3, at A11. The process leading to the delivery of the WTO panel opinion in the gasoline emissions case closely resembled the closed opinion process that characterized the GATT dispute resolution mechanism. See Shell, *supra* note 6, at 849 & n.93 (describing the role of the WTO Secretariat as assisting panels with the legal, historical, and procedural aspects of cases).

⁸ The U.S. Trade Representative stated that he will appeal the decision to the WTO's new supreme court of trade, the WTO Appellate Body. See Steve Charnovitz, *The WTO Panel Decision On U.S. Clean Air Act Regulations*, Int'l Envtl. Rep. (BNA) No. 5, at 195 (March 6, 1996) (stating that the USTR announced its appeal of the gasoline decision on Feb. 20, 1996). The right to an appeal of a WTO panel decision is guaranteed by the Understanding on Rules and Procedures Governing the Settlement of Disputes, Final Act, *supra* note 2, Annex 2, art. 17, *reprinted in* 33 I.L.M. 1226, 1236 [hereinafter Understanding].

under WTO rules will be to persuade every GATT signatory state, including Brazil and Venezuela, to join the United States in voting to overturn the decision.⁹ The decision immediately drew “fierce criticism” from Republican presidential candidates favoring economic nationalism,¹⁰ public interest groups favoring environmental causes,¹¹ and economists worried that the case might undermine support for the WTO in the United States¹²

The gasoline import standards case illustrates several of the problems that both Professor Philip Nichols and I foresee in the new WTO dispute resolution machinery. While Nichols and I differ over the direction that reforms of the WTO system should take, we agree that the WTO system, as now structured, is in danger of collapse from political stresses.¹³

In his well-crafted article, Professor Nichols articulates his disagreements with the WTO reforms I had previously proposed in an article entitled *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization* (“*Trade Legalism*”).¹⁴ In *Trade Legalism*, I argue that the WTO should open its dispute resolution system and policymaking bodies to outside scrutiny and ultimately to formal participation by a variety of parties, including businesses and nongovernmental organizations (“NGO’s”).¹⁵

⁹ Unlike the GATT dispute settlement system, a WTO panel or appellate decision is adopted by the WTO Dispute Settlement Body (a group comprised of representatives from all states that have signed the treaty in dispute) unless “the winner of the case can be persuaded to vote to overturn its own victory.” Shell, *supra* note 6, at 849; Understanding, *supra* note 8, arts. 16-17, 33 I.L.M. at 1235-36.

¹⁰ See Blustein, *supra* note 1, at F3 (citing conservative candidate Patrick Buchanan’s position that the United States should withdraw from the WTO and indicating his intention “to make this a major issue in this [1996 Presidential] campaign”).

¹¹ See *id.* (noting the opposition voiced by Public Citizen, the public interest group founded by Ralph Nader).

¹² See *id.* (discussing economists’ concerns that the decision could provoke vehement “protectionist and isolationist sentiment” against continued U.S. involvement in the WTO).

¹³ See Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT’L ECON. L. 295, 300-02 (1996) [hereinafter Nichols, *Extension of Standing*].

¹⁴ Shell, *supra* note 6.

¹⁵ See *id.* at 907-925. Similarly, Steve Charnovitz supports this opening of the WTO policymaking and dispute resolution processes to NGOs. See Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade*

Nichols strongly disagrees with this idea and counters with his own set of suggested reforms. For example, Nichols favors putting nontrade experts on selected WTO dispute resolution panels as "minority" members so that nontrade values will be given a voice within this system.¹⁶ Additionally, Nichols wants WTO dispute resolution panelists to interpret the WTO Charter to exempt from WTO override any domestic law enacted "primarily" to codify some nontrade "underlying societal value" even if such a law impinges "incidentally" on international trade.¹⁷

This essay summarizes my thesis, defends it, and discusses why I think Nichols' reforms would turn the clock backward instead of forward on trade governance. Additionally, this essay explores the theoretical foundations for Nichols' proposals and demonstrates how these foundations both ground and unnecessarily limit his perspectives on trade governance.

2. BACKGROUND: COMPARATIVE ADVANTAGE, INTERNATIONAL RELATIONS THEORY, AND THE WTO

The occasion for my 1995 article and for this exchange of views is the creation of the WTO. The WTO legal system departs radically from its GATT predecessor in at least two striking respects. First, a member state that lost a case before a GATT dispute settlement panel could simply block adoption of the panel decision by the GATT membership and ignore it.¹⁸ By contrast, WTO legal decisions can be overturned only if all states that have signed the treaty in dispute, including the winner of the

Organization, 17 U. PA. J. INT'L ECON. L. 331 (1996). Indeed, Charnovitz has pointed out that NGO participation in world trade governance has been an issue since before the founding of the GATT. See Steve Charnovitz & John Wickham, *Non-Governmental Organizations and the Original International Trade Regime*, 29 J. WORLD TRADE 111 (1995).

¹⁶ See Nichols, *Extension of Standing*, *supra* note 13, at 328.

¹⁷ See *id.* at 297, 301; Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 709 (1996).

¹⁸ See Nichols, *Trade Without Values*, *supra* note 17, at 697. Since all GATT decisionmaking was by "consensus," one party could utilize a "dilatory" strategy, block the adoption of a panel report, and bring the dispute resolution machinery to a halt. See ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 155-203 (1993) (citing examples of the dilatory strategy).

case, vote to reverse them.¹⁹ In essence, the de facto veto power has shifted from the states that lose cases to the states that win them.²⁰

Second, the GATT system did not provide a legal appeals process for the loser; it was either veto the decision, delay compliance for as long as possible, or comply. Under the new WTO procedures, strict time limits for hearings, and compliance are now an integral part of the process.²¹ More striking, a new appeals process has been established in the form of a permanent “supreme court” for world trade — the WTO Appellate Body.²²

The Appellate Body consists of seven appointed members²³ who, sitting as three-judge panels, will apply the “customary rules of interpretation of public international law” in their decisions.²⁴ The Appellate Body has jurisdiction to hear appeals from all WTO dispute resolution panels and make legal rulings on all treaties supervised by the WTO.²⁵ The creation of the Appellate Body and the prospect of a growing corpus of carefully crafted legal opinions that authoritatively interpret the WTO’s main trade treaties gives the WTO an air of formal legalism that was totally absent from the GATT.²⁶

¹⁹ See Understanding, *supra* note 8, art. 16(4), 33 I.L.M. at 1235.

²⁰ See Shell, *supra* note 6, at 849.

²¹ See Understanding, *supra* note 8, art. 17(5), 33 I.L.M. at 1236.

²² See *id.* art. 17(1), 33 I.L.M. at 1236; see also Shell, *supra* note 6, at 849-50 & nn.93-98 (describing the composition and functions of the WTO Appellate Body).

²³ The first seven members of the Appellate Body have now been named. They consist of a former U.S. congressman and trade official, a career New Zealand diplomat, a German authority on international economic law, an Egyptian economics professor and former World Bank official, a career trade diplomat from Uruguay, a Supreme Court Justice from the Philippines with a graduate law degree from Yale who has extensive experience as a trade lawyer and international arbitrator, and a Japanese international economic law professor who studied at Tulane Law School as well as Tokyo University. See *International Trade: WTO reaches Accord on Membership to new Appellate Body, Picks Members*, 1995 DAILY REP. FOR EXECUTIVES 230 d14, Nov. 30, 1995, available in LEXIS, Legnew Library, Drexec File.

²⁴ See Understanding, *supra* note 8, art. 3(2), 33 I.L.M. at 1227.

²⁵ See *id.* art. 17(6), 33 I.L.M. at 1236. The treaties supervised by the WTO are set forth in Appendix 1 to the Understanding. See *id.* App. 1., 33 I.L.M. at 1244.

²⁶ See Georg M. Berrisch, *The Establishment of New Law Through Subsequent Practice in GATT*, 16 N.C. J. INT’L L. & COM. REG. 497, 500 (1991) (stating that the WTO dispute resolution process creates “a system governed by the rule

In *Trade Legalism*, I attempt to explain these innovations with reference to free trade and international relations theories. The problem of international trade governance arises because the implementation of free trade theory and the related doctrine of “comparative advantage”²⁷ call for levels of cooperation among nation-states that are difficult to achieve and sustain in the face of “realist” assumptions about state behavior.²⁸ As I summarize it, the classic foreign relations theory of “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. The interstate competition for power, in turn, creates a world that is characterized by anarchy. In such an anarchic world, international law is “but a collection of evanescent maxims or a ‘repository of legal rationalizations,’” and international cooperative arrangements have an unstable existence.²⁹

From a realist perspective, international trade is problematic because it requires states to lower economic and other protective barriers, subjecting them to possible exploitation by power-seeking rivals.³⁰

The structure of the old GATT dispute resolution system

of law”). For a discussion on the shift from pragmatism to legalism in the GATT/WTO system, see Jared R. Silverman, Comment, *Multilateral Resolution Over Unilateral Retaliation: Adjudicating the Use of Section 301 Before the WTO*, 17 U. PA. J. INT’L ECON. L. 233, 253-63 (1996).

²⁷ The doctrine of comparative advantage traces its roots to David Ricardo’s insight that nations are materially better off, individually as well as collectively, if they produce only those goods and services that they are most efficient at producing and import the rest of what they need. See EDWIN MANSFIELD, *ECONOMICS: PRINCIPLES, PROBLEMS, DECISIONS* 357-58 (7th ed. 1992) (providing examples to differentiate comparative advantage from absolute advantage).

²⁸ See HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 3-15 (1960) (discussing the six principles of political realism); Joseph M. Grieco, *Anarchy and the Limits Of Cooperation: A Realist Critique Of the Newest Liberal Institutionalism*, 42 INT’L ORG. 485, 485 (1988) (describing the fundamental tenets of realism and identifying its major proponents).

²⁹ Shell, *supra* note 6, at 855 (footnote omitted).

³⁰ See *id.* at 856-58 (describing the “paradox of Free Trade governance”).

reflected the seeming paradox between the realist notion of self-interested states and the idea of multilateral state cooperation to lower trade barriers. The formally nonbinding GATT system assumed that a state would comply with international trade rules only when that state deemed it in its immediate self-interest to do so.³¹ To avoid the embarrassment of having states openly defy GATT rulings, the system gave states that lost panel decisions the de facto power to veto the panel decision. Consequently, throughout the entire GATT history, the GATT membership voted only once to approve economic retaliation by one state against another for violations of GATT treaty obligations.³² With this highly flexible and forgiving legal structure in the background, the GATT was able to foster — or at least stay out of the way of — an unprecedented expansion of trade and global economic integration during the period between 1947 and 1995.³³

Against this background, the new WTO structure raises a serious problem for realist trade governance theory: how are we to explain and reconcile (1) the switch from formally nonbinding to formally binding rules and (2) the change from GATT's loosely structured, arbitration-styled panel process to the current legalistic system led by the WTO's Appellate Body? My article attempts to help develop a theory to explain these developments by positing three trade governance models — the Regime Management Model, the Efficient Market Model, and the Trade Stakeholders Model.³⁴

The Regime Management Model best describes the current, state-dominated structure of the WTO. The Regime Management Model derives from “regime theory”³⁵ in the international organi-

³¹ Conversely, if it was in a state's interest to comply with a GATT tribunal ruling, compliance would presumably take place regardless of the fact that the GATT system was formally nonbinding.

³² See Netherlands, Measures of Suspension of Obligations to the United States, Nov. 8, 1952, GATT BISD 1st Supp. 32 (1953); see also Pierre Pescatore, *Drafting and Analyzing Decisions on Dispute Settlement*, in 1 HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT pt. 2, at 8 n.7 (1995) (referring to the Netherlands Action initiated in response to U.S. restrictions on dairy imports).

³³ See JAGDISH BHAGWATI, PROTECTIONISM 8-9 (1988) (noting the probability “that diminishing trade barriers were a major contributory force in the postwar expansion of incomes”).

³⁴ See Shell, *supra* note 6, at 834-38.

³⁵ See Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 217-19 (1993)

zation literature of political science. Regime theory is an iteration of realism that focuses on the fact that states usually cooperate rather focusing on the potential that states may not cooperate.³⁶ Like realism, regime theory views the sovereign nation-state as the primary actor on the world stage and accepts the state as the sole voice for its people in international relations.³⁷ Unlike realism, however, regime theory assumes that states are motivated to achieve a set of sometimes conflicting goals, such as wealth enhancement and domestic political control, and not just the single goal of power enhancement.³⁸ Regime theory views trade treaties as “contracts” among sovereign states that help them to resolve potentially conflicting interests over these diverse goals.³⁹ Binding, rule-oriented trade adjudication can thus be seen as an enforcement mechanism by which states solve a multiparty “prisoners’ dilemma”⁴⁰ arising out of their trade contracts.

Viewed as a formal international trade “regime,” the new WTO legal system has the purpose of providing states with a set of consistent, international legal rules. These rules are intended to induce states to negotiate trade relations “in the shadow of the law,” rather than purely on the basis of power relationships.⁴¹ Under the Regime Management Model, both the potential gains to be had from increased trade and the losses to be suffered by states failing to faithfully abide by the trade adjudication system serve as sufficient inducements to assure compliance with the WTO, even though international law lacks a centralized police

(defining international regimes as “principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area”).

³⁶ See Shell, *supra* note 6, at 858-66.

³⁷ See *id.* at 835.

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See *id.* When parties bargain “in the shadow of the law,” they must take into account not only their relative power positions and interests, but also their predictions about how tribunals will interpret rules in particular cases. See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968-69 (1979) (discussing how legal rules confer “bargaining endowments” upon the two bargaining sides in a divorce case, allowing them “to negotiate some outcome that makes both parties better off than they would be if they simply accepted the result a court would impose”).

power.⁴²

Against this quasi-realist explanation for the WTO, I posited an alternative — the Efficient Market Model.⁴³ This model derives from a combination of the foreign relations theory of “liberalism” and an ideological commitment to neo-classical free trade doctrines.⁴⁴ Under liberalism, nations are neither conceived of as autonomous, self-maximizing actors, nor are they considered the ultimate actors on the international stage.⁴⁵ Rather, private individuals, businesses, and interest groups are the “essential players in international society who, in seeking to promote their own interests, influence the national policies of States” in international relations.⁴⁶ Because free trade leads to the most (comparatively) efficient use of national resources, a majority of domestic economic interests and all transnational business enterprises are presumed to favor implementing the doctrine of comparative advantage as an international “rule of law.”⁴⁷ Such a rule would constrain domestic protectionists and legal rent-seekers that attempt to sidetrack governments from pursuing liberal trading policies.⁴⁸

Multinational corporations in particular gain from reduced trade barriers because such barriers represent a deadweight loss on intra firm movement of goods. Trade barriers between nation-states amount to nothing more than a tax on internal firm transfers for large business entities whose production and distribution span regional and global markets. In the United States, for example, intra firm sales from U.S. corporations to their foreign affiliates from 1982 through 1993 annually constitut-

⁴² See Shell, *supra* note 6, at 835.

⁴³ See *id.* at 877-893.

⁴⁴ See *id.* at 836.

⁴⁵ See *id.*

⁴⁶ 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) (describing Ann-Marie Slaughter Burley's definition of liberalism).

⁴⁷ See Shell, *supra* note 6, at 836.

⁴⁸ See Jan Tumlir, *Need for an Open Multilateral Trading System*, 6 WORLD ECON. 393, 406 (1983) (stating that “international [free trade] rules represent a truer expression of the national interest of all the countries concerned than the mass of national (economic) legislation”).

ed a steady 30% of all U.S. exports.⁴⁹ Over the same period, from 32% to 37% of U.S. imports derived from intra firm purchases, led by growing numbers of purchases by U.S. affiliates of foreign firms.⁵⁰

Because the domestic "losers" from international trade tend to be well-organized, interest groups favoring free trade confront the problem of how to systematically induce states to submit to the greatest amount of free trade discipline. Viewed as an Efficient Market Model institution, the WTO represents a partial triumph of free trade interests *over* protectionist states, not a victory for states seeking to maintain control over trade.⁵¹ With its binding rules and authoritative Appellate Body,⁵² the WTO legal system can potentially provide a strict set of international trade rules. These rules can be used as legal instruments to strike down government regulation of trade and achieve efficient international capital and consumer markets. For example, the recent WTO gasoline import standards decision⁵³ can be viewed as a legal triumph of international oil producers over their U.S. counterparts and allies in Congress as readily as a strictly political adjustment in relations between the states of Brazil, Venezuela, and the United States.

From the perspectives of global capital and consumer markets, the WTO promises to become the instrument by which beneficiaries of free trade (or their surrogates) can further reduce the legal transaction costs of global trade. The WTO's voting requirement that member states achieve complete unanimity to overturn a WTO legal decision⁵⁴ is much stricter, in my view, than is required to provide simple "regime management."⁵⁵

⁴⁹ See *Not by the Book*, ECONOMIST, Dec. 9, 1995, at 76 (citing OBIE WHICHARD & JEFFREY LOWE, BUREAU OF ECONOMIC ANALYSIS, AN OWNERSHIP-BASED DISAGGREGATION OF THE US CURRENT ACCOUNT 1982-93 (1995)).

⁵⁰ See *id.*

⁵¹ See Shell, *supra* note 6, at 836.

⁵² See Understanding, *supra* note 8, art. 17, 33 I.L.M. at 1236.

⁵³ See *supra* notes 1-11 and accompanying text.

⁵⁴ See Understanding, *supra* note 8, arts. 16(4), 17(14), 33 I.L.M. at 1235, 1237.

⁵⁵ Until now, even the more radical international voting conventions required three-fifths, three-fourths, or weighted majority votes to take action or make amendments to treaty obligations. See David A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79 IOWA L. REV.

Indeed, the idea that all signatory states may be bound by a treaty interpretation that only a single state (plus a dispute resolution tribunal) supports is without precedent in international law. By setting such a high political bar to overturning a legal decision, WTO framers provided states and free trade advocates with unambiguous, credible “cover” against criticism whenever compliance with a WTO legal decision promoting trade might run counter to any competing constituency’s interest — whether that group is a locally protected industry, an international environmental group, or a labor rights organization.⁵⁶ With this leverage, the Efficient Market Model hypothesizes that the internationally-minded business interests that always monitored trade disputes as they wound their way through the GATT will soon push the WTO to grant them something more than “shadow” status.⁵⁷

Both the Regime Management Model and — to an even greater extent — the Efficient Market Model point to a WTO that will exalt trade over other domestic and transnational values and thus, Nichols and I agree, place enormous domestic political stresses on the WTO. But in *Trade Legalism* I suggest a third model, the Trade Stakeholders Model, as an alternative vision of the interplay between trade and other social policies.⁵⁸ This model is more visionary than either of the other two, and I concede in *Trade Legalism* that “[s]ubstantial institutional reforms will be needed . . . before the Trade Stakeholders Model can be used as a blueprint for future jurisprudential developments and systemic reforms within the WTO.”⁵⁹ Nevertheless, I argue that concerns about the WTO’s long-range stability, the distributive fairness of global wealth allocation, and the procedural justice of WTO processes all suggest the normative superiority of the Trade Stakeholders Model over both the Regime Management and the

769, 792-97 (1994) (discussing various examples of nonconsensus voting conventions as exceptions to the ordinary practice of requiring consensus to make any change or adopt any new interpretation of a treaty).

⁵⁶ Shell, *supra* note 6, at 900.

⁵⁷ See *id.* at 902. Nichols confirms that business groups had favored access to the GATT. See Nichols, *Extension of Standing*, *supra* note 13, at 307 n.37 (discussing how groups such as the International Chamber of Commerce and the World Bank had access to GATT policymaking bodies). Nichols makes no mention of parallel participation in the GATT by environmental, consumer, or labor rights groups.

⁵⁸ See Shell, *supra* note 6, at 907-25.

⁵⁹ See *id.* at 838.

Efficient Market models.⁶⁰

Like the Efficient Market Model, the Trade Stakeholders Model sees individuals and groups — not states — as the primary actors in international relations.⁶¹ Unlike the Efficient Market Model, however, the Trade Stakeholders Model emphasizes opening dispute resolution and policymaking processes to environmental, labor, and other groups. As a result, a wide array of interests can join businesses and nation-states in the important task of constructing the economic and social norms that will make global trade a sustainable aspect of a larger transnational society.⁶² In contrast with the Efficient Market Model, which emphasizes “economic legalism” in the WTO, the Trade Stakeholders Model embodies a form of “participatory legalism” that would render the WTO an effective forum for discussing the trade-offs between trade and nontrade issues.⁶³

The transformation of the European Union (“EU”) from a cooperative steel and coal arrangement in the 1950s into the wide-ranging social and economic entity of today provides a useful analogy.⁶⁴ Indeed, the EU and the European Court of Justice (“ECJ”) embody Trade Stakeholders Model values that might inspire WTO reforms, especially as continued global economic integration shapes international institutions and links trade with other social values.

To summarize my three claims: (1) the Regime Management Model best describes the *present* overall structure of the WTO; (2) the Efficient Market Model helps explain the most striking innovations in the WTO system, suggesting that globally oriented businesses will soon pressure states for more direct access to the WTO machinery in *future rounds* of WTO reforms; and (3) the Trade Stakeholders Model articulates an alternative to the Efficient Market Model as a blueprint for future reforms that is both normatively superior and more likely to result in long-run trade governance stability.

⁶⁰ See *id.* at 907-08.

⁶¹ See *id.* at 911.

⁶² See *id.*

⁶³ See *id.* at 915.

⁶⁴ See *id.* at 917-19.

3. A RESPONSE TO NICHOLS

Although Nichols characterizes his disagreement with me as one involving the policy question of standing for NGOs in the WTO dispute settlement proceedings, the differences between Nichols' and my views can better be summarized as a difference in theoretical approach. As an international relations "liberal," I look toward the day when international institutions become more transparent to the constituent domestic and transnational actors that these international entities purport to serve. On the other hand, I understand Nichols to be a trade "realist" who prefers to leave trade matters under the control of diplomats and states. Nichols acknowledges that "expanded standing [for NGOs in the WTO] may become desirable" at some point in the future,⁶⁵ but he clearly views this development with alarm.⁶⁶ Because realists and trade liberals philosophically disagree about the way international relations should be conducted, it is no surprise that Nichols and I disagree about opening up the WTO.

The realist underpinning of Nichols' world view emerges in a number of ways. First, Nichols locates all "societal values" squarely within nation-states and nowhere else.⁶⁷ Transnational values, such as global environmentalism and human rights, have no place in his analysis except as these values achieve expression either through domestic law or national policies of state "champions" for these concerns.⁶⁸ This focus on states as the sole legitimate voices in international affairs is classically realist.

Second, Nichols sees institutions such as the GATT and the WTO solely as "forums in which governments, not private parties, formulate trade policy."⁶⁹ I agree with Nichols' factual assertion that governments dominated the GATT structure and governments created the WTO. But Nichols takes the fact of government domination a step further — he considers state-centeredness as "the essence" of the WTO.⁷⁰ An alternative

⁶⁵ See Nichols, *Extension of Standing*, *supra* note 13, at 327.

⁶⁶ See *id.* (stating that calls for expanding the scope of standing before WTO dispute settlement panels "are suspect" and "should be heeded with caution").

⁶⁷ See Nichols, *Trade Without Values*, *supra* note 17, at 668-90.

⁶⁸ See *id.* at 676.

⁶⁹ See Nichols, *Extension of Standing*, *supra* note 13, at 303.

⁷⁰ See *id.*

arrangement for governing global trade appears, to Nichols, not only unwise, but inconceivable because such arrangements are “based on implicit assumptions that do not comport with the real world.”⁷¹ The “real world” of which he speaks, however, is simply the existing system of nation-states in which realists believe, not some truly objective reality.

In fact, global institutional arrangements show considerably more complexity and flexibility than either Nichols or realist theory permits as possible. Even a casual review of international, trade-related institutions reveals a number of international governance mechanisms in which states successfully share power with private parties. For example, the International Center for the Settlement of Investment Disputes (“ICSID”) of the World Bank and the International Labor Organization (“ILO”) permit private parties to participate with states in settling disputes and making policy.⁷² The ICSID permits private parties, mainly banks, to sue states and obtain binding arbitration awards that the domestic courts of the defendant states are obligated by treaty to enforce.⁷³ The ICSID is a global international adjudicatory system, not one restricted to European states or even to democracies.⁷⁴ The same holds true for the world wide system of international commercial arbitration.⁷⁵

Additionally, the European Union provides an alternative conception to the realist emphasis on dispute resolution and policymaking machinery monopolized by states.⁷⁶ Nichols acknowledges that analogies between the EU and the WTO are “inevitable” and even “useful,”⁷⁷ but then quickly characterizes the EU as exceptional — and therefore of no relevance to the WTO — primarily because the EU is composed of democratic states sharing a “commonality of values, experiences, and perspectives.”⁷⁸

As the Efficient Market Model reveals, there may in fact be

⁷¹ *Id.*

⁷² See Shell, *supra* note 6, at 886-90.

⁷³ See *id.* at 889-90.

⁷⁴ See *id.*

⁷⁵ See *id.* at 888-89.

⁷⁶ See *id.* at 917-19.

⁷⁷ Nichols, *Extension of Standing*, *supra* note 13, at 322.

⁷⁸ See *id.*

significant shared values regarding the promotion of free trade underlying the WTO, but even assuming that no such common values exist today, Nichols misconceives my point regarding the EU. My point is to suggest the EU as a possible source of inspiration for what the WTO *can become* given continued integration of the global economy, not to describe what the WTO is today.⁷⁹ In order to create the conditions necessary for a Trade Stakeholders Model to take root, the WTO must have a chance to evolve over a period of years — or perhaps even decades — in the face of continued global economic integration. Simply put, the WTO is today where the EU was forty years ago: a nascent collective of trading partners attempting to frame the conditions of rule-oriented economic integration.

My thesis is that domestic and transnational forces unleashed by global trade and cooperation will shift the ground underneath the WTO, advancing either the business-oriented Efficient Market Model or the more broad-based, participatory Trade Stakeholders Model. The history of the EU gives me hope that the outcome of this dynamic process will have some of the attributes of a Trade Stakeholders Model system — as the EU has today.⁸⁰ Nichols offers an alternative, rather static vision of the dynamics of trade governance in which states — at least at the global level — continue to dominate and control global economic forces. His proposals for WTO reform seek to lead the WTO toward a return to the traditional realist assumptions that appear to have worked successfully for the GATT.⁸¹

⁷⁹ See Shell, *supra* note 6, at 838 (noting that “ultimately” all trade stakeholders should have “places at the table,” but that “[s]ubstantial institutional reforms will be needed . . . before the Trade Stakeholders Model can be used as a blueprint for future jurisprudential developments and systemic reforms within the WTO”).

⁸⁰ See Shell, *supra* note 6, at 917-19 (describing aspects of the EU institutional arrangements that embody Trade Stakeholder Model values, including standing for private parties in the ECJ and the transnational election of representatives to the European Parliament).

⁸¹ The disagreement between Nichols and me on this point is, of course, one of fact and cannot be readily resolved without a crystal ball. Nichols’ realist perspective certainly has power in today’s world and helps to explain such things as the U.S. decision to bypass the WTO dispute resolution, instead using section 301 in its recent dispute with Japan over U.S. auto parts sales in Japan. See G. Richard Shell, *Kantor’s “Sue Me” Diplomacy*, N.Y. TIMES, June 16, 1995, at A27 (stating that “[t]he United States is teaching the world to litigate American style in the new W.T.O. legal system” by thinking of trade

Differences of theoretical inclination aside, let us look for a moment at Nichols' three substantive objections regarding NGO participation in the WTO. First, he asserts that NGO participation in the WTO undermines the authority of states to negotiate trade policies.⁸² The logic of Nichols' argument runs as follows: some domestic NGOs might oppose their government's position on a trade issue; such opposition would create an unseemly "spectacle" as "irreconcilable dissonance" surfaced between the state and the subject NGOs; "uncertainty about a country's true position" would then ensue; and finally other states would become reluctant "to negotiate with that country."⁸³

This argument gives trade bureaucrats too little credit. Is it really so difficult to discern the differences among positions taken by the United States government, the World Wildlife Federation, or domestic trade associations? In the United States, the EU, and even the United Nations, issues routinely pit governments against governments and governments against interest groups.⁸⁴ In these situations, parties do not become unduly confused about which group, government, or entity stands on which side of the issue. Although the WTO has more members than any regional political or constitutional union, trade bureaucrats are professionals who live in an information age in which it is possible to stay informed

in terms of "contracts" and "damages" and believing that the United States can gain more than it loses by breaching the WTO strictures); Silverman, *supra* note 26, at 263-93 (describing the events surrounding the U.S.-Japanese auto and auto parts dispute and suggesting how the WTO might resolve the conflict between multilateral and unilateral dispute resolution). It is also worth recalling that I identified the realism-based Regime Management Model as the best overall description of the way the WTO is presently structured. Thus, our disagreement does not center on the way things *are* but rather on the way they will and ought to be.

⁸² See Nichols, *Extension of Standing*, *supra* note 13, at 317-18.

⁸³ *Id.*

⁸⁴ For example, in a case now before the U.S. Supreme Court, the U.S. government is suing the state of Virginia over Virginia's sponsorship of a public college that excludes women, the Virginia Military Institute. See *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995), *reh'g denied* 52 F.3d 90, *cert. granted*, 116 S. Ct. 281 (1995). A variety of interest groups have weighed in on one side or the other of this case. See *United States v. Virginia*, 44 F.3d at 1229-30 (listing the numerous private associations who have attempted to influence the outcome of this case as friends of the court). Nobody has expressed confusion over whether — nor implicitly suggested that — the National Organization for Women speaks for the Justice Department or the VMI Alumni Association speaks for the state of Virginia.

about political positions and interest group politics in various trading states. Such information makes it possible to discern where a state's position on a trade issue ends and an interest group's position begins. I see no substantial disincentive to trade negotiations given this greater transparency.

Second, Nichols thinks the WTO is not up to the task of fairly choosing which NGOs should — or should not — be heard.⁸⁵ Once again, Nichols relies on an assumption of bureaucratic incompetence to support his view that states should have a monopoly on trade policy and adjudication. Even if increased participation is desirable, he argues, no nonstate voices should be heard because WTO member states could never equitably decide which subset of nonstate voices should be heard in any given matter.⁸⁶

This argument defies both domestic and international experience. The U.S. Supreme Court⁸⁷ and the European Court of Justice ("ECJ")⁸⁸ have developed rules to decide standing questions. These rules may not be perfect, but they are sufficiently fair to satisfy most participants that decisions of standing are not sheer acts of arbitrary political judgment. Similarly, the United Nations has evolved an elaborate set of criteria for qualifying international NGOs to participate in U.N. business.⁸⁹ Perhaps the U.N. standards could be used for international NGO participation in the WTO.⁹⁰ Finally, this entire issue could be left to the community of NGOs themselves with some form of

⁸⁵ See Nichols, *Extension of Standing*, *supra* note 13, at 318-19.

⁸⁶ See *id.*

⁸⁷ Before the United States Supreme Court, the normal rules of standing apply in cases where litigants advance their own interests, but special rules of standing apply when a litigant represents another's interests "to ensure that the controversy is indeed genuine and the interests of the individuals alleged to be represented are indeed protected." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 145-54 (2d ed. 1988).

⁸⁸ See K.P.E. LASOK, *THE EUROPEAN COURT OF JUSTICE: PRACTICE AND PROCEDURE* 57-65, 122 (1984) (stating which persons may appear before the court and the requirements that must be met in order to participate in a proceeding).

⁸⁹ See Charnovitz & Wickham, *supra* note 15, at 111-16 (describing the U.N. Charter provision that contemplates relationships with NGOs).

⁹⁰ See, e.g., Charnovitz, *supra* note 15, at 337-40 (stating that the GATT Secretariat prepared a report for the first ITO conference which contained proposed procedures for NGO involvement in the ITO, the predecessor to the GATT).

representative standing as the goal.⁹¹

Third, and most damaging, Nichols fears that NGO participation will weaken the ability of the WTO to pursue the goal of free trade.⁹² Nichols believes such participation will bring trade issues into the “sunshine” of global publicity, amplify the voice of protectionist groups opposed to trade liberalization, and eliminate the old GATT/new WTO “buffer” that insulates international trade bureaucrats from domestic protectionist forces.⁹³ This is a serious concern — one that goes to the heart of my critique of the WTO.

NGO participation by nonstate parties will certainly bring publicity to global trade issues, and this sunshine will affect the way trade bureaucrats make decisions. But domestic protectionist groups will not be the sole, or even the main, beneficiaries of these reforms. Rather, domestic business interests that favor free trade, as well as international NGOs who champion global issues like the environment, labor and human rights, consumer protection, and product safety standardization, perhaps supported by domestic counterparts, will be the big “winners” from my suggested reforms.

Protectionism is a battle most likely won at the domestic level, where protectionists’ pain is concentrated, and lost at the transnational level, where any given protectionist agenda balances against the much greater gains realized by those who benefit from trade. Thus, even as domestic politics requires certain exemptions or enhanced protection for politically vocal, import-competing industries, trade treaties tend to liberalize trade on a net basis rather than restrict it.⁹⁴ Trade adjudication then works incrementally to further implement trade liberalization. It is no coincidence that the case in which the ECJ first recognized the standing of a private party to bring a complaint against a government involved a Dutch importer seeking to overturn his own

⁹¹ See *id.* at 356.

⁹² See Nichols, *Extension of Standing*, *supra* note 13, at 319-21.

⁹³ See *id.*

⁹⁴ See Gene M. Grossman & Elhanan Helpman, *The Politics of Free-Trade Agreements*, 85 AM. ECON. REV. 667, 680-81 (1995) (modeling the politics of free trade agreements in a way that demonstrate the need to provide both some measure of protection to or exemption for import-competing industries in order for trade deals to be politically viable).

government's protectionist custom duties on imports⁹⁵ — not a protectionist group seeking relief from Dutch free trade policies. The same overall trend characterized GATT adjudications.

Environmental and similar global welfare perspectives, meanwhile, need be neither protectionist nor antiprotectionist.⁹⁶ Concerns for global warming, clean air, and chemical toxicity express independent, valid transnational values that WTO treaty-makers and many domestic governments have chosen to minimize.⁹⁷ Because the general welfare of the earth's peoples may depend on linking these values to trade policies at the international — and not just the domestic governmental — level, such perspectives deserve a multifaceted hearing within the WTO. Perhaps protectionists' interests will occasionally coincide with an environmental or consumer value, but potential coincidence is no reason for the wholesale rejection of all environmental, labor, or consumer voices.

It is precisely the technical “legalization” of global trade institutions that might possibly lead to their silent “capture” by the narrow set of business interests that are positioned to benefit most directly from indiscriminate global economic expansion.⁹⁸ The Efficient Market Model seeks a global legal institution that can remove trade issues from the “noisy” realm of domestic politics and place those trade issues into the rarified atmosphere of legal proceedings in Geneva, closed to all except a few states and business parties most directly affected by the outcomes.⁹⁹

The Trade Stakeholders Model envisions an alternative that allows a broader array of private interests — not just business parties — to have a hand in both international trade policymaking and adjudication. Normatively, I believe that broader participation by nonstate parties, not monopolization by states, will give the WTO the credibility it will need to make effective, legitimate

⁹⁵ See Case 26/62, *N.V. Algemene Transport-en Expeditie Onderneming Van Gend & Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

⁹⁶ See Philippe J. Sands, *The Environment, Community and International Law*, 30 HARV. INT'L L.J. 393, 393 n.1 (1989) (noting that global climate change has been recognized by governments as “a common concern of mankind”).

⁹⁷ See *id.* at 393 (noting that “states have generally proved unwilling to exercise their right of ‘guardianship’ over the global environment”).

⁹⁸ See Shell, *supra* note 6, at 881-85.

⁹⁹ See *id.*

pronouncements on trade and trade-related issues.

Nichols thinks that WTO's future depends on injecting nontrade values into the WTO while keeping the collision of trade and nontrade trade issues as quiet as possible.¹⁰⁰ He proposes two ideas to achieve this goal. First, Nichols proposes to put nontrade experts on WTO panels.¹⁰¹ This is an attractive idea that fits nicely into the overall structure of the Trade Stakeholders Model and I support it. But when viewed in light of Nichols' overall theory of WTO panel practice, his proposal will do very little to alter the GATT status quo. I therefore fear that putting nontrade experts on panels without letting nonstate parties participate in panel proceedings would result in a change of "appearance" only without a change in either the procedural or substantive justice of WTO decisionmaking.

Nichols asserts that WTO panels "are not courts and are not meant to be courts."¹⁰² He also sees the panelists in the WTO system as carrying on the pragmatic and "consciously circumspect" traditions of the old GATT panels.¹⁰³ With nontrade experts safely relegated to a minority role on such "circumspect" panels — and without any nontrade experts at all on the all-important WTO Appellate Body — nothing need change about the results the panels will reach. Nor would such a reform do much to broaden the base of domestic and international political support for the WTO. To achieve broadened support and confidence, the WTO will need to let outsiders into the dispute resolution process so they can judge whether the nontrade perspective is being expressed effectively and considered seriously.

Second, Nichols proposes that when the Appellate Body is ultimately forced to grapple directly and legalistically with collisions between trade and nontrade values, the Appellate Body should interpret the WTO Charter to exempt from WTO override any domestic law enacted "primarily" to codify some "underlying societal value" other than trade.¹⁰⁴ This proposal,

¹⁰⁰ See Nichols, *Extension of Standing*, *supra* note 13, at 315 (stating that moving trade further into public view could "prove disastrous for free trade").

¹⁰¹ See *id.* at 328-29.

¹⁰² *Id.* at 326.

¹⁰³ *Id.* at 325.

¹⁰⁴ See Nichols, *Extension of Standing*, *supra* note 13, at 297, 301; Nichols, *Trade Without Values*, *supra* note 17, at 709.

which I previously embraced as at least within the spirit of the Trade Stakeholders Model,¹⁰⁵ is likely to return the WTO to the GATT status quo.

Exempting from WTO scrutiny a law that codifies an underlying societal value 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.” Careful drafting of domestic laws could easily become the old GATT “veto” power in disguise, because there is no reliable way for a member of the WTO Appellate Body to pierce the surface of domestic laws and discover their “true” purpose. Nor does Nichols offer a persuasive, principled method of analysis whereby the Appellate Body could distinguish which societal values are “legitimate” and which domestic laws having protectionist effects might be deemed exempt from WTO review because they are “primarily” directed at those “legitimate” values. In short, this idea would give protectionism a new tool to avoid the liberal trade regime just when the system of trading states had figured out a way to use an international mechanism to trump these forces.¹⁰⁶

¹⁰⁵ See Shell, *supra* note 6, at 921.

¹⁰⁶ One way to get a taste for these interpretive difficulties is to observe the clashes that occur when U.S. courts attempt to discern whether government actions that have racially discriminatory effects can be overturned based on a finding of discriminatory “intent.” In *City of Memphis v. Greene*, 451 U.S. 100 (1981), for example, the U.S. Supreme Court was asked to determine if a city had acted lawfully in agreeing, at the request of a white neighborhood, to place a road barrier between that neighborhood and an immediately adjoining black neighborhood so that traffic would not flow between the two areas. The issue was whether the city acted with discriminatory intent or for reasons related to neighborhood safety and orderliness. After a full trial in which various neighborhood residents and city officials gave testimony as to their states of mind, the district court held that the city acted from a proper motive. *See id.* at 108. The appeals court reviewed the same evidence and held that the city had an improper motive. *See id.* at 109. The Supreme Court took a look at the same evidence a third time and, over a dissent by Justices Marshall and Brennan, *see id.* at 135, held that the city acted lawfully. *See id.* at 110-29. In short, the motives of the city residents and officials were difficult to parse and different judges drew different inferences from the evidence. Professor Nichols’ proposal to charge international jurists with judging the motives of various national legislatures as “legitimate” or “protectionist” without any mechanism for taking primary evidence on motive as a question of fact makes the *City of Memphis* case look easy. Just like the road barriers in the *City of Memphis* case, the trade barriers of international relations have very complex origins that

4. CONCLUSIONS

To summarize our differences, Nichols writes that countries asked to choose between “obedience to the World Trade Organization and having empirically legitimate [domestic] laws” will choose the latter.¹⁰⁷ As a realist, Nichols is convinced that states will thus fatally undermine the WTO. His solution is to see that states can avoid this choice. Meanwhile, to assuage international environmental and interest groups with nontrade agendas, he proposes to place nontrade experts in minority positions on WTO panels but not on the Appellate Body, which has the final word on WTO law. Nichols is worried that the WTO’s current structure may be too rigid to withstand the political winds of domestic politics, but he thinks that my proposals will push trade even more into the political “spotlight,” making the WTO’s situation worse.

As a foreign relations liberal, I have more confidence that the domestic and transnational political conditions under which the WTO operates can change and, furthermore, that the forces of global economic integration will eventually push the WTO toward more transparency, especially with respect to the business interests that are directly effected by domestic trade policies. In this altered world, the WTO must accommodate a broader set of trade stakeholders if it is to command sufficiently broad support to achieve compliance with its legal decisions.

Unlike Nichols, I think that the “quiet” days of trade adjudication and policymaking are gone. His attempts to preserve trade in a zone of secrecy will only hurt our common cause of creating a robust system for resolving international trade disputes. Reports on global economic integration and competition are the stuff of everyday news,¹⁰⁸ and trade policymaking will (and should)

cannot be parsed by simply reading the laws that create them.

¹⁰⁷ Nichols, *Extension of Standing*, *supra* note 13, at 300.

¹⁰⁸ The 1996 Republican Presidential primaries suggest that I am correct as trade has developed into a substantial campaign issue even though Republicans are traditionally a party favoring liberal trade. See Richard L. Berke, *Candidates Clash Over Trade Issues Heading Into Vote*, N.Y. TIMES, Feb. 20, 1996, at A1 (quoting Bob Dole as not realizing “that jobs and trade . . . would become a big issue in the last few days of this [primary] campaign”); David E. Sanger, *A Flare-Up of Passions Over Global Trade*, N.Y. TIMES, Feb. 20, 1996, at A1 (reporting that Patrick Buchanan’s campaign for President has “gathered steam

never again be the special province of the foreign policy and trade elites. The question for today is not how to put a lid on publicity regarding trade differences, it is how best to assure that points of view about transnational issues such as the environment, consumer issues, and labor standards — issues that no single state may have a sufficient incentive to champion consistently — are heard in the international trade institutions that will increasingly have the power to shape our future.

and passionate crowds with his thundering calls for economic nationalism”).