IN FROM THE COLD: CANADA'S WTO OBLIGATIONS & INCOMPLETELY THEORIZED AGREEMENTS IN CONTEMPORARY INTERNATIONAL LAW

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A NEW ERA IN INTERNATIONAL LAW

Referring to the internationalization of law, in 2001 Schwartz declared: "we are in the midst of creating a constitution for the entire world."[1] While it is unclear whether it can in fact be said that the world is moving towards such a supra-national constitutional order, it is readily evident that the past twenty-five years have witnessed the emergence of a more integrated and authoritative international socio-economic infrastructure that requires deeper civic engagement on a truly global scale. In the words of former Supreme Court Justice Bastarache, "internationalization of the law" in Canada is a "bottom up exercise" whereby "universal values reflecting a commonality of objectives facilitates a certain form of harmonization".[2] This conception of what some scholars have termed the "selective adaptation"[3] of international law demands, first and foremost, that the requirements of trade be subordinated to those of fundamental justice and to the sovereignty of democratic peoples. For Clarkson, while in many respects unjust and unfair, the rules and rulings of supranational private arbiters represent an "external constitution" since "they prevail over domestic legislative or administrative powers [and] because they cannot be amended by domestic democratic processes or law and regulation making".[4]

Although both the modern system of international trade law and the international human rights regime emerged in the immediate aftermath of the Second World War, as Biukovic asserts, "the two systems appear to be completely separate even though both have the same normative underpinnings—those associated with the

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[1] Bryan Schwartz, "Lawyers and the Emerging World Constitution" (2001) 1 Asper Review of International Business and Trade Law 1 at 1.

[2] Michel Bastarache, "How Internationalization of the Law has Materialized in Canada" (2009) 59 UNBLJ 190 at 191.

[3] Ljiljana Biukovic, "International Law Interrupted – A Case of Selective Adaptation" (2009) 60 UNBLJ 161.

[4] Stephen Clarkson, "Globalization's Perilous Imbalance: Constraints for Canada's Governments, Opportunities for Canadian Citizens" (2010), 60 UNBLJ 251 at 256.

Western ideas of liberal democratic capitalism".[5] More accurately, perhaps, both regimes highlight a longstanding tension in modern democracies between liberty and equality interests and the need to situate liberal aims within a broader social justice framework. As Bronckers asks, "does the principle of better market access always prevail, or do other objectives (such as the protection of intellectual property, or of the environment) carry equal weight?"[6] Although the nation state occupies a key position in international law, when states fail to pursue democratic aims the internationalization of legal authority does not necessarily create a more representative international legal system. Likewise, although recent decades have witnessed a distinct proliferation of NGOs at the international level, as many NGOs have little connection with popular interests, their spread does not necessarily translate into a more democratic or inclusive legal order. A central question, therefore, concerns "the accountability effects on the global regulatory agency of civil society involvement, or, in other words, how citizen group interventions have and have not advanced transparency, consultation, evaluation and redress in respect of the global regulatory agency concerned…and filled the gaps left by those other channels".[7]

The incremental advancement of public international law represents the efforts of lobbyists, international law scholars, legal professionals, and members of international legal organizations, a community that is often uniquely and expertly trained. Unfortunately, many domestic courts often lack the expertise of international experts who could provide guidance on international law in an efficient, inexpensive, and competent manner.[8] While the conventional theory of accountability assumes that states are alone responsible for the well-being of their citizens and for safeguarding their own autonomy, this model is quickly becoming antiquated. Realistically, many developing or non-democratic nation states are either unable or unwilling to put the interests of citizens at the forefront of global trade negotiations, just as multilateral treaties and forums can be dominated by a small number of powerful "first world" states.[9] Compounding this democratic deficit at the international level is the increasing separation of trade-related forums and laws from the international legal system.

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[5] Biukovic, *supra* note 3 at 169.

[6] M. Bronckers, "Better Rules for a new Millennium: A Warning Against Undemocratic Developments in the WTO" (1999) 2 J Int'l Econ L 547 at 566.

[7] Jan Aart Scholte, "Global Governance, Accountability and Civil Society" in Jan Aart Scholte, ed, *Building Global Democracy?: Civil Society and Accountable Global Governance* (Cambridge: Cambridge University Press, 2011) 8 at 41.

[8] Ian Brownlie, *Basic Documents in International Law* (Oxford: Oxford University Press, 2009) at 51.

[9] Scholte, *supra* note 7 at 27.

Another problem is simply that much contemporary concern over human rights has failed to recognize the importance of democratic rights. This emphasis on democratic principles as a central aspect of international human rights can be found in Article 1(2) of the Charter of the United Nations, which provides that one of the purposes of the United Nations (UN) is "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".[10] As noted in Article 21 of The Universal Declaration of Human Rights, voting rights are a vital human right. Moreover, they are rights that, like freedom of expression, ensure that state governments respect and foster an environment that is generally more conducive to the creation of rights cultures. These two documents are well established as important sources of international law, meaning that these provisions should be given careful consideration by jurists and scholars alike. Further expression of a democratic human right can be found in Article 1 of both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), which refer to the right of peoples to "freely determine their political status". Similarly, Article 25 of the ICCPR provides that "Every citizen shall have the right and the opportunity…To take part in the conduct of public affairs, directly or through freely chosen representatives". While Article 25 has been very broadly interpreted, especially during the Cold War era, it does reflect an important regard for representative democratic principles whose time may have finally arrived.[11]

While the link between free trade and democracy is often viewed as being integral to neoliberal ideologies, it is also a potential site of strategic convergence for human rights advocates and proponents of international trade. If state agreement and internal ratification is seen as an important requirement for the application of international conventions, and democratic rights are important human rights, then why have we not extended the notion of popular sovereignty as an element of a signatory's consent, particularly where an agreement has a direct effect upon the scope of the state's sovereign power? Careful scrutiny of what Harrington terms "a treaty's democratic credentials"[12] must become commonplace for elected representatives and members of the judiciary alike. Not only is there no obligation for executives to consult legislatures, even when entering into treaties that impose

[10] J N Maogoto, "Democratic Governance: An Emerging Customary Norm?" (2003) 5 University of Notre Dame Australian Law Review 55 at 70.

[11] Additional support for an emerging democratic norm can be found in Article 3 of Protocol I of the European Convention on Human Rights and Article 23 of the American Convention on Human Rights, as well as the writings of prominent international law scholars. See S Varayudej, "A Right to Democracy in International Law: Its implications for Asia" (2006) 12 Ann Surv Int'l & Comp L 1 at 6.

[12] J Harrington, "Redressing the Democratic Deficit in Treaty Law Making: (Re-) Establishing a Role for Parliament" (2005) 50 McGill LJ 465 at 508.

permanent changes in domestic law, but there are also longstanding common law presumptions of conformity with international conventions.[13]

There is a deeply disconcerting jurisdictional and legitimization problem with the World Trade Organization (WTO) Treaty and its impact upon domestic legal systems. The WTO Treaty resembles an agreement that is partial in the sense that it has never quite fully been understood by the constituents—and perhaps too often the legislatures—of its nation members, and because it has incongruously defined itself as both a legal agreement between nations and as a quasi-legal body in terms of its dispute resolution process that does not take full account of other sources of international law. Integration, then, requires that courts and legislatures bring the executive to task by fully scrutinizing the domestic effect of the WTO Treaty and the international legal obligations that the agreement has created that may have serious implications for parliamentary sovereignty. Likewise, the WTO needs to recognize that the only way for it to overcome this legitimization problem is by making itself more transparent, more representative, and by respecting and considering broader principles of human rights. As Trachtman reminds us, whether or not integration between trade and other important issues is desirable is determined by the simple issue of utility:

> The general issue raised by most linkage claims is whether trade rules and environmental, labor, human rights, or other nontrade rules should somehow be combined at the WTO in a different way than they now are. The fundamental basis for responding to such a question is welfare, broadly understood: does it make individuals, in the aggregate, better off to do so?[14]

To such an end, less than a decade ago Cass Sunstein wrote about what he termed "incompletely theorized agreements": agreements that are made even when parties have very different views but share common goals and interests.[15] Incomplete theorization often allows progress and compromise to be made on problems that would otherwise appear to be intractable and irresolvable.[16] Rather than arguing about abstract differences, parties focus on achieving compromises that are both possible and mutually advantageous. While incomplete theorization can be a problem if, for example, one is talking about an institution that fails to have some

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[13] *Ibid.*

[14] J Trachtman, "Institutional Linkage: Transcending "Trade and ..." (2002) 96 AJIL 77 at 77.

[15] C R Sunstein, "Incompletely Theorized Agreements" (1995), 108 Harv L Rev 1733.

[16] A S Desai, "Libertarian Paternalism, Externalities, and the 'Spirit of Liberty': How Thaler and Sunstein are Nudging Us Toward an 'Overlapping Consensus'" (2011) 36 *Law and Social Inquiry* 263.

distinct institution identity,[17] incompletely theorized agreements are particularly advantageous where consensus is necessary for both parties, compromise has otherwise been difficult to achieve, and stakes are relatively high. Sunstein distinguishes between three types of incompletely theorized agreements: i) incompletely specified agreements (e.g., "constitutional provisions and regulatory standards in administrative law"); ii) mid-tier incompletely theorized agreements where there is "agreement on a mid-level principle" but disagreement "about the more general theory that accounts for it and about outcomes in a particular case"; and iii) "incompletely theorized agreements on particular outcomes, accompanied by agreements on the low-level principles that account for them".[18] According to Sunstein, incompletely theorized agreements offer a number of practical advantages, including "the facilitation of convergence, the reduction of costs of disagreement and the demonstration of humility and mutual respect…[and] are especially well adapted to a system that must take precedents as fixed points".[19]

In examining the institutional shortcomings of the WTO and what has been called its current "legitimization crisis", this paper will illustrate that it is both expedient and permissible for the WTO framework to incorporate a higher degree of respect for democratic norms and human rights, and that is likewise necessary for domestic courts and legislatures to attempt to come to terms with the nature and effect of the WTO Agreement on domestic institutions and laws. If the dismantling of the entire international financial system and supranational bodies such as the WTO, the International Monetary Fund (IMF), and the World Bank is unlikely, then efforts aimed at creating tangible democratic gains through incompletely theorized agreements may be a sensible form of compromise. Similarly, supporters of the WTO have already acknowledged the need for enhanced legitimacy just as many trade advocates are committed to the principles of democratic governance and free markets. There is, simply speaking, too much at stake for both trade advocates and human rights proponents to ignore the need for a deeper, more representative consensus.

Unfortunately, although we see evidence of convergence in both the realms of public international law and international trade law, there appears to be little strategic consolidation or dialogue between the latter two emerging spheres. Instead, the Canadian legal system has failed to fully articulate the place of the WTO Treaty as a unique aspect of international law within the domestic legal system. Consequently, Sunstein's notion of incompletely theorized agreements provides a

[17] Y Bathaee, "Incompletely Theorized Agreements: An Unworkable Theory of Judicial Modesty" (2007) 34: 5 Fordham Urb LJ 1457.

[18] Sunstein, *supra* note 15 at 1739-1740.

[19] Sunstein, *supra* note 15 at 1761.

useful model for considering the need for convergence and consolidation of the trade framework, which appears to be state-centric, and the human rights framework, which is moving towards a more global and less state-centric model of public international law. International trade law cannot solely rely on treaties whose legitimacy depends on state sovereignty since it most often represents the interests of corporations and other non-state actors. Likewise, international human rights law cannot ignore the growing power and influence of international trade law if its proponents are to create a truly global and effective international rights regime. Convergence can thus be accomplished by integration from above by the decision-making bodies of international human rights organizations and trade organizations, as well as from below within democratic states that insist that international trade agreements respect human rights and are negotiated and ratified in a transparent, open, and democratic manner.

THE WTO: A CASE STUDY IN FAILED INTEGRATION

The Expanding Jurisdiction of the WTO

Why should Canadians be concerned about the WTO? As Krueger points out, "the WTO is the legal and institutional foundation of the multilateral trading system. It is not a best endeavors organization".[20] While citizens formulated many of the constitutions of classic liberal democracies, to date there has been little popular input into the creation and governance of supra-national organizations such as the WTO. Although the WTO has expanded its jurisdiction to include issues related to the environment,[21] culture, telecommunications, and intellectual property, the agreements that collectively define the WTO framework have failed to reflect a deep sense of the importance and relevance of human rights and democratic norms. Public anger over the perceived inequality and anti-democratic nature of the WTO system was all too evident during such ugly incidents as the well-known protests in Seattle, Genoa, Washington, Madrid, and Paris. Some of the most contentious provisions of the WTO system include the principle of non-discrimination and, in particular, most-favored nation status, which dictates that any tariff reduction or advantage offered to a single country or trading partner must be offered to all.

Moreover, WTO decisions on issues related to the environment, farm subsidies, the regulation of pharmaceuticals, and the treatment of developing

[20] A Krueger, *The WTO as an International Organization*. (Chicago: University of Chicago Press, 1998) at 32.

[21] Trachtman, *supra* note 14.

countries have all been controversial.[22] Generally, critics have drawn careful attention to the significant limitations the WTO Agreement places on domestic jurisdiction over trade, the Agreement's wide-ranging surveillance over domestic governments and bodies that administer trade policy, and the degree to which the Agreement "overrides domestic legislation enacted to preserve…cultural values, environmental resources, and labor standards".[23] The WTO, in this respect, is not your typical international organization since it is unique in

> the extent to which [it has] diverged from [its] original State-centered modes of operation and [has], instead, sought legitimacy from, and accountability to, a wide variety of international stake holders, as well as pursuing goals and embracing values that might be divergent from the interests of many (if not most) States.[24]

Also rare in this regard is the ability of the WTO to effect compliance without having to rely upon enforcement mechanisms within the state itself.[25] In this sense, its consistent failure to situate its regulatory framework within the international legal system is surprising, given its demonstrated ability to create a relatively internally coherent and comprehensive set of dispute resolution procedures, rules, and norms for resolving member disputes.

In terms of its ability to regulate international trade, then, the WTO is a remarkably effective body. According to Moore, the WTO "provides an answer to perhaps the central political question of our time: how to manage a globalizing world when democracy remains rooted in the nation-state".[26] This is significant, given that the WTO in many ways represents a partial devolution of democratic sovereignty without extensive democratic consultation. There is no analogous international organization that restricts trade in furtherance of international democracy or rights. Broader participation requires that citizens and legislatures understand the full nature of international trade agreements before they are signed.[27] In a truly accountable international legal order, "Responsibility means that WTO negotiators have to ensure that parliaments, citizens, and companies can verify beforehand what the

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[22] Marc Williams, "Civil society and the WTO: Contesting accountability" in Jan Aart Scholte, ed, *Building Global Democracy?: Civil Society and Accountable Global Governance* (Cambridge: Cambridge University Press, 2011) 105 at 128.

[23] *Ibid*, at 111-12.

[24] David J Bederman, *Globalization and International Law* (New York: Palgrave Macmillan, 2008) at 156.

[25] *Ibid*.

[26] M Moore, "The WTO's First Decade" (2005) 4 World Trade Review 3, 359 at 359.

[27] M Bronckers, "Better Rules for a new Millennium: A Warning Against Undemocratic Developments in the WTO" (1999) 2 J Int'l Econ L 547-566.

implications of WTO rules are".[28] Even beyond that, "this is a minimum requirement, now that the WTO is transforming itself from a trade and customs organization to an organization that is increasingly occupied with domestic policy issues such as the environment, public health, investments, and the commercial behavior of companies".[29] Although Moore traces the origin of the WTO to post-war reconstruction efforts and links its creation to that of the IMF, the World Bank, and the UN, in matter of fact it is much more like the first two organizations than the third.[30]

Despite its effectiveness and growing power, the nature of the inter-relationship between national laws and the jurisdiction of the WTO is not entirely clear. According to Beaulac, a prominent Canadian legal scholar, "The structural conception of the relation between international law and domestic law in Canada is essentially dualist; indeed, the two systems are not, in any real sense, part of an integrated legal order, one that would fall within a monist logic".[31] Yet, despite the essentially dualist conceptual model used by the Canadian judiciary, WTO panels and the WTO Appellate Body essentially operate within a monist framework. A recent example of the scope of WTO jurisdiction is the panel decision in *EC – Seal Products* to uphold a European Union ban on seal products on the ground of the "public moral concern" exception. This decision was not favorably received by Canada and Norway, but demonstrates that existing exceptions can be utilized to create a more equitable and democratic balance of powers within the present regime. Despite the traditional inter-state conception of international law that emphasizes managing conflict among sovereign nations, "international trade law, like international environmental law and international human rights law, are part of this international law of cooperation".[32] Indeed, in 1996, the WTO Appellate Body in *US—Gasoline* ruled that the provisions of the WTO Agreement itself permitted consideration of public international law,[33] and in the *Korea—Procurement* decision of 2000 the Panel Report held that customary international law applied to WTO treaties.[34]

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[28] *Ibid* at 566.

[29] *Ibid.*

[30] Moore, *supra* note 26 at 365.

[31] Stephanie Beaulac, "International Law Gateway to Domestic Law: Hart's 'Open Texture' Legal Language and the Canadian Charter" (2012) 46 RJT 443 at 465.

[32] P Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge: Cambridge University Press, 2005) at 61.

[33] *Ibid* at 63.

[34] P C Mavroidis, "No Outsourcing of Law? WTO Law as Practiced by WTO Courts" (2008), 102(3) AJIL 420 at 436.

There are other examples of linkages between WTO law and public international law. The WTO Agreement contains provisions that allow for states to amend the governing agreement and to adopt interpretations of certain provisions.[35] The Appellate Body and the panels also regularly make reference to the Vienna Convention on the Law of Treaties in interpreting and applying the provisions of WTO Agreements in order to render their decisions, and often rely upon implied powers that are necessary to reach a ruling in a given case that is consistent with its overall mandate.[36] In *US—Wool Shirts and Blouses*, the Appellate Body also adopted a general principle of law regarding the burden of proof required to reach a finding,[37] demonstrating that the Dispute Settlement Body of the WTO has begun to function more like a general international commercial court than simply a panel for mediating party disputes. Similarly, the General Council and the Ministerial Conference also possess the authority to adopt interpretations and is able to exercise broad powers within the WTO framework itself.[38]

Like the WTO's relationship with public international law, the interconnection between the institutional mechanisms of the WTO and the legal systems of its member states is complex. But there is also an important internal aspect to the emergence of international trade law within the public international law regime. Most importantly, Article XVI:4 of the WTO Agreement requires that members ensure "conformity of its laws, regulations and administrative procedures",[39] while Article XXIV of the General Agreement on Tariffs and Trade (GATT) provides that members "shall take such reasonable measures as may be available to [them] to ensure observance to the provisions of this Agreement by the regional and local governments and authorities within its territories".[40] Likewise, domestic courts, as a principle of general application, attempt to interpret domestic law in a manner consistent with international treaties that their nation has signed and ratified.[41] Indeed, the WTO Appellate Body, in *India—Patents*, ruled that it could use domestic law as evidence of a nation's compliance or non-compliance with the TRIPS Agreement,[42] while the Panel Report in *Argentina—Poultry Anti-Dumping Duties* specifically noted that domestic law could not override the specific provisions

[35] *Ibid* at 423.

[36] *Ibid* at 434.

[37] *Ibid* at 424.

[38] *Ibid* at 433.

[39] Article XVI: 4 of the WTO Agreement as cited in Bossche, *supra* note 32 at 65.

[40] GATT 1994 as cited in Bossche, *supra* note 32 at 65.

[41] Bossche, *supra* note 32 at 67.

[42] *Ibid.*

of the WTO Agreements themselves.[43] Mechanisms do, therefore, exist for the WTO to take human rights and democratic norms into account should it possess the will and initiative to do so.

Domestic Reception of WTO Rulings and Agreements

What, then, has been the effect of WTO rulings and agreements in Canada? The WTO clearly has a direct effect on vital national interests. Canada has lost a number of high profile WTO disputes, including *EC – Asbestos*, *Canada—Aircraft*, *Canada—Wheat*, *Canada—Periodicals*, *Canada—Patent Term*, *Canada—Pharmaceutical Patents*, and the *Auto Pact Case*.[44] Yet, according to Brandon, despite growing public concern, Canadian courts have been slow to conceptualize the nature of the inter-relationship between domestic and international law.[45] They have, however, emphasized the relevance of international treaties to which Canada is a party when interpreting domestic statutes and the scope of *Charter* rights. Indeed, the Supreme Court of Canada has used unimplemented treaties as an aid to statutory interpretation[46] in recognition of the presumption that legislatures are assumed to act in a manner consistent with international law absent evidence to the contrary.[47]

Charter jurisprudence has been a particularly active site of engagement with international law. As the Supreme Court of Canada noted in *Slaight Communications Inc. v Davidson*[48] and *Baker v Canada (Minister of Citizenship and Immigration),*[49] and reiterated in *R v Keegstra*, international human rights law is of particular relevance for Canadian courts when determining the content of *Charter* rights, as well as the nature of worthwhile substantial and pressing objectives under s 1.[50] However, in *Suresh v Canada (Minister of Citizenship and Immigration),*[51] although the Court emphasized the relevance of international human rights covenants as establishing a baseline or minimal content for related *Charter* rights, it also stated that these obligations could

[43] Mavroidis, *supra* note 34 at 467.

[44] J D Krikorian *International Trade Law and Domestic Policy: Canada the United States and the WTO* (Vancouver: UBC Press, 2012) at 196.

[45] E Brandon, "Does International Law Mean Anything in Canadian Courts?" (2011) 11 J Envtl l & Prac 399.

[46] *Ibid* at 3.

[47] D.Bassan, "The Canadian Charter and Public International Law" (1996) 34:3 Osgoode Hall LJ 583 at 593. See also Brandon, *supra* note 45.

[48] *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416.

[49] *Baker v Canada (Minister of Citizenship and Immigration*, [1999] 2 SCR 817, 174 DLR (4th) 193.

[50] *R* v *Keegstra* [1990] 3 SCR 697 at 750.

[51] *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3.

be reasonably limited in exceptional circumstances in accordance with s 1 (the balancing analysis that is typically used in assessing breaches of s 7 of the *Charter*).[52] Some scholars have argued that s 26 of the *Charter* allows for the incorporation of rights protected by customary international law into Canadian domestic law.[53] Not surprisingly, in *R v Hape*,[54] the Supreme Court of Canada also used customary international law as a relevant consideration in determining the reasonable limitations of *Charter* rights.[55] Unlike international treaty law, which generally must be adopted by domestic legislatures, customary international law is presumed to be a part of the domestic legal system absent a conflicting domestic statute or common law rule.[56] This is significant since, apart from any incorporation by direct reference or any use of international legal instruments as interpretative aids, all WTO members are bound by *jus cogens* regardless of whether such principles are directly referenced or incorporated.[57]

Unfortunately, the active use of international law in *Charter* jurisprudence has not given rise to any deep engagement with the issue of the effect of Canadian human rights commitments or of Canada's democratic rights and its obligations under the WTO Treaty. The treatment of international law by domestic courts takes on special dimensions once it is recognized that "individuals actually are the holders of international rights without being international persons".[58] Generally, Canadian courts have relied on a dualist model of international law to treat the issue as one of jurisdiction rather than as a problem related to democratic or human rights. In *Pfizer Inc.* v *Canada (T.D.)*,[59] the Federal Court held that, like any other international treaty, the WTO Agreement did not become part of Canadian law until it was ratified by the Parliament of Canada.[60] While the court noted that executive action must be constitutional, this fact could not give rise to a right of action for private parties under the *World Trade Organization Agreement Implementation Act* where none would otherwise exist.[61] Likewise, in *R v Cook*,[62] the Supreme Court of Canada considered the relevance of the customary norm of international law regarding the

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[52] J H Currie, *Public International Law* (Toronto: Irwin Law, 2008) at 260.

[53] *Ibid* at 590.

[54] *R v Hape*, 2007 SCC 26 at 1, [2007] 2 SCR 292 [*Hape*].

[55] Currie, *supra* note 52 at 261.

[56] Bassan, *supra* note 47 at 587.

[57] Mavroidis, *supra* note 34 at 426.

[58] R Portman, *International Personality in International Law*, (New York: Cambridge Press, 2010) at 11.

[59] *Pfizer Inc v Canada (TD)*, [1999] 4 FC 441 [*Pfizer*].

[60] Brandon, *supra* note 45 at 7.

[61] *Ibid.*

[62] *R v Cook*, [1998] 2 SCR 597.

sovereignty of states.[63] While the majority considered the customary norm of international law that protected state sovereignty, Justice Bastarache, writing in *obiter*, expressed a general reluctance to allowing international legal norms and standards to limit a domestic *Charter* right.[64]

This begs the question of whose interests are relevant in determining the utility of such agreements and who gets to make such a decision. Such complexities are compounded by recent decisions underscoring the importance of parliamentary intention when applying international treaties domestically. In *Pfizer*,[65] the Federal Court found that the *World Trade Organization Agreement Implementation Act* had not been fully enacted domestically as an integral part of Canadian law since this required the clear and unequivocal consent of Parliament and, for matters falling within provincial jurisdiction, the consent of the provinces. This was so despite the fact that the federal government holds both the treaty-making power and, pursuant to s 91 of the *Constitution Act, 1867*, jurisdiction over trade and commerce. The Federal Court's strict interpretation of the enactment of the *World Trade Organization Agreement Implementation Act* is encouraging, especially given that private citizens are prohibited from bringing claims under both this Act and the WTO Agreement. *Pfizer* reminds us that there are some problematic issues associated with the domestic implementation of the WTO Agreement that need to be viewed in relation to the very real pressures imposed upon legislatures by executives exercising their prerogative to enter into binding international agreements. A similar democratic deficit has been recognized at the international level by those who have voiced concerned about the relative lack of dialogue between human rights discourse and trade liberalization discourse.

As the Supreme Court of Canada noted in *Reference re Secession of Quebec*, constitutional supremacy implies a whole range of obligations related to popular sovereignty and the rule of law, and further requires that the principle of popular democracy be given due consideration even where its legal effect is less than clear. In this way, arguments for protecting and promoting democratic rights mirror those aimed at fostering economic self sufficiency: by ensuring autonomy and viability at the local level, the potential for self-help is enhanced. Unfortunately, to date, as Kelsen notes, conventional international law is concerned primarily with the efficacy of a government within a state as opposed to its commitment to any democratic principles or values.[66] Although, in *Pfizer*, the Federal Court explicitly rejected the argument that the rule of law should be used to strike down provisions of

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[63] Currie, *supra* note 52 at 261.

[64] *Ibid.*

[65] *Pfizer* at 441.

[66] Kelsen, as cited in Maogoto, *supra* note 10 at 56.

the *World Trade Organization Agreement Implementation Act* that prohibit such actions, in its interpretation of the patent claim before it the Court narrowly described the WTO Agreements as "matters of public law involving public rights, not matters of private economic or commercial rights" and held that "the rule of law [that] requires that all government action comply with the Constitution" could not be "interpreted as a sword to strike down sections 5 and 6 of the WTO Implementation Act".[67]

Pfizer illustrates the fact that the prevailing dualist model of international law fails to recognize the far-reaching nature of the WTO Agreement, as well as the increasing need to hold the executive accountable to existing constitutional frameworks to reflect a growing tendency to encourage democratic rights and values at the international level. While the Court imposes an analysis that relies heavily on the division of powers between the executive and legislative branches, and suggests that barring individual claims under the WTO Agreement allows the executive to operate efficiently in foreign affairs, it gives no consideration to how these Agreements effect the rule of law and the other democratic principles articulated in the *Quebec Secession Reference*. It is perhaps somewhat fitting that in *Pfizer* we see the Court make a ruling that can be narrowly construed as being applicable to corporate rights, but that has broader implications for democracy and the rule of law—an all too common theme with respect to WTO-related jurisprudence.

LEGISLATURES, INTEGRATION AND THE WTO AT INTERNATIONAL LAW

To what extent, then, does the WTO's growing jurisdiction represent a challenge to parliamentary sovereignty? First of all, it is important to remember that, unlike many international agreements, the WTO Treaty is a comprehensive and far-reaching international agreement that imposes very real obligations on member states. Specifically, it imposes a general system of administrative oversight and trade liberalization that is legally binding upon all member states. As Clarkson points out, "In the international domain, a tremendous imbalance characterizes the disparity between the authoritative, hard-law nature of the WTO's economic rules and the hortatory, soft-law character of most other multilateral agreements".[68] The WTO panels have maintained that although their decisions, *per se*, do not create a binding precedent, this does not mean that the cases and decisions of WTO adjudicating bodies do not constitute an influential body of jurisprudence in its own right,[69] or perhaps even a potential emerging body of customary law. Indeed, having legal

[67] *Pfizer* at paras 59 – 61.

[68] Clarkson, *supra* note 4 at 258.

[69] Mavroidis, *supra* note 34 at 464.

personality, the WTO General Council itself has treaty-making power and has entered into international agreements with the IMF, the World Bank, the World Intellectual Property Organization, and the World Organization for Animal Health.[70]

While the WTO does represent a substantial shift in state practice with respect to commercial matters, its effects are mitigated in many respects by a variety of internal and external limitations. The fact that the WTO is itself the creation of state agreement also means that states remain capable of amending these multilateral agreements. While the WTO Treaty is relatively robust in terms of the tools and mechanisms that it places at the WTO's disposal, the WTO panels and decision-making bodies lack the ability to impose damages or to order specific performance. The GATT 1994 does include specific exceptions from the GATT general liberalization requirements, provided that the legislative measures are necessary to promote a specific policy objective in relation to a certain limited number of categorical restrictions, and provided that they are not disguised restraints on trade: public health, the environment, "public morals", national security, and measures necessary to protect non-renewable natural resources. Of course, WTO members remain perfectly capable of contracting out of any customary international law, except for *jus cogens*.[71]

Despite this, however, the WTO Agreements are silent as to whether its rulings are meant to have direct effect within each national jurisdiction,[72] ensuring that the means by which compliance is attained is left within a particular state's prerogative. International agreements like the WTO Treaty reflect a further contradiction: namely, they purport to derive their authority from state consent and yet they represent a major trend towards globalization and the denigration of democratic state authority, particularly the principle of parliamentary sovereignty. This is partly because, generally speaking, the judiciary will often accord the executive fair latitude in its conduct of international affairs, not infrequently calling on its representatives to provide "evidence" regarding contentious international matters.[73] As Brandon emphasizes:

> The notion of parliamentary sovereignty also has consequences for treaty implementation in Canada. Whereas the executive is responsible for representing Canada's interests in the negotiation, signature and ratification of a treaty, traditionally it has been the role of the legislature to give a treaty its domestic effect. As Rosenberg, J.A. of the Ontario Court

[70] Mavroidis, *supra* note 34 at 435.

[71] *Ibid.*

[72] Bosche, *supra* note 32 at 70.

[73] Brownlie, *supra* note 8 at 50.

> of Appeal notes in his dissenting judgment in *Ahani v Canada (Attorney General)*, this principle exists 'to protect Parliament and the people of Canada from executive action.'[74]

While the conventional dualist position on the incorporation of international law does provide some protection for the principle of parliamentary sovereignty, it does nothing to prevent the executive from binding the state though agreements that have far-reaching effects. Reliance upon such a model, coupled with a lack of transparency and complex multilateral agreements on important areas of legislative jurisdiction, can create a very confusing, ineffective, and, some might say, destabilizing state of affairs. As the majority of the Supreme Court of Canada emphasized in *R v Hape*, Parliament retains the authority to contravene its international obligations should it see fit:

> Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.[75]

This is a strong endorsement of state sovereignty, one that does not seem to mesh well with commentators who are concerned about the power of international legal trade organizations. However, it is important to remember that there is very little judicial consideration of WTO provisions, and even less overt legislative debate on its influence and jurisdiction. As Biancardi asserts, "the paradox of state power in pursuit of goals whose consequences serve partly to limit its future scope of action may seem stark but it is not uncommon…it is only paradoxical if one takes the primary goal of states to be the maximization of autonomy".[76] In reality, however, "such an approach would miss the salience of democracy precisely because it assumes that those who control the state simply reflect the interests and desires of the people as a whole".[77]

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[74] Brandon, *supra* note 45 at 5.

[75] *Hape* at para.39.

[76] F Biancardi, *Democracy and the global system* (New York: Palgrave Macmillan, 2003) at 166.

[77] *Ibid*.

For all these reasons, a principled form of integration is necessary in order to achieve a form of coherence at the international level, even as the domestic legal system seeks to fulfill its role in overseeing the actions of the executive to protect fundamental democratic principles. Whereas domestic judges have ignored the issue of popular sovereignty and the delegation of democratic authority at the national level, WTO decision-making bodies have begun to consider these issues out of concern for their own legitimacy and questions of political expediency. The concern is that such forms of soft authoritarianism represent an undesirable incrementalism and eventually a deep change in international legal regimes, one paralleled by a disconcerting unwillingness of national judiciaries to exercise oversight at the national level. This lack of participation is worrisome since "public policy emanates from – and accountability correspondingly applies to – complex networks rather than one or the other player in isolation".[78]

Viewed in this context, it is important to consider the complex ways in which WTO policy-making bodies integrate important customary norms, such as those related to human rights, and contribute to the creation of new norms. The integration of domestic and international legal systems must therefore be done in a manner that respects existing principles of international law, and the legitimacy of formalized legal frameworks.[79] To simply impose an artificial unity on the basis of formal treaties that fail to reflect more fundamental grounding norms risks creating a formal international legal order that lacks legitimacy. Rather, a more democratic cooperative project can take shape though "experimental institutional arrangements that allow for the egalitarian formulation of cross-sectorial policies based on legal procedures, allowing for transparent rule making regarding the most urgent issues at stake".[80]

International institutions like the WTO, therefore, force the international community to choose between politics and policy and a more formal regime of international legal arrangements. The demand for consistency and predictability within international trade law as it currently exists cannot be fairly reconciled with its desire to enhance its perceived legitimacy by incorporating the remainder of public international law without deep changes in one—or both—of these two systems. While conceived largely in isolation from international publics, and domestic legislative and judicial bodies, the process of democraticizing these

[78] Scholte, *supra* note 7 at 19.

[79] J Bernstorff, *The public international law theory of Hans Kelsen: Believing in universal law* (Cambridge: Cambridge University Press, 2010).

[80] *Ibid* at 267.

formalized legal relationships is also closely related to the need for more engaged publics within the international sphere. As Clarkson astutely notes, while commenting on the need to revisit the type of national and international reforms that created a more responsible international order in the wake of the Second World War, "Re-establishing symmetry between supranational economic and social governance must happen again".[81] More broadly speaking, "The role of international law in this vein would also be to reconnect global rule to national publics through new institutional procedures, for unless that happens, executive global rule making remains isolated from non-institutionalized local and national discursive structures".[82]

WTO LEGITIMACY AND DEMOCRATIC NORMS AT INTERNATIONAL LAW

What types of problems, then, lie at the heart of the WTO's legitimization crisis? The relative fairness and the practical effect of formal legal relationships are central to much of the concern regarding the representativeness of the WTO regime. As Giroux and Giroux caution, "transnational in scope, neoliberalism now imposes its economic regime and market values on developing weaker nations through structural adjustment policies enforced by powerful financial institutions such as the World Bank, the International Monetary Fund (IMF), and the World Trade Organization (WTO)".[83] The WTO Agreements have themselves been passed by Parliament and the *World Trade Organization Agreement Implementation Act* explicitly states that WTO rulings have no effect on internal legislation unless specifically enacted. Yet the Appellate Body and the Dispute Settlement Body nonetheless exercise far greater powers and, in the words of Jackson, constitute a "supreme court of commercial law" that "reach deep inside member's regulatory systems".[84] Despite this, as Clarkson states in his discussion of Mexican and Columbian court decisions that upheld the primacy of national constitutions over international treaties, "the fact that the treaties were properly negotiated and signed by the…government…did not mean that they could trump the constitution's own supra-legislative norms".[85] Unfortunately, these types of decisions have been both infrequent and without much far-reaching effect.

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[81] Clarkson, *supra* note 4 at 263,

[82] Bernstorff, *supra* note 79 at 267.

[83] H Giroux & S Searls Giroux, "Challenging Neoliberalism's New World Order: The Promise of Critical Pedagogy" (2006) 6 Cultural Studies 21 at 23.

[84] Stephen Clarkson, *Canada's Secret Constitution: NAFTA, WTO and the End of Sovereignty?* (2 October 2002) online: Canadian Center for Policy Alternatives <http://www.kerri.policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/clarkson_constitution.pd> at 21.

[85] *Ibid* at 22.

At its heart, a legitimization issue requires that formal legal arrangements be assessed in terms of both their normative status and their practical real world consequences. The legitimacy of the WTO is a question that runs much deeper than the democratic and human rights records of the nation state signatories of the WTO Agreement, and relates to the legitimacy of constitutional devolutions of sovereignty. The notion that the jurisdiction and decisions of the WTO can simply be prescribed by its member states ignores the issue of the domestic legitimacy of those delegations of authority and any potential conflict that might exist with human rights conventions and preemptory norms. Although such coordinated state actions can, over time, create new norms, the existing countervailing human rights norms are deeply entrenched and cannot simply be disregarded. This has two implications: namely that trade law cannot be considered in isolation from all other aspects of international law, but also that international trade conventions must respect existing human rights obligations. Important in this regard is the possibility that there exists an emerging customary norm of international law in favor of democratic governance. As explained by Marks:

> The move to reconsider international law's approach to constitutions in the light of political changes was initiated by Thomas Franck. In a path-breaking article published in 1992, Franck advanced the contention that a 'norm of democratic governance' (or 'right to democratic governance') is emerging under international law. His idea was later taken up and refined by others, among them Christina Cerna, James Crawford, Gregory Fox, and Georg Nolte. The norm these scholars have in mind would imply, in the first place, that the legitimacy of governments is judged by international—rather than purely national—criteria. Secondly, it would entail that those criteria stipulate democracy; that is to say, only democratic governments would be accepted as legitimate. And thirdly, it would establish that democratic governance is a human right, subject to international protection through appropriate procedures and enforcement. Conceived in this way, a norm of democratic governance would alter received international legal doctrines in a number of fundamental respects. Whether a government is recognized for international purposes as the representative of the state would depend not just on whether the government wielded control over the state's territory, but on whether it was a democratic government. The norm would also modify accepted notions of sovereignty. Instead of being tied solely to coercive power, sovereignty would become linked to political legitimacy, as it is in national contexts. In Fox's words 'popular sovereignty'—sovereignty that resides with citizens—would replace 'state sovereignty'—sovereignty that resides with states, whether governed with the consent of citizens or not. Finally, the norm of democratic governance would challenge assumptions about human rights. The notion that internationally recognized human rights do not presuppose any particular political system could no longer hold. Cerna observes that 'by becoming a party to a human rights instrument, a state agrees to organize itself along democratic lines'. The norm would make democratic organization a universal right enforceable

> against all states, whether or not they have become parties to human rights treaties.[86]

It is not clear that this norm, even if it can be said to exist, entails the right to have democratic supranational organizations. It might entail some degree of transparency and accountability or, as Marks herself has argued,[87] an international principle of democratic inclusion that could mandate a certain minimal degree of transparency, representativeness, and accountability to democratic states depending on the nature of the affected interests. It simply might require that existing treaties and customary norms be interpreted and applied in a manner consistent with democratic principles such as that of popular sovereignty.

What, then, would be the value of integrating democratic rights and norms into the WTO framework? One reason to use these provisions to interpret other international laws is the fact that, as Pauwelyn has argued, addressing the issue of conflicting international norms is central to the viability of the WTO regime. This conflict must be addressed not only by international organizations and legal bodies, but also by the domestic courts which are charged with determining the applicability of international norms and rules within their own countries' domestic constitutional frameworks.[88] There is no principle of *res judicata* that binds either domestic courts or international tribunals to follow the decisions of one another.[89] However, there is also no principle precluding the adoption of an international precedent by a domestic court when it is on all fours with the case before it. The advent of the *Charter* has made the Canadian judiciary considerably more cosmopolitan in its outlook, particularly with regard to human rights litigation.[90]

Pauwelyn described the need for a broader discussion about the proper role of the WTO within the existing international framework by stating, "The WTO treaty must be construed and applied in the context of all other international law".[91] Rather than being an esoteric area only of interest to those engaged in international trade or economic policy making, undoubtedly "WTO law is international law. The WTO is not a closed legal circuit".[92] Although the WTO was created by the assent of separate

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[86] S Marks. *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology.* (Oxford, UK: Clarendon Press, 2000) at 38.

[87] *Ibid*.

[88] J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge, UK: Cambridge University Press, 2003)

[89] Brownlie, *supra* note 8 at 51.

[90] Bassan, *supra* note 47.

[91] Pauwelyn, *supra* note 88 at 492.

[92] *Ibid* at 52.

sovereign states, it has independent personality at international law and is itself a source of new law and norms created though panel decisions and state practice. Integrating public international law into the WTO framework does not require a further widening of the WTO's mandate, but simply involves having the WTO consider international law where necessary to address a given trade issue. More principally, international law can "fill gaps or provide interpretative material. But it may also overrule WTO norms".[93] "That way", argues Pauwelyn, "the WTO can continue to produce trade norms; other international organizations and conferences can produce other types of norms".[94]

Although Pauwelyn underscores the importance of environmental law, the law of treaties, and *jus cogens*, equal emphasis must be placed on international rights and democratic norms. The need for "integration" is also a broader public educational aim that reminds us that such institutions, as well as the broader international public sphere, must remain open and transparent. The creation of an active and engaged international citizenry is doubtlessly a long way off. However, it is precisely this type of norm-creating activity which reminds us that international law needs to be increasingly popularized through concerted public education initiatives in order to counterbalance the narrow interests of private corporations, international bureaucrats, and the executive branch of governments within ostensibly democratic nation states.

THE PROBLEM OF INTEGRATION

Essentially Contested Concepts and Incompletely Theorized Agreements

Is it even realistic to suggest that something can be done about the WTO's ongoing democratic deficit? Although the Vienna Convention On The Law of Treaties prohibits a state from relying on "the provisions of its internal law as justification for its failure to perform a treaty",[95] the issue of legitimization inevitably arises when international agreements that represent a significant devolution of sovereignty are not negotiated or signed in a transparent manner. Nonetheless, measures can be taken to enhance democratic representativeness short of outright abrogation. As with any international agreement, deficiencies can be remedied by renegotiating or amending the treaty, by internally curtailing the scope of the treaty through legislative or judicial action, or, where the treaty sets up a decision-making process, by incorporating the legal principles of transparency and popular sovereignty into the legal decisions of the decision-making bodies themselves. To some extent, all three

[93] *Ibid*.

[94] *Ibid*.

[95] Article 27, *Vienna Convention*, as cited in Bossche, *supra* note 32 at 61.

of these tactics will lead to a more effective integration of domestic law, international trade law, and the "remainder" of public international law.

The degree to which the WTO is perceived as a threat to democracy depends, in part, on whether one sees it as an intergovernmental or a supranational organization.[96] If the former, then the WTO derives its legitimacy solely from its member states who should be presumed to adequately represent their citizens' interests. If the latter, then matters become somewhat more complex and the implications for developing a broader framework of civic engagement within international law is even more pressing. Unfortunately, as Scholte reminds us, despite the lingering influence of the Westphalian model of international law, to date individual states—including democracies—have failed to provide rigorous oversight of many international treaties and supranational organizations.[97] Instead, "only extended and weak chains of accountability link state delegates in a global governance area to the wider publics that those officials notionally represent".[98]

The vital issue with regard to delegation is its practical effect and the legitimacy of the decisions subsequently made. As Bederman states, "the real question is the extent to which decision-making practically shifts from domestic to international levels of authority (and back again), and whether there is sufficient transparency and accountability of decision-making—at whatever level—so as to confer legitimacy on the decisions that are rendered".[99] WTO and NAFTA arbitration decisions, and the administrative and regulatory apparatus that has grown up around these bodies, are symptomatic of "the de-territorialization and privatization of law"— a tendency that has weakened the authority and influence of modern democracies and further heightened the vast influence of corporate power.[100] Even within the conventional Westphalian model, for example, amendments to the WTO Agreement permitting waivers for bilateral or multilateral agreements between states for issues relating to human rights or the environment would be one means of enhancing the WTO's legitimacy and encouraging agreement on mid-level principles. [101] Of course, as Tractman suggests, the Appellate Body could also simply recognize the effect of such waivers without requiring any formal amendment.

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[96] Williams, *supra* note 22.

[97] Scholte, *supra* note 7.

[98] Scholte, *supra* note 7 at 26.

[99] Bederman, *supra* note 24 at 180.

[100] Clarkson, *supra* note 4 at 260.

[101] Trachtman, *supra* note 14 at 89.

Although the conceptual underpinnings of contemporary international law are seen as rooted in inter-state agreement that derives its legitimacy from state sovereignty, the international system itself more commonly recognizes non-state actors and demonstrates increasing monist tendencies. Part of the problem is that "it is not clear that, for instance, government ministers at an OIC conference or technocrats in the World Bank Executive Board are particularly attuned to the needs and opinions of various non-state actors in their home countries".[102] Nonetheless, there seems to be a growing recognition that the WTO needs to be increasingly transparent and that international trade law is part of a broader system of international law, even though there is very little agreement on the full content of these principles and the full extent of their application.

Perhaps this should not be surprising because states with radically different cultures and systems of governance can be expected to disagree on the essential nature of international governing bodies and their founding agreements. Portman, in his book on legal personality, discusses the relevance of broad legal principles to this theme in international law. Drawing on Gallie's work on "essentially contested concepts", Portman argues that "there are certain concepts, for example, 'fairness' or 'justice', the basic purpose of which might be agreed on but where there is no consensus on what they specifically entail".[103] The result is that "there are often social and indeed legal situations in which most participants agree that the concepts of 'fairness' or 'justice' are relevant, but where there are many different views on what exactly represents a 'fair' or 'just' solution."[104] Moreover, as Portman notes, conventional conceptions of international law founded on state sovereignty do not fully accord with existing international practice. If this is true, then perhaps it is more important to consider the relevance of international persons, as well as human rights and democratic norms, when interpreting and applying broad inter-state agreements such as those that delegate state power to the WTO. This requires recognizing that "international law is not only particular or a mere decision-making process, but includes rules and principles of a general nature, and that factual developments do not have direct legal value, but have to be transformed into law through a principled justification".[105] As Beaulac maintains, this is a process that is essentially interpretative in nature:

> In an Anglo-Saxon common law system such as in Canada, the debate is not so much about the measures by which judicial activism may be tamed or controlled. As regards written law, traditionally approached

[102] Scholte, *supra* note 7 at 6.

[103] Portman, *supra* note 58 at 14.

[104] *Ibid* at 15.

[105] *Ibid* at 282.

> restrictively, the issue has rather been how to prompt decision-makers to appreciate their role more in terms of collaborative participant in the pursuit of societal goals. The area of human rights protection was no doubt most apposite to a methodological paradigm shift, in favor of a substantive engagement to the realization and actualization of the law. In an era of globalization, as well as inter/supra/transnational governance, favoring open texture legal language to encourage and facilitate recourse to international normativity in the process of legal interpretation at the domestic level certainly constitutes a most effective strategy in promoting (not thwarting) rule of law values, both in the national and the international legal sphere.[106]

What is interesting is that the interpretation of these agreements by national courts and WTO decision-making bodies themselves can be used to articulate an effective and principled compromise between these seemingly divergent norms. This does not mean insisting that "global governance is wrong in principle but it does suggest that a rebalancing of the current global institutions is urgently needed."[107] If we are to take seriously Clarkson's claim that the provisions of these agreements have created a new external constitution for nations like Canada, it is important to consider their full nature and effect. Thus, rather than looking at the issue of compliance, the issues of coherence and integration in legal systems and the implications of incomplete integration for democratic values need to be considered. To this end, Sunstein has famously claimed that the incomplete theorization of constitutional law can be both useful and the product of a tacit social agreement. According to Sunstein, incomplete theorization of the law allows for decisions to be made more readily without the need to engage in protracted disagreement over principles and concepts that lie at the heart of the legal system. Complete theorization is unnecessary, particularly at the early stages of system building, and rife with the potential for needless conflict. Consequently, Sunstein stated the following about the place of disagreements in the constitutional realm:

> Constitutional disagreements have many legitimate sources. Two of these sources are especially important. First, people may share general commitments but disagree on particular outcomes. Second, people's disagreements on general principles may produce disagreement over particular outcomes and low-level propositions as well. People who think that an autonomy principle accounts for freedom of speech may also think that the government cannot regulate truthful, non-deceptive commercial advertising—whereas people who think that freedom of speech is basically a democratic idea, and is focused on political speech, may have no interest in protecting commercial advertising at all. Constitutional theorizing can have a salutary function in part because it tests low-level principles by reference to more ambitious claims. Disagreements can be

[106] Beaulac, *supra* 31 at 484.

[107] Clarkson, supra note 84 at 25.

> productive by virtue of this process of testing.
> Certainly if everyone having a reasonable general view converges on a particular (by hypothesis reasonable) judgment, nothing is amiss. But if an agreement is incompletely theorized, there is a risk that everyone who participates in the agreement is mistaken, and hence that the outcome is mistaken. There is also a risk that someone who is reasonable has not participated, and that if that person were included, the agreement would break down. Over time, incompletely theorized agreements should be subject to scrutiny and critique, at least in democratic arenas, and sometimes in courtrooms as well. That process may result in more ambitious thinking than constitutional law ordinarily entails.[108]

Incompletely theorized agreements must be first recognized as such and then become the object of further collective dialogue and critical scrutiny in order to build a more principled and formalized system. While many have argued that contemporary international law is moving towards a consensus-building model, and that international trade law is part of public international law, there is a distinct lack of discussion regarding the place of democratic norms within this integrated framework. Widespread agreement on the importance of state sovereignty as a background assumption regarding the creation of supranational organizations such as the WTO has failed to consider the relevance of emerging democratic norms, as well as the general tendency towards inclusiveness and consultation that has been increasingly evident at the international level. But, as Sunstein contends, this is not necessarily a barrier to progress:

> When people disagree or are uncertain about an abstract issue—is equality more important than liberty? does free will exist? is utilitarianism right? does punishment have retributive aims?—they can often make progress by moving to a level of greater particularity. They attempt a *conceptual descent*. This phenomenon has an especially notable feature: it enlists silence, on certain basic questions, as a device for producing convergence despite disagreement, uncertainty, limits of time and capacity, and heterogeneity. In short, silence can be a constructive force. Incompletely theorized agreements are an important source of successful constitutionalism and social stability; they also provide a way for people to demonstrate mutual respect.[109]

Sunstein also says that where disagreement is intense, "full particularity" may be required; that is, the parties focus on results rather than theories or reasons since agreement on the former is more likely and can produce tangible results. In the case of trade advocates and human rights scholars, such a "conceptual descent" may be

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[108] C Sunstein, "Incompletely Theorized Agreements in Constitutional Law" in *Public Law and Legal Theory Working Paper Series* {2007) online: University of Chicago Law School <http://www.law.uchicago.edu/academics/publiclaw/index.html> at 20.

[109] *Ibid* at 2.

necessary if we are to create a truly balanced international constitutional order. In Sunstein's words, "when people diverge on some (relatively) high level proposition, they might be able to agree if they lower the level of abstraction".[110] As he notes, "what is critical is that they agree on how a case must come out and on a low-level justification".[111]

Sunstein's theory, then, provides a conceptual model for the vertical and horizontal integration of human rights and international trade law. Seen in this light, the WTO Agreement is not itself an international trade constitution as much as it is part of a broader emerging unitary system of international law that includes conventional public international law, international human rights, and international trade law. Given that we can likely agree, all other things being equal, that trade is good and human rights are good, and that to date there has been relatively sparse progress made in terms of integrating human rights law and international trade law, there is room to propose a model of international legal harmonization using Sustein's notion of incompletely theorized agreements. This implies two related but equally necessary projects: i) the creation of tangible legal and institutional practices that further integration in a practical sense; and ii) the opening of a legal dialogue where integration can be formalized through legal decisions, conventions, and treaties at both the domestic and international level.

As Sunstein notes, agreement can often be reached by parties with radically differing views by promoting a principle of deference whereby "issues are resolved by reference to institutional competence, not on their merits".[112] Such a principle of deference roughly parallels the tendency of WTO Appellate Bodies to respect member autonomy by refraining from imposing damages or claiming any direct effect for its rulings, and by permitting exemptions for certain important interests, as provided for in Article XX of the GATT and highlighted in the traditional emphasis placed on state consent in giving rise to member obligations. This leaves open the possibility of recognizing the "institutional competence" of national legislatures over issues relating to democratic interests and rights as well as the institutional competence of international bodies like the UN Commission on Human Rights.

Sunstein provides us with a starting point to build coherence from above and below. There are many mechanisms within the WTO that can potentially effect integration provided the political will for consensus building and enhancing legitimization exists. Regardless of whether we see these norms as preemptory

[110] Sunstein, *supra* note 15 at 1740-1741.

[111] *Ibid* at 1741.

[112] Sunstein, *supra* note 15 at 1747.

norms of international law within the meaning of Article 53 of the Vienna Convention on the Law of Treaties, they, and other international human rights instruments, constitute "other rules of international law applicable in relations between the parties" that can be considered by the Dispute Settlement Body or the Appellate Body for the purposes of interpreting the treaty obligations under the WTO pursuant to Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[113] Similarly, Article 3.2 of the Dispute Settlement Understanding, which governs the proper procedure to be followed by the parties and the Dispute Settlement Body in resolving disputes,[114] provides: "The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law".[115]

The WTO Appellate Body has shown a willingness to consider other international agreements. For example, in *US—Shrimp Turtle*, it noted the United States' participation in the Inter-American Convention for the Protection and Conservation of Sea Turtles in its consideration of the application of Article XX of the GATT. Notably, the Appellate Body suggested that states should attempt to take other measures before imposing unilateral restraints on trade.[116] Whether the Appellate Body or the Dispute Settlement Body would accept evidence of an international human rights obligation as a defence to a violation of a state's obligations under the WTO Agreement, or as an exception under Article XX of the GATT or Article XIV of the GATS, remains to be seen. There are, however, other means to legally justify the incorporation of democratic human rights into the WTO framework. In *EC–Biotech*, the WTO Panel Report noted that Article 31(3)(c) allowed it to take into account other treaties that applied to parties to a dispute when interpreting states' respective WTO obligations.[117] More generally, however, the WTO Panel Report voiced a reluctance to make determinations regarding the nature and extent of member obligations outside of the realm of WTO law.[118]

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[113] A Blackett, "Mapping the Equilibrium Line: Fundamental Principles and Rights at Work and the Interpretive Universe of the World Trade Organization" (2001) 65 Sask L Rev 369 at 377.

[114] *Ibid.*

[115] Annex 2 of the WTO Agreement, *Understanding on Rules and Procedures Governing the Settlement of Disputes* (15 April 1994) online: World Trade Organization <http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#3>

[116] G Shaffer & J Trachtman, "WTO Judicial Interpretation" in A Narlikar, M Daunton & R.M. Stern, eds, *The Oxford Handbook on the World Trade Organization* (Oxford, U.K.: Oxford University Press, 2012) at 541-42.

[117] *Ibid* at 544.

[118] *Ibid* at 546.

While the views of globalization advocates may be seen as shortsighted by those on the left, it is important to recognize that international trade law is founded on the principles of consensus building and state consent. Greater legitimacy and inclusiveness would likely create a more stable and robust international financial order, one that would seek to ameliorate longstanding tensions between developing nations and the western world. As Sunstein notes, "Through both analogies and rules, it is often possible for participants in constitutional law to converge on both abstract principles and particular outcomes without resolving large-scale issues of the right or the good."[119] The WTO has already shown an increased tendency toward greater transparency and deference to the policy-making decisions of individual states. However, if a more comprehensive degree of integration at the public international level is to occur, the WTO must consider a practical means of allowing greater participation by other international organizations and localized interests. Likewise, integrative efforts must also occur at the domestic level as part of the process of formulating a broader civic awareness, which is essential to building a more effective international legal regime. Convergence, in this case, may require human rights scholars to consider practical ways in which transparency, accountability, and representativeness may be enhanced, while experts in international trade consider how theoretical concerns about integration and popular sovereignty can be addressed as a means of enhancing the legitimacy of the WTO.

Justiciable Norms and the Role of Deference

The complexity of the integration problem is compounded by what one might call the degree of fit between democratic principles and the lack of popular consultation that has historically been characteristic of multilateral conventions, like the WTO Treaty, entered into by nation states. What is the test of legitimacy for agreements or customary norms entered into by nation states that seek to abdicate areas of popular sovereignty? Are there any minimum standards of transparency and popular choice that apply to the law-making activities of nation states at the international level when those same activities can be applied at the domestic level? This is of particular concern when such norms have not been debated or fully and properly considered within nation states. In the absence of a more concerted and principled search for democratic integration there is a risk that integration will be imposed from above by a very narrow and self-interested set of international actors and their local proxies. Despite the fact that WTO bodies have shown themselves as subject to political pressure, Krikorian raises the intriguing possibility that "we are witnessing a shift in the nature of international law whereby a form of judicial review is now being undertaken at the international level".[120]

[119] Sunstein, *supra* note 108 at 7.

[120] Krikorian, *supra* note 44 at 218.

Is part of the problem perhaps that neither monism nor dualism are particularly tenable theories in light of the blurring of jurisdictional boundaries within today's rapidly globalizing world? Cottier insists that we have long moved beyond a simple dichotomy between monist and dualist models of international law towards what he terms "an emerging doctrine of multilayered governance". For this reason, legal questions involving the intersection of domestic and international law cannot be solved simply by traditional methods that often failed to adequately consider the complex interrelationship between domestic interests and international law. Perhaps it is more practical in the long run to simply focus on the type of problem before us, whether it is indeed a legal problem, and the types of tools and principles that we have at our disposal to solve it. In this vein, Cottier instead urges that problems related to the intersection of domestic and WTO law be solved by determining whether: i) it is a political question that does not involve legal principles and norms; ii) the question is justiciable, involving a legal matter or issues related to legal principles best solved by courts; and iii) it is a matter that requires judicial restraint or deference depending on the degree to which democratic bodies are involved or the level and nature of expertise required. Moving beyond the traditional monist-dualist dichotomy requires focusing on situating legal norms within the context of real life disputes that they may help resolve:

> The notion of law cannot be divided. It is conceptually outdated to question the legal nature of international law, and in particular of WTO law in light of existing mechanisms of international dispute settlement and enforcement of WTO law. No longer are Austinian and positivist doubts appropriate. Instead, the body of law needs to be considered as a whole, and it is a matter of defining the mutual relationship between different sources and layers of regulation in defining primacy and the effect of norms. This is the essence of an emerging doctrine of multilayered governance, seeking to establish a proper balance between international and domestic law. Within this concept, norms—whatever the layer of governance—may be of a programmatic nature, calling upon the legislator for implementation and barring direct effect. Such norms may be found in international law and in constitutional law alike. They may also be found in legislation. At the same time, other norms are suitable for direct effect, again independently of whether they belong to the realm of international or domestic law. Whether or not a norm is of such a quality depends on what we call the doctrine of justiciability.
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> Courts need to ask whether the norm is justiciable—whether, in other words, it is suitable for judicial decision-making. Courts can refer to criteria in assessing whether the matter pertains to their province or not. These criteria not only include the textual clarity and precision of a rule, whether it allocates rights and obligations, but mainly whether it is suitable for judicial application, concretization, and refinement in case law. The matter before the court must be apt to be assessed by the court, and a decision taken suitable to be implemented without further legislation…In assessing justiciabilty, the implications of a ruling on the allocation and balance of powers within a constitutional framework thus

> play an important role. These considerations are today often taken into account silently and implied in reasons given to deny direct effect. They need, however, to be discussed in explicit terms. Separations of powers and checks and balances form an important ingredient of judicial reasoning in assessing justiciability. A political question doctrine and a doctrine of judicial restraint offer appropriate rationales.[121]

Such a model, then, envisions a more active role for domestic courts in determining the exact inter-relationship between WTO rules and rulings and domestic law. Cottier also suggests that the extent of direct application is a matter which should be explicitly stated within the WTO Agreements themselves, along with any future amendments, and cited Article XX of the WTO Government Procurement Agreement as an example. Finally, Cottier recommends allowing private citizens access to WTO law within their own domestic legal systems. While this does appear to be a step towards enhanced openness and fairness in the relationship between domestic and international legal trading systems, it is difficult to see how many of the problems regarding legitimacy are resolved by direct effect if the current democratic deficit within the existing regime is not resolved and if such rules are not negotiated in an open and democratic manner from the outset.

If domestic integration is to become a reality, much work remains to be done as the focus begins to shift to forging incompletely theorized agreements that incorporate democratic rights and formalizing existing democratic rules and institutional structures. Despite Canadian courts' long history of using international case law and conventions to interpret domestic law, despite that it can be reasonably claimed that the WTO Agreement constitutes part of Canada's "external constitution",[122] and despite the relatively "open texture" of much of the language surrounding WTO enabling statutes and decisions,[123] there is a remarkable lack of judicial deliberation regarding their legal nature and effect. A primary issue perhaps is our collective failure to see international trade law as far more than a technical realm beyond the comprehension or concern of ordinary citizens. As Bederman states, "there is thus a subtle interplay between fairness, humanity and democracy as values in international law".[124] Indeed, "the combination of these principles has offered a powerful philosophic alternative to State-centered objectives of peace, order and sovereignty".[125] This is a question that is ultimately related to education

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[121] T Cottier, "The role of domestic courts in the implementation of WTO Law: The Poltical economy of separation of powers and checks and balances in international trade regulation" in A. Narlikar, M. Daunton & R.M. Stern, eds. *The Oxford Handbook on the World Trade Organization* (Oxford, U.K.: Oxford University Press, 2012) at 623-624.

[122] See Clarkson, *supra* note 84.

[123] Beaulac, *supra* note 31.

[124] Bederman, *supra* note 24 at 198.

[125] *Ibid* at 199.

and the need to cultivate a deeper public understanding of the WTO's proper role, a project that is closely related to the WTO's legitimacy.[126] While the WTO's role as an instrument of active policy-making and dispute mediation is well understood, its real importance lies in its law-making capacity. According to Cho, this requires a "didactic approach" in order to ensure that "the gravitational force of international trade law can be better absorbed in the domestic legal system" as more people become "norm entrepreneurs".[127]

In many respects this international democratic deficit highlights the importance of creating a broader and more representative global public sphere, but one in which individuals become active and critical citizens. The issue of legitimacy is one that is related to education and the global public's knowledge of the WTO and their ability to lobby for effective state action.[128] However, legitimacy is also related to the organization's ability to reflect and embody fundamental international democratic norms. Widespread discomfort about the aims of the WTO underscore the need for more representative global institutions that are characterized by enhanced transparency, and a heightened role for NGOs and citizens alike within an emerging global public sphere. Creating a more inclusive international legal order requires moving beyond "the breathless rhetoric of free market rationality" towards the search to create, on a global scale, "those noncommodified public spheres that serve as the repository for critical education, language, and public intervention".[129] While this is a difficult task, it is not an impossible one, provided that it is coupled with a more comprehensive civic literacy in which global citizens are informed about the complex dynamic that exists between nation states, corporations, and international organizations within a rapidly changing world.

To return to Schwartz's comment, if we are indeed talking about an emerging international constitution, it remains incompletely theorized and perhaps necessarily so. Both trade and democracy are important ends, but we can no longer afford to have each pursued in such stark isolation. As Clarkson has well argued, concrete particularity is needed while we continue to articulate emerging principles and more formalized ground rules that effectively balance the practical requirements of popular sovereignty with the demands of free trade. Extreme rhetoric on both the right and left will only deepen the divide at the cost of lost opportunities and, possibly, a new global social contract that is less utopian than the gradual product of a principled pragmatism that remains preoccupied with the messy business of forging an enduring compromise. This is a political project that has law at its core and that

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[126] S Cho, "A Quest for WTO's legitimacy" (2005) 4 *World Trade Review*. 3, 391-399.

[127] *Ibid* at 399.

[128] Clarkson, *supra* note 4 at 263.

[129] Giroux & Giroux, *supra* note 83 at 24.

seeks to formalize a gradually expanding network of tacit and *ad hoc* agreements into a global system that makes allowance for democracy, trade, and human rights. It is a difficult but possible task, provided we remain focused on the dangers of partisanship in a world that is rapidly becoming increasingly polarized and devoid of any deep and lasting social commitments.

HARMONIZATION AS DEMOCRATIC COMPROMISE?

What would a harmonized model that integrates democratic norms and trade liberalization look like? As Scholte emphasizes, "today no regulatory body—including a state—constructs public policy on its own. Global institutions, regional agencies, state bodies and substate authorities are embedded together in a host of polycentric networks that operate in respect of different policy issues".[130] Whereas Sunstein promotes incomplete theorization as a tacit agreement to neglect articulating a comprehensive theorization of the law, there is an opposite problem here. International law is viewed as something that is fundamentally outside of the Canadian legal system and that is acknowledged or incorporated by the judiciary or the legislature in an *ad hoc* and unprincipled manner. The type of harmonization described by Bastarache needs to be informed by a new democratic realism that can act as a force for change within both domestic nation states and supra-national organizations alike. The evolving reality of public international law requires a change in the way domestic law and international trade law intersect. The conventional dualist model and the traditional emphasis upon state consent fails to reflect emerging democratic norms and the broader question of institutional legitimacy at international law. In Sunstein's words, "legitimacy stems not simply from principled consistency on the part of adjudicators (or someone else) but from a justifiable exercise of public force. That theory should be founded on a theory of authority and hence (if we are democrats) in suitably constrained democratic considerations".[131]

There are also measures that can clearly be taken to enhance democratic norms within the WTO framework itself, leaving room for consensus building by nations that are eager to enhance the legitimacy of the WTO system. As Loy suggests, measures such as increasing the public visibility of the dispute resolution process and permitting the participation of NGOs and allowing them to submit *amicus curiae* briefs are likely also steps in the right direction. Experts on international human rights jurisprudence could also be consulted pursuant to Article 13.2 of the Dispute Settlement Understanding, Article 11(2) of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), and Article 14 of the

[130] Scholte, *supra* note 7 at 19.

[131] Sunstein, *supra* note 15 at 1763.

Agreement on Technical Barriers to Trade (TBT).[132] For example, Article IX:2 of the WTO Agreement allows member states to adopt interpretations of WTO provisions by a three-fourths majority,[133] which leaves room for provisions that explicitly reference international human rights instruments or the importance of democratic principles. Similar measures can be taken through the amending provisions of Article X,[134] mentioned above, or simply through the recommendations of working groups and internal committees. Such a process of formalizing implicit norms can not only animate effective compromise in the international sphere, but also reflect important democratic principles at play within the nation state, including chiefly that of popular sovereignty and the right of self determination. Harrington maintains that there are also distinct changes that can be made to address a broader democratic deficit that exists within all Commonwealth democracies, including Canada:

> A multipartisan federal parliamentary committee specifically dedicated to the task of treaty scrutiny is the best means to achieve both public awareness and improved democratic accountability in the field of treaty making. A treaty committee focuses public attention on treaty making, dispels any myths and uncovers matters needing further investigation, and also provides a public repository for treaty information. Such a committee, however, must be established with the support of the government in power since the committee will need the co-operation of its ministers and officials. It must also be of an adequate size if it is to follow Australia's lead and carry out hearings beyond the confines of the capital, and it must be supported by an adequate secretariat to assist with the development of a corporate memory and a fruitful relationship with civil society groups, industry leaders, academic, and other non-governmental organizations.
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> As for the need for parliamentary approval for treaty action, whether federal or regional, it is my view that the treaty-making process must allow for the possibility that a state will not ratify a treaty following an expression of parliamentary disapproval. All treaties need not be expressly approved by Parliament, but there should be a mechanism that enables Parliament to draw attention to a future treaty action that has strong opposition, and this mechanism should not rest on the goodwill or discretion of the executive branch…I can hardly see the expansion of this legal fetter on the prerogative power of the Crown causing any great harm. A negative resolution procedure applicable to treaties after signature but before ratification will not unduly tie the hands of the executive during treaty negotiation, and may foster a greater degree of consultation, and even co-operation, between the levels and branches of government at the

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[132] F Loy, "Public Participation in the World Trade Organization" in G P Sampson, ed. *The Role of the World Trade Organization in Global Governance* (New York, U.S.A.: United Nations University Press, 2001) at 129.

[133] Mavroidis, *supra* note 34 at 429.

[134] *Ibid.*

> pre-signature stage. It is also a middle ground position that balances the various interests at play.[135]

While these types of practical measures are promising, they also rely on a widespread recognition of the vital national interests at play and the failure of the present regime to protect the interests of Canadian democracy. Interestingly, Harrington also sees an expanded role for the Courts in bridging the democratic deficit caused by the usual lack of consultation between the executive and the legislative branches of most Western nations:

> A final impetus for securing a greater role for the elected legislature in the making of treaties comes from the domestic courts. No longer is it 'elementary', to use the words of Lord Denning, 'that these courts take no notice of treaties as such…until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tells us'. Our common law courts are increasingly finding ways to give unincorporated treaties domestic legal significance, it not domestic effect, and for this reason too, I support a greater role for Parliament, whether federal, state, provincial or devolved, in the making of treaties. The resulting public record of Parliament's involvement prior to ratification could serve to either counterbalance the activism of the courts when Parliament is against giving domestic effect to a treaty, or bolster the decision of the courts by providing evidence of Parliament's support for a treaty's provisions. In any event, a parliamentary role in treaty making is necessary to avoid engaging the nation in long standing legal commitments without public scrutiny and debate.[136]

While there may not be a customary international norm in favor of democratic governance, it is worth considering the relevance and potential effect of an emerging norm in interpreting a post-Statist international legal framework. As Bederman states, "in reality, it may just be that we are changing our notions of State sovereignty to accommodate the new realities of non-State actors and diverse sources of international law-making authority and enforcement".[137] For judiciaries and legislatures, the key question remains one of constitutional integrity: whether the statutes implementing international treaty obligations are in fact constitutional and democratic, and whether international human rights conventions and preemptory norms are properly respected. Although supranational trade organizations do exhibit an increasing willingness to take international law into consideration, there remains a disturbing tendency to ignore the close connection that exists between economic equality, social justice, and democratic legitimacy. More important, perhaps, is the

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[135] Harrington, *supra* note 12 at 509.

[136] *Ibid.*

[137] Bederman, *supra* note 24 at 157.

need to create a broader system of public international law that embodies what Marks calls "the principle of democratic inclusion", whereby "democracy is seen to entail not only a particular set of institutions and procedures, but also, and more generally, an ongoing call to enlarge the opportunities for popular participation in political processes and end social practices that systematically marginalize some citizens while empowering others".[138]

As a whole then, the present situation is unsatisfactory for a number of reasons. Firstly, it leaves much of the day-to-day work of conceptualizing international law to the executive, its administrative apparatus, and the political interests that often drive international deal making. Furthermore, an increasing number of international treaties dealing with trade and intellectual property rights are much more explicit about their integration into domestic legal systems and have created organizational systems in order to ensure their full implementation. The existing rights regime lacks a comparable degree of organizational efficiency and is much less explicit about integration, raising the danger that one area of international law will have a proportionately larger degree of domestic influence. The Canadian judiciary has failed to adequately theorize and relate democratic principles regarding constitutional supremacy and popular sovereignty to international law, meaning that international trade organizations have applied far-reaching rules and regulations to our domestic legal system with no sense of the unique legal culture, or the particular democratic traditions, of the nation in which these rules are applied. In the absence of human rights advocacy and popular dialogue, expedience breeds injustice and oversight to the detriment of global democracy. Quite simply, this must change.

[138] Marks, *supra* note 86 at 109.