

# GLOBAL GOVERNANCE AND THE WTO

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## ABSTRACT

The international trading system, embodied in the World Trade Organization (WTO), is rightly celebrated as one of the great successes of international cooperation. The success of that system, however, has not been matched in other important areas of international policymaking, including environmental, labor, human rights, and competition policy. In recent years, the trading system has come under stress because the impact of its success has been felt in these “non-trade” areas. The liberalization of trade and the establishment of multilateral trading rules, for example, have made it more difficult for nation-states to impose trade sanctions on states that fail to undertake certain environmental measures. Governments, non-governmental organizations (NGOs), and individuals concerned about the impact of the trading system on these non-trade issues have challenged the WTO to address this concern. As of yet no consensus has emerged on the question of how to balance existing trade interests against these other interests.

This Article proposes a strategy that would allow states to discuss trade and non-trade interests in a single forum. No such forum exists today.

The best starting point for this effort is the WTO. The WTO has the advantage of being an established and successful organization that has proven itself capable of managing complex negotiations and administering the resulting agreements. It also has the advantage of a well functioning dispute resolution system. The primary problem with the WTO as the single home for these diverse issues is the fact that it is a trade organization, staffed by trade specialists, and prone to favoring trade interests over others. If it is to be an effective and accepted forum for non-trade issues, this trade bias must be eliminated.

To overcome the trade bias of the institution, this Article advances a novel proposal to create autonomous, topical departments within the WTO. Each department would represent a single area, such as trade, environment, human rights, and so on. The departments would organize rounds of negotiation within their issue areas, leading to WTO obligations. In addition, to permit negotiation across issue areas, periodic “Mega-Rounds” would be convened in which trade concerns could be balanced against, for example, environmental concerns. The resulting agreements from the Mega-Rounds would also represent WTO obligations. The departmental structure would avoid the problems of a trade bias within the organization and retain the advantages of specialization. At the same time, the organization would have a mechanism to undertake the difficult but critical tasks of determining how trade and non-trade interests will interact.

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## I. INTRODUCTION

We live in a world of national governments and international economic activity. As states attempt to manage the international system, the global community – from time to time – reaches moments of stress when powerful economic and social pressures force it to consider reform of its institutions and practices. The aftermath of the Second World War was probably the greatest such moment of stress in the last century, and gave rise to the Bretton Woods system, including the International Monetary Fund (IMF), the World Bank, and the General Agreement on Tariffs and Trade (GATT), which brought order and stability to the international economic system.<sup>1</sup> Another such moment occurred in the early 1970s, when the United States abandoned the Gold Standard, precipitating the collapse of the fixed exchange rate system and a return to floating rates.

One could make a strong argument that the world faces another such period of stress today. In this case, the stress is most acutely felt in the trading system, though it finds its roots in other policy areas such as the environment and labor. The problem arises in part as a consequence of the remarkable success of the World Trade Organization (WTO).<sup>2</sup> Over time, and especially as a result of the Uruguay Round, the GATT/WTO has moved from a system of rules prohibiting certain trade measures to a

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<sup>1</sup> The Bretton Woods system, of course, was originally intended to include the International Trade Organization, but only the much less ambitious GATT actually came into being. See John H. Jackson, *The Puzzle of GATT: Legal Aspects of a Surprising Institution*, in John H. Jackson, *The Jurisprudence of GATT & the WTO* (2000).

<sup>2</sup> See Joel P. Trachtman, *Transcending “Trade and...” An Institutional Perspective*, mimeo (2001), at \*33 (“the WTO’s competitors do not seem to be contesting strongly the WTO’s authority”).

system of rules requiring certain affirmative government actions.<sup>3</sup> The consequence is a WTO that is engaged in monitoring and adjudicating the legality of domestic rules that are not primarily about trade. These include rules governing the protection of intellectual property, service industries, health and safety measures, and so on.<sup>4</sup> Though each of the rules adopted has an important connection to liberalized trade (with the possible exception of the TRIPs Agreement<sup>5</sup>), the substance of those rules makes it impossible to consider them in strictly trade terms.

The impact of the trading regime is also felt in areas that are not subject to any specific WTO regulation. Areas such as environmental policy, human rights, labor, and competition policy are not regulated by the WTO, but in each case trade and the trading system has influenced policymaking. The influence of WTO obligations on non-trade areas has generated cries of protest from many quarters. Critics argue that the WTO remains a trade institution at heart, and that its forays into what were traditionally considered non-trade areas has caused the non-trade values at stake to be ignored in favor of trade concerns.<sup>6</sup> Thus - the argument goes - the tremendous power of the organization, combined with its efforts to influence policies in non-trade areas, has elevated trade at the expense of other issues.

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<sup>3</sup> See Sylvia Ostry, *WTO: Institutional Design for Better Governance*, mimeo, available online at <http://www.ksg.harvard.edu/cbg/trade/ostry.htm>.

<sup>4</sup> See Claude E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 2 *Chi. J. Int'l L.* 406 (2001).

<sup>5</sup> See TRIPs Agreement, art. 27(1) (“[P]atents shall be available for any inventions.”).

<sup>6</sup> See Margaret Graham Tebo, *Power Back to the People*, *ABA Journal*, July 2000, at 54 (“Shortly before the [WTO’s meeting, Sherrod Brown, member of the U.S. House of Representatives] said it was important to ‘make labor standards, environmental standards and human rights as important to our trade bureaucrats as intellectual property rights.’”).

The dramatic failure of the WTO's 1999 Ministerial Conference in Seattle demonstrated the dissatisfaction of certain groups with the current state of globalization. Protesters succeeded in drawing attention to their concerns about labor, environmental, and human rights issues.<sup>7</sup> The collapse of the Seattle Ministerial stands as dramatic evidence that international cooperation and globalization cannot continue with a focus on trade alone.<sup>8</sup> Nor is it only the protesters who take this view. WTO members appear to have recognized that other concerns must be addressed.<sup>9</sup> Most recently, at the Doha Ministerial Conference in the fall of 2001, the WTO laid out an agenda for the "Doha Development Round," which opens the door to a discussion of at least some of these non-trade issues, including environment, competition policy, and investment.<sup>10</sup>

These developments have placed the WTO and the international economic community at a crossroads. The WTO must either move forward by incorporating more regulatory issues within its mandate, or move backward and retreat to a narrower focus on

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<sup>7</sup> See Mark Weisbrot, *One Year after Seattle: Globalization Revisited*, available at <http://www.cepr.net/wto/seattleplusonefinal.htm> (providing an opponent's view of the events at Seattle).

<sup>8</sup> See Claude E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 2 *Chi. J. Int'l L.* 403, 404 (2001).

<sup>9</sup> See, e.g., Helene Cooper, et al., *Up in Smoke: WTO's Failure in Bid to Launch Trade Talks Embolden Protestors*, *Wall St. J.*, Dec. 6, 1999, at A1 (discussing the resistance of developing countries to the incorporation of labor standards).

<sup>10</sup> Among the issues to be negotiated in the new round are investment, environment, and competition policy. The opening provided by the Doha Round should not be exaggerated, however. Rather than a clear commitment to negotiate on, say, environment, the Declaration states that the Committee on Trade and Environment should investigate certain environmental issues, especially "the effect of environmental measures on market access." This is well short of a commitment to bring environmental issues within the WTO in a manner analogous to how intellectual property has been incorporated. See *Doha WTO Ministerial Declaration*, Nov. 20, 2001, available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm). Similarly the WTO is moving into the competition policy field in gingerly fashion, with Doha Ministerial Declaration calling on the Working Group on the Interaction of Trade and Competition Policy to focus only on "core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; [and] modalities for voluntary cooperation." *Id.* at ¶ 25.

trade, leaving controversial topics such as environmental issues outside of its influence.<sup>11</sup> Though the incorporation of more issues within the WTO faces many hurdles, the alternative of reducing international economic cooperation is inconsistent with the needs of an increasingly global economy.<sup>12</sup> Turning away from non-trade issues does not make them go away, and does not change the fact that the trade and non-trade issues are connected. Rather it pushes these issues into the shadows and prevents policy formation in an open and organized fashion.<sup>13</sup> Nor is retaining the status quo a practical option.<sup>14</sup> The power of the WTO has caused it to extend its reach into non-trade-related issues such as health and safety, intellectual property, and the environment. The non-trade interests in these areas, however, are powerful and important enough that they must be given a voice if relevant trade rules are to be sustained. A refusal to grant such a voice will give strength to the already powerful forces aligned against the WTO and globalization.

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<sup>11</sup> See John H. Jackson, *The Perils Of Globalization and the World Trading System*, 24 *Fordham Int'l L.J.* 371, 374 (2000) (“[S]ome people in the United States have argued that we should reverse course and take the WTO back to the time when it was responsible only for border measures, thereby limiting its ability to affect national regulation internally. This is folly, because such time never existed. It was always recognized that there were measures in GATT that would have effects behind the border.”). Jackson’s point here is well taken: there has never been a time at which the GATT/WTO system concerned itself only with border measures. That said, it is probably correct that the pressure on the WTO system could be reduced by restricting the organization’s attempts to influence issues other than tariffs and other border measures. This would leave states with greater freedom to pursue their own policies in variety of areas such as environmental policy or health and safety issues, but would also undermine efforts to prevent the use of such policies as protectionist devices.

<sup>12</sup> See C.E.J. Bronkers, *More Power to the WTO?*, 4 *J. Int’l Econ. L.* 41, 41 (2001) (“more and more issues can no longer be resolved domestically – and, if domestic measures are taken, they easily create conflicts with other jurisdictions”).

<sup>13</sup> See Daniel C. Esty, *Bridging the Trade-Environment Divide*, 15 *J. Econ. Persp.* 113, 114 (2001) (“The only choice [with regard to trade and the environment] is whether the policies put in place to respond will be designed openly, explicitly, and thoughtfully, with an eye to economic and political logic – or implicitly and without systematic attention to the demands of good policy-making.”)

<sup>14</sup> See Joel P. Trachtman, *Transcending “Trade and...” An Institutional Perspective*, mimeo, May 2001.

The non-trade concerns at issue – sometimes referred to as “trade and” issues<sup>15</sup> or “fair trade” issues<sup>16</sup> – include (at least for the purposes of this Article) human rights, environmental issues,<sup>17</sup> labor,<sup>18</sup> competition policy, and intellectual property.<sup>19</sup> Among the consequences of the trade bias said to exist within the WTO is the frustration of efforts to use trade sanctions as a tool to achieve changes in the policies of foreign states with respect to these “fair trade” issues.<sup>20</sup>

Much of the criticism leveled at the WTO stems from the perception that the liberalization of international trade has received inappropriate prominence, and that other values have been sacrificed.<sup>21</sup> One solution to this perceived problem – the one usually at the center of the discussion – is to slow the expansion of trade and international trade rules. An alternative solution – one that is more consistent with the reality of growing international activity – consists of increasing the level of cooperation

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<sup>15</sup> See Trachtman, “Trade and...”, supra note 14.

<sup>16</sup> See Fair Trade and Harmonization (Jagdish Bhagwati & Robert E. Hudec, eds. 1996).

<sup>17</sup> The most active literature has been in the environmental area. See Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 *Am. J. Int'l L.* 268 (1997); Daniel C. Esty, *Greening the GATT: Trade, Environment, and the Future* (1994).

<sup>18</sup> See Leary, *Workers Rights and International Trade: The Social Clause*, in 1 *Trade and Harmonization: Prerequisites for Free Trade?* (Jagdish Bhagwati & Robert E. Hudec, eds. 1996); Raj Bhala, *Clarifying the Trade-Labor Link*, 37 *Colum. J. Trans'n'l L.* 11 (1998); Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 *J. Small 7 Emerging Bus. L.* 131 (1999); Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 *Cal. L. Rev.* 885 (2003).

<sup>19</sup> See Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 *European J. Int'l L.* 733, 739-45 (1999) (discussing several “trade and” issues, including environment, labor, competition, intellectual property, investment, and culture).

<sup>20</sup> See Margaret Graham Tebo, *Power Back to the People*, *ABA Journal*, July 2000, at 52 (“By making decisions that favor free trade over concerns about people and the environment, the activists say, the WTO is thwarting efforts to press for change through economic sanctions directed at countries that allow such abuses within their borders.”).

<sup>21</sup> See Joel P Trachtman, *Transcending “Trade and . . .”*: An Institutional Perspective, mimeo, at \*18 (“[T]he current system for dealing with conflicts between trade values and other values, and between trade law and other law, seems to provide a privileged position to trade values.”); Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (Int'l

and focusing on important non-trade issues. That is, rather than slowing progress in the trade area, the concerns voiced at Seattle and elsewhere should be addressed by increasing the level of international cooperation with respect to labor, environment, human rights, competition policy, and intellectual property.

At first glance, the idea of moving toward more, rather than less, global governance may seem inconsistent with the objections of opponents of the WTO. As one examines the concerns of these groups carefully, however, it becomes clear that only increased global cooperation can provide an effective strategy for addressing those concerns. Indeed, the notion of slowing the pace of globalization is difficult to justify based on the concerns of WTO critics. Like WTO supporters, critics recognize that international cooperation is needed to address the challenges of globalization.<sup>22</sup> A turn away from the world's most effective international institution, then, is an odd prescription.

This Article proposes that the WTO should, over time, expand its role to include non-trade issues for which there are significant trade implications. Doing so will require changes to the institution, and this Article outlines some of the necessary reforms. This is not the first Article suggesting an expansion of the WTO,<sup>23</sup> but it offers a novel set of reforms that would both allow the organization to retain its effectiveness as it expands

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Centre for Human Rts. & Democratic Dev., Policy Paper, 2000) ("Institutionally, the GATT developed in isolation, a fact which produced a single-minded free trade perspective.").

<sup>22</sup> See, e.g., The Foreign Policy Interview: Lori's War, 118 *Foreign Policy* 28, 37-47 (Spring 2000).

<sup>23</sup> See Marco C.E.J. Bronkers, More Power to the WTO?, 4 *J. Int'l Econ. L.* 41 (2001); I.M. Drestler & Peter J. Balint, *The New Politics of American Trade: Trade, Labor, and the Environment* (1999). For a glimpse of the other side of this debate, see e.g., Jagdish Bhagwati, The Question of Linkage, 96 *Am. J. Int'l L.* 126 (2002); Daniel K. Tarullo, Norms and Institutions in Global Competition Policy, 94 *Am. J. Int'l L.* 478 (2000).

and eliminate the trade bias. Though incorporating additional areas into the WTO is frequently proposed as a straw man to be knocked down, it is less common to find a serious proposal supporting the idea.<sup>24</sup> This Article demonstrates that the WTO can be reformed in such a way as to retain the benefits of a stable, influential, and well-functioning international organization while eliminating the trade bias of the institution. Though a reformed WTO will not be perfect, the alternatives (the most prominent being the establishment of stand-alone issue-oriented institutions)<sup>25</sup> are worse.

To permit the expansion of the WTO into new areas while taming its trade bias this Article recommends that the WTO be structured along departmental lines. Thus, there would be a “department” for each issue area – a trade department, an intellectual property department, an environmental department, and so on.<sup>26</sup> Each department would be staffed by representatives from member states and would hold periodic negotiating rounds, much as the WTO does today. These “Departmental Rounds,” however, would be limited to issues relevant to the organizing department. In addition to the Departmental Rounds, there would be occasional “Mega-Rounds” of negotiation, where agreements could be struck across departmental lines. For example, a Mega-Round might generate agreements in one departmental areas based on concessions offered in another area. It would also be possible to reach an agreement that implicates more than one

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<sup>24</sup> See Jose E. Alvarez, Symposium: The Boundaries of the WTO: Foreword, 96 A.J.I.L. 1, 2 (2002); David W. Leebron, Symposium: The Boundaries of the WTO: Linkages (Edited by Jose E. Alvarez), 96 A.J.I.L. 5 (2002).

<sup>25</sup> See, e.g., Daniel C. Esty, Greening the GATT: Trade, Environment and the Future 73-98 (1994) (proposing a Global Environmental Organization); Eleanor M. Fox, Competition Law and the Millennium Round, J. Int’l Econ. L. 665 (1999) (proposing a free standing “World Competition Forum”).

<sup>26</sup> As discussed in Part II, this departmental structure is, in a limited way, reflected in the existing structure of the WTO.

department, such as an environmental agreement that provides for a set of trade-based incentives for compliance. Mega-Rounds would be analogous to the Uruguay Round where the TRIPs Agreement was negotiated.<sup>27</sup>

Despite dramatic differences in perspective, both proponents and critics of the WTO agree that some form of international cooperation is required. That these groups with opposing agendas should agree is perhaps not surprising because any serious consideration of topics such as the environment, intellectual property, and health and safety measures eventually has to consider their substantial international implications. One cannot speak for long about environmental issues, for example, before international concerns such as greenhouse gases come up. Regardless of how one feels about the appropriate balance between, for example, the environment and economic growth, it is clear that environmental concerns can only be addressed through cooperative efforts among states. That sort of balance and cooperation cannot be achieved by a retreat from globalization, and specialized international organizations will not be equipped to promote the necessary dialogue. The better answer is to leverage the WTO's existing success by reforming the institution and turning it into a World Economic Organization.<sup>28</sup>

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<sup>27</sup> A fair description of the TRIPs Agreement includes recognizing that the intellectual property goals of developed states were achieved in exchange for concessions to developing countries on market access issues. See Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, forthcoming, Va. J. Int'l L. (2003).

<sup>28</sup> This name is borrowed from Bronkers, *supra* note 12. For the sake of clarity, the organization will be referred to as the WTO throughout the Article, though that name would be inappropriate if the proposals advanced herein were accepted.

## II. A PROPOSAL FOR REFORM

As international integration continues, the economic and regulatory challenges continue to mount. Scholars and practitioners working on questions of international cooperation have not overlooked these questions. The most commonly advocated solution is establishing or strengthening issue-oriented international institutions.<sup>29</sup> Such calls have been heard in the environmental,<sup>30</sup> labor,<sup>31</sup> and competition policy literatures.<sup>32</sup> Others have suggested that dispute resolution panels at the WTO should apply certain non-WTO norms more aggressively, and should take commitments made outside the WTO into account when evaluating state conduct.<sup>33</sup>

This Article proposes a different approach to the problem of international governance in an age of interdependence. Rather than establishing separate international institutions with the inevitable fixed costs, start up costs, and uncertainty about their success – not to mention the question of how these institutions will interact with one another – the international community should take advantage of the strength currently enjoyed by the WTO by expanding its jurisdiction to include additional substantive issues. That expansion, of course, generates attendant challenges and risks, and requires

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<sup>29</sup> Thus, for example, there are calls for reforms to the International Labor Organization designed to make that organization more powerful and effective.

<sup>30</sup> Among those who have suggested a World Environmental Organization is former WTO Director-General, Renato Ruggiero. “It will not be possible if we are just talking about trade liberalization. We need to have real progress towards environmental legislation, with the creation of a World Environmental Organization. We also need progress in the International Labour Organisation in defence of social values such as labour standards and child protection.” Quoted in Larry Elliot, *The World on His Shoulders*, *The Guardian*, April 30, 1999.

<sup>31</sup> See *supra* note 29.

<sup>32</sup> See Fox, *supra* note 25.

reform of the institution both to ensure that future international negotiations take place efficiently and that the new organization does not place trade interests ahead of other concerns. Some of the more systemic questions are addressed below. Other concerns are addressed in detail in Parts III and IV.

A problem that must be considered at the outset is the increased complexity generated by an expanding the WTO's jurisdiction. Everything from the day-to-day operation of the institution, to the organization and execution of future negotiating rounds, to dispute resolution, would become more complicated and difficult to manage. Consider first how incorporating additional issues would complicate the negotiations that take place at the WTO. Rather than focusing primarily on trade, as is currently the case, an expanded WTO would also have to consider, for example, environmental and labor issues. In addition to the problem of complexity, an expansion of WTO authority may threaten the benefits of specialization and expertise that have served the WTO well. Bringing disparate topics together in a single organization might make the regulation of each of them less effective.

Fortunately, the problems of increased complexity and loss of specialization can be addressed through the structure of the institution. Specifically, this Article proposes that the expanded WTO be organized along departmental lines. That is, a separate department would be established for each issue area within the jurisdiction of the WTO. For example, there might be a trade department, an intellectual property department, an

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<sup>33</sup> See Robert Howse & Kalypso Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step too Far*, in *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium* (2001).

environmental department, and so on. To some extent, of course, this resembles the existing Council for TRIPs, Council for Trade, and Council for Trade in Services.<sup>34</sup> As discussed below, however, the departments would enjoy greater autonomy and authority than the existing Councils.

One of the important responsibilities of the departments would be to manage periodic negotiating rounds intended to address issues within their respective departments. For example, an environmental department would manage a round of negotiations about environmental commitments. Any agreements emerging from these “departmental rounds” would generate WTO obligations for member states. The use of departmental rounds is an important element of the proposal because without them, negotiation at the WTO might become hopelessly complex. An increase in the number of topics within the WTO’s jurisdiction would put more issues on the table for discussion. The resulting set of potential deals would grow dramatically, and the number of negotiators and interests at stake would have to increase as well.<sup>35</sup> At the very least, attempting to conduct all negotiations simultaneously would be inefficient. At worst, it may be paralyzing.

Departmental rounds would eliminate the need to address every issue through this sort of all-at-once negotiation. The agreements reached within a departmental round would be restricted in their scope to the subject matter within the department’s

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<sup>34</sup> In some other respects, the proposed departments might resemble the existing committees and working groups within the WTO, such as the Committee on Trade and Environment, the Working Group on Competition Policy, and the Working Group on Investment.

<sup>35</sup> Notice that with an increase in the number of issues there would be a geometric increase in the number of potential agreements because each final agreement represents a delicate balancing of interests and concessions across many issues.

jurisdiction, but there is every reason to think that many valuable agreements could nonetheless be reached this way. In fact, virtually all international negotiation on regulatory matters undertaken to date, whether inside or outside the WTO, have addressed only a single issue area – often with positive results. For example, the various trade rounds at the WTO have focused almost exclusively on trade,<sup>36</sup> environmental negotiations (conducted outside the WTO) have been limited to environmental issues, and competition policy agreements have only addressed antitrust issues.<sup>37</sup> There is no reason to abandon these more specialized negotiations simply because several topics fall within the purview of the WTO. To encourage international cooperation on specific topics, it makes sense for the WTO to organize periodic negotiations on each of its issue areas.

Negotiations within departments would allow states to reach agreement at lower cost than would negotiations that include all departments, but such negotiations would not be able to structure concessions from one department to the next. For example, the trade department would not be permitted to include environmental commitments in its agreements. Restricting the negotiating authority of each department would make it possible to staff the departments and carry out negotiations with issue area specialists without the risk that, for example, the environmental department will approve a set of measures that include trade restrictions without full consideration of relevant trade concerns.

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<sup>36</sup> One exception is the negotiation of the TRIPs agreement during the Uruguay Round.

<sup>37</sup> See Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. Rev. 1142 (2001).

Because individual departments will not be permitted to establish obligations that go beyond their departmental authority, they will neither be able to commit states to obligations that significantly impact on other departments, nor structure concessions in one department to generate agreement in another.<sup>38</sup> To address these more difficult issues, the WTO itself would have periodic “Mega-Rounds” of negotiation. All departments would be present at these negotiations, and all issues would be open for negotiation. This would be analogous to the existing system of negotiating rounds at the WTO, though the talks would include a wider range of topics. The negotiations would be broader in scope than any form of international negotiation that currently takes place at the WTO or anywhere else. The breadth of the talks would open the door to a richer set of potential cooperative agreements and would allow states to strike a balance among issue areas such as trade and the environment.

Skeptics might point out that periodic rounds of negotiation have proven difficult when only trade topics have been considered. Presumably they would be even more challenging if environmental law, competition policy, and labor were also included – making the Mega-Rounds unwieldy to the point of uselessness. This is a legitimate concern, but rather than illustrate a problem with wide ranging rounds, it illustrates their importance. With only trade on the table, other concerns are ignored. This not only leads to agreements that favor trade concerns over other issues, it prevents these other concerns from being considered at all. The result, then, is a set of agreements with a

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<sup>38</sup> For example, the TRIPs Agreement was possible only because of the linkage between trade and intellectual property. See Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, forthcoming *Va. J. Int'l L.* (2003).

trade bias and an absence of agreement in other areas. Though the proposed Mega-Rounds would be difficult, they would be made easier by the presence of Departmental Rounds of negotiation, where many issues can be resolved without the need for discussion at a Mega-Round. This will reduce the number of issues to be negotiated at the Mega-Rounds and open the door for welfare-increasing agreements. In any event, if there are to be serious discussions about the appropriate relationship between trade and non-trade issues, there must be negotiations that include multiple issue areas. The resulting complexity is the inevitable result of trying to tackle the difficult problem of how to balance competing interests at a global level.

Regardless of where agreements are reached – whether at the departmental rounds or a Mega-Round – the resulting commitments would become part of a state's WTO obligations. As such, they would be subject to the dispute resolution provisions of the DSU, unless states specified in their agreement that some other dispute resolution process would apply. The dispute resolution mechanism would remain a single WTO procedure and would not be within the control of any single department. This would require some reform of existing procedures, but the broad strokes of the dispute resolution procedures would remain the same. Detailed discussion of the proposed reforms of the DSU and the reasoning behind them is left for later in the Article.<sup>39</sup>

The new WTO, then, would consist of a series of departments, each of which would hold its own negotiations from time to time; periodic Mega-Rounds of negotiation; and a dispute resolution mechanism that is charged with the task of resolving all disputes

within the organization. From one perspective, this proposal is not all that far removed from existing proposals for strengthening or creating stand-alone organizations devoted to specific issue areas. Creating a labor or environmental department retains the advantages of a stand-alone organization while permitting the negotiations of cross-issue area transfers and taking advantage of the strength of the DSU. For this reason, the proposal dominates calls for separate stand-alone organization.

Before proceeding, a word about the political prospects for reform is in order. There is no denying that the reforms suggested in this Article are substantial and go far beyond what is currently being considered at the Doha negotiations. As such, the proposal might it could be criticized as unrealistic and politically naïve. Such a characterization, however, would overlook the importance of the normative thrust of the paper. First, there is value in a normative assessment of the problem at the WTO even if the best course of action is unlikely to be taken. Whether the WTO ever adopts the departmental structure outlined in this Article or not, it is useful to recognize that these reforms could resolve many significant problems for the organization. In addition, the Article points out why stand along institutions designed to deal with issues such as labor and the environment -- the main alternative to incorporation of these topics within the WTO -- represent poor choices. Incorporation of those issues within the WTO may be desirable even if the departmental structure cannot be achieved.

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<sup>39</sup> See *infra* Part III.C.

Finally, it should also be noted that the WTO is not as far from some of the proposals made herein as it may initially appear. Intellectual property is already handled in the WTO, and the Doha Round of talks includes competition issues, environmental issues. Talks on those issues are admittedly much more modest than what is proposed in this Article, but it is significant that they are being considered and that the continued pressure to address non-trade issues is generating a response from the WTO.

### **III. THE CASE FOR A SINGLE GLOBAL ORGANIZATION**

This Article's proposal rests on an analysis of two questions. First, should a single institution be charged with a range of regulatory issues including environment, labor, competition, human rights, and trade? Second, assuming an affirmative answer to the first question, what organization should take on that responsibility? This Part advances the case in favor of housing a range of international economic issues within a single institution. It then demonstrates why a reformed WTO should be the starting point for the construction of that single institution. In Part IV the Article addresses potential concerns with a single institution, and with the choice of the WTO as that institution.

#### **A. Broader Perspective**

One of the most salient critiques of the WTO is that it places trade values ahead of other concerns, including the environment, human rights, and labor.<sup>40</sup> The prioritization of trade issues is not surprising in light of the fact that the WTO is a trade

organization, staffed by trade specialists, and guided by agreements negotiated with an eye toward the trading regime. To be fair, it may not be accurate to say that the problem stems from the WTO's focus on trade issues. Rather, the problem exists because the organization is so much more powerful and effective than other institutions. If, for example, an environmental organization were in place and enjoyed similar influence and success, there might be less concern about the WTO. In the absence of such an environmental organization, however, there is a perception that trade interests trump environmental interests.

What is missing, then, is a way to counter the trade interests of the WTO with appropriate environmental interests, labor rights interests, and so on, without undermining the strengths of the trading system. One frequently proposed solution is to build stronger specialized non-trade institutions such as a "World Environmental Organization" or a more effective International Labor Organization (ILO). Although creating such entities would not reduce the trade bias of the WTO, the notion is presumably that these organizations would have biases of their own and the various international institutions would keep one another in check, leading to desirable outcomes.

Growth in the number of institutions, however, has significant dangers. First, there is no guaranty that new organizations could be established with universal membership. Developing countries have reasons to avoid joining a powerful labor

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<sup>40</sup> The WTO panels on environmental issues are the most commonly cited examples of this problem. See *Shrimp/Turtle, Tuna/Dolphin*. For a discussion of the *Shrimp/Turtle* case, see Arthur E. Appleton, *Shrimp/Turtle: Untangling the Nets*, 2 J. Int'l Econ. L. 477 (1999).

organization that might force them to improve local standards to the detriment of their economic well being. Similarly, an effective international environmental organization may have little to offer developing states prepared to accept lower environmental standards in exchange for greater economic success. Getting the consent of all states for such organizations, then, may not be possible. Without universal membership, there is no reason to think these institutions will prosper and be able to check the influence of the WTO.

Second, even if one could establish a universal organization dedicated to, for example, environmental concerns, it may never achieve the success and influence of the WTO. In fact, we already have an example of such an organization, the ILO, which has achieved a significant degree of influence, but nevertheless remains much less powerful than the WTO.<sup>41</sup>

Third, if the ILO became more powerful, and if an influential international environmental organization came into being, it is not clear why one would expect these institutions to strike a desirable balance among trade, environment, and labor. By constructing new, issue-oriented organizations, one brings attention to the relevant issues, but does little to manage the more important question of how conflicting priorities are

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<sup>41</sup> See, e.g., Chantell Taylor, *NAFTA, GATT, And The Current Free Trade System: A Dangerous Double Standard For Workers' Rights*, 28 *Denver J. Int'l L. & Pol'y* 401, 423 (2000) ("While the [ILO] Conventions espouse seemingly industrious labor stands, in fact the principles are meaningless without a concomitant enforcement mechanism."). The difficulty in creating an international institution whose strength rivals that of the WTO is evidenced by the fact that the WTO stands alone as the most effective and powerful such organization. See Jose Alvarez, *How Not to Link: Institutional Conundrums of an Expanded Trade Regime*, 7 *Widener Law Symposium Journal*, 1, 1 (2001) ("[T]he World Trade Organization (WTO) is the envy of international lawyers who are more familiar with less efficient and more compliance-resistant legal regimes, including those within the International Labor Organization, United

managed. How should the free trade goals of the WTO be reconciled with the environmental priorities of a World Environmental Organization? How should conflicts between these organizations be resolved? What forum would exist to weigh the environmental costs of trade against the economic costs of environmental protection? Independent organizations are unable to answer these questions, leaving many international regulatory problems unresolved. By incorporating a range of issues into a single institution, it would be possible for negotiators, appointed by their national governments, to get down to the critical business of balancing the benefits of trade against the values of other issues such as the environment or labor.<sup>42</sup>

For all of these reasons, establishing separate, stand-alone organizations is less promising than the incorporation of the relevant issue areas within a single organization. The question then arises – what is the appropriate organization? Should a new one be created from scratch, or would it be better to adapt an existing institution to the needs of the international community.

There is a strong argument that this single inclusive international organization should be the result of reforms implemented within the WTO. The WTO has already established itself as a strong, effective, and respected institution with a good record of state compliance. Furthermore, it has already incorporated at least one non-trade issue:

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Nations, human rights bodies, and other adjudicative mechanisms such as the World Court or the ad hoc war crimes tribunals.”).

<sup>42</sup> See Bronkers, *supra* note 12, at 54 (“Negotiators . . . would then weigh the merits of these public policies against the benefits of liberal trade. This would be preferable to litigators arguing over important public policies as exceptions to [trade agreements].”).

intellectual property.<sup>43</sup> Both its strength and its demonstrated ability to incorporate additional issues are evidence in favor of an expansion of the WTO.

The primary problems presented by a strategy of creating several stand-alone organizations can be eliminated or reduced through a strategy of incorporation. With appropriate adjustments to the WTO, it would be possible to take advantage of the institutional strength of the WTO to avoid or overcome the challenges facing stand-alone institutions, and at the same time prevent the reformed organization from placing trade ahead of other interests.

Restructuring the WTO as a set of departments, as discussed in Part II, would separate the reformed organization from its trade roots enough to provide a fair hearing for other important values. Trade would not disappear as a priority, but it would have to share the stage with other issues such as the environment, labor policies, and so on.

### **B. Linkage**

The nature of international regulation often makes it unrealistic to expect international cooperation in non-trade areas to take place without some form of linkage. International agreement in areas such as competition policy, labor, and environment are much more likely when states are able to make concessions that cross issue-areas.

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<sup>43</sup> The incorporation of intellectual property has not been without controversy, but it has taken place. As is so often the case with international cooperation, progress has been difficult and contentious. That said, whatever the flaws in the WTO's treatment of intellectual property, I am not aware of anyone that claims the WTO's trade bias has led to an agreement that privileges trade over the protection of intellectual property. Rather, the TRIPs agreement has generated controversy precisely because of the way in which it raises barriers to trade. See John D. Blum, *The Role Of Law In Global E-Health: A Tool For Development And Equity In A Digitally Divided World*, 46 St. Louis L.J. 85, 103-04 (2002). To the extent one is concerned about a trade bias, then, it has not been a problem in the most prominent example of the incorporation of a non-trade issue.

Separating the negotiation of trade from non-trade issues (and the separation of the non-trade issues from one another) handicaps negotiation and is likely to frustrate agreements that could make all states better off. This leads to the straightforward but nevertheless under appreciated point that a forum should exist in which issues are be grouped together at the negotiation stage to allow for suitable cross-issue transfers.<sup>44</sup>

One of the many challenges facing international cooperation in areas such as the environment, human rights, labor, intellectual property and competition policy is that the states have divergent interests. States may disagree because they have different tastes and priorities, but they may also disagree because states with different economies and trade flows will, acting rationally, have conflicting international goals. The clearest example is in the area of intellectual property. Developed states have every reason to support a strong intellectual property regime because the vast majority of innovation takes place in those countries. In fact, in the presence of trade, the preferred international regime for a country that exports intellectual property is actually more protective of intellectual property rights than would the case in an otherwise identical closed economy (i.e., one without international trade). A closed economy would want to balance the costs of intellectual property (reduced low cost access to existing technology) against its benefits (greater innovation). An open economy, however, weighs those costs and benefits differently. In particular, an open economy that exports intellectual property puts more weight on the benefits of future innovation than would a closed economy, all else equal, and puts less weight on the reduced consumer access to the technology. This is so

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<sup>44</sup> See Trachtman, *Law and...* at \*29 (“Negotiations in the WTO may provide an advantage over

because the state does not care about consumers that are located abroad. Thus, some of the costs of stricter intellectual property rules are felt by foreigners, and these costs are ignored when the innovating country considers its preferred policy. On the other hand, all of the increased profit that goes to innovators as a result of greater protection of intellectual property is enjoyed by the innovating country, so those gains are included in the policy calculus. The innovating country, therefore, prefers stronger protections of intellectual property if it is an exporter of intellectual property than if it is a closed economy.

On the other side of trade in intellectual property are, of course, importers. They do not feel any of the benefits of increased profits when intellectual property protections are increased,<sup>45</sup> but they do suffer the attendant costs as their citizens are unable to gain low cost access to the property. These importing states will, therefore, prefer an international policy with relatively weak intellectual property protections.<sup>46</sup>

As long as there are net importers and net exporters of intellectual property, this divergence between their preferred international policies will exist. Notice that the positions of the states are the result of their respective trade flows in intellectual property, and not the result of a lack of communication, differences of opinion with respect to the economics of intellectual property, or idiosyncratic preferences.

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negotiations in a MEA or UNEP, ILO or other functional context: the greater possibility of linked deals.”

<sup>45</sup> Though they would get some future benefit if greater protections led to an increase in the rate of innovation.

<sup>46</sup> See Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, forthcoming, *Va. J. Int'l L.* (2003).

Because it is the underlying economic interests that cause states to have inconsistent policy preferences, any agreement that leads to a change in the existing level of international intellectual property protections will benefit some states and hurt others.<sup>47</sup> Unless they are compensated in some way, states that stand to be harmed by an agreement will refuse to consent to it. In principle, compensation could take any number of forms -- from cash to concessions in any other area of international relations. For that compensation to be offered and accepted, however, negotiators must be authorized to bargain over more than just intellectual property. Discussing intellectual property in a specialized forum such as the World Intellectual Property Organization (WIPO) is unlikely to lead to an agreement because the individuals present cannot offer concessions in other areas.

Embedding negotiation of intellectual property in an organization that also negotiates over other topics, however, opens the door to an exchange of concessions across issue areas that may make everybody better off. Indeed, this is essentially what happened with intellectual property. Many prior attempts to negotiate an agreement through WIPO failed, but once the WTO took up the issue, an agreement was struck in which developing countries were offered compensation in the form of concessions relating to agricultural subsidies, market access for agricultural goods, and protection against

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<sup>47</sup> This is a slight overstatement because a move toward a more desirable international intellectual property regime would generate a net gain and it is conceivable that this could lead to a welfare gain for every state.

unilateral sanctions by developed countries, especially the United States.<sup>48</sup> These concessions simply could not have been negotiated through WIPO.<sup>49</sup>

The strategic problem with negotiating intellectual property is also present in the other key “trade and” areas. In the competition policy arena, developed countries are home to the bulk of firms that operate in imperfectly competitive industries (where antitrust is most likely to be an issue), and so they have reason to favor relatively weak international protections. Developing states, on the other hand, have reason to favor relatively strong protections since their consumers benefit from increased competition.<sup>50</sup> As with intellectual property, an international agreement on antitrust seems unlikely unless the negotiations provide for transfer payments. As I have argued elsewhere, the WTO is the most promising forum to arrange for such transfers.<sup>51</sup> Though there is support in the competition policy literature for a single, stand-alone, forum for the

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<sup>48</sup> See Frederick M. Abbott, Commentary: The International Intellectual Property Order Enters the 21<sup>st</sup> Century, 29 Vand. J. Transnat'l L. 471, 472 (1996); Frederick M. Abbott, The WTO Agreement and Global Economic Development, 72 Chi.-Kent L. Rev. 385, 388 (1996).

<sup>49</sup> See Guzman, Lesson from Intellectual Property, *supra* note 27 (“The decision to place the negotiations within the Uruguay Round, therefore, proved critical. Had IP negotiations remained within WIPO, negotiators would have been unable to exchange IP concessions by developing countries for trade concessions by developed countries.”).

<sup>50</sup> These preferences relate to the level of international enforcement that would be preferred by the states if there were a single, harmonized global policy. It offers an explanation for why the United States has consistently resisted calls for international harmonization while developing states have expressed an interest in such cooperation. None of this is to be confused with the fact that developing states have relatively weak domestic antitrust laws when compared to the U.S. This is to be expected because small open economies that cannot or do not apply their laws extraterritorially have no incentive to adopt competition laws that restrict the actions of their own firms without affecting the behavior of foreign firms that sell to local consumers. A large country like the U.S. that applies its laws extraterritorially, on the other hand, has an incentive to adopt competition laws both because a substantial percentage of local production is also consumed locally (causing it to internalize the benefits of antitrust laws) and because extraterritorial application of its laws imposes the costs of strict antitrust rules on foreign firms while delivering the benefits to local consumers – providing an incentive for overly strict laws.

<sup>51</sup> See Andrew T. Guzman, Is International Antitrust Possible?, 73 N.Y.U. L. Rev. (1998); Andrew T. Guzman, Antitrust and International Regulatory Federalism, *forthcoming*, N.Y.U. L. Rev. (2001).

negotiation of international antitrust, that literature does not explain how the forum could overcome the divergent interests of states.<sup>52</sup>

Similar, though not identical, analyses could be applied to environmental and labor issues. Many environmental agreements impose costs on a few states but yield benefits to many more states. Thus, for example, an effort to reduce the pace of deforestation is likely to be very costly to Brazil, among others, and to benefit every state. In this example, Brazil has no incentive to accept a globally desirable policy because it bears a disproportionate share of the costs. If other states want such a policy, however, it may be possible to obtain it by offering concessions in other areas. It might be possible to generate appropriate concessions in other environmental areas (e.g., other states could commit to tougher emissions policies), but there is even greater scope for a cooperative agreement if concessions can come in other forms as well. Thus, for example, Brazil might be prepared to agree to an agreement on deforestation in exchange for trade concessions from other states.

With respect to labor, developing states have concerns that international labor standards will reduce the competitiveness of their labor-intensive industries. Based on these concerns, developing states have an incentive to resist many international labor agreements.<sup>53</sup> Again, if these agreements are desirable from a global perspective, it may be possible to achieve them through the use of concessions in unrelated areas. For

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<sup>52</sup> See Fox, *supra* note 25.

<sup>53</sup> Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96 *AMER. J. INT'L LAW* 126, 133 (2002).

example, a particular labor rights agreement might be acceptable to developing states if developed states agree to reduce domestic subsidies.<sup>54</sup>

In general, then, the WTO offers a promising forum in which to negotiate agreements on topics that require concessions to be made across issue areas.<sup>55</sup> Each of the issue areas discussed in this Article would benefit if transfers could be structured to make agreement on value-increasing deals possible. Furthermore, as each issue area is brought into the WTO, it will become a potential source of concessions when agreement is sought in other areas – further increasing the choice set for negotiators. Thus, for example, developing countries might get an international competition policy agreement in exchange for concessions relating to labor.<sup>56</sup> Expanding the set of issues within the organization expands the number of potential deals. Though such cross-issue negotiations can be cumbersome, they can also lead to agreements that could not be achieved any other way.<sup>57</sup>

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<sup>54</sup> But see, Howard Chang, Carrots, Sticks, and International Externalities, 17 *International Review of Law and Economics* 309 (1997) (discussing strategic issues relating to international agreements, and pointing out that states may adopt bad policies in an attempt to extract concessions).

<sup>55</sup> See Bronkers, *supra* note 12, at 45 (“[It is] possible within the WTO to break deadlocks where other organizations have failed, because here governments can make package deals.”); Atik, *Democratizing the WTO*, *Geo. 33Wash. Int’l L. Rev.* 451 (2001); Michael More, *The WTO and the Arab World: Preparations for Doha*, Address to UNCTAD High-Level Meeting for Arab Countries (June 20, 2001), at [http://www.wto.org/english/news\\_e/news\\_e.htm](http://www.wto.org/english/news_e/news_e.htm) (“There is a much greater change of reducing agricultural support in Europe and Japan if other countries are willing to make concessions in areas where Europe and Japan have demands, such as competition, investment, and anti-dumping.”).

<sup>56</sup> See Trachtman, *Trade and . . .*, *supra* note 2, at \*9 (“It is important to the trade and . . . discourse that ‘basket deals’ might make it perfectly sensible to accept a treaty that makes that relevant state worse off, in exchange for countervailing treaty obligations that make the relevant state better off in larger measure.”).

<sup>57</sup> See Claude E. Barfield, *Free Trade, Sovereignty, Democracy* (2001) (“The most productive and fruitful legislative advances in the WTO are undoubtedly a result of the package deals put together at the end of periodic trade rounds.”).

The importance of dispute resolution is discussed elsewhere in this Article, but a brief note is appropriate here. Once one recognizes that negotiation over international trade and regulatory issues involves concessions and trade-offs by all states, one should also recognize that enforcement issues are sure to be a problem. In many instances of international cooperation, compliance can be secured through the credible threats of the parties to end their own compliance in response to a violation. Thus, for example, a treaty banning nuclear weapons testing may succeed in preventing such tests because both parties are better off with mutual compliance than with mutual violation.

Where agreement is achieved through concessions in unrelated areas, however, there is a greater need for effective dispute resolution and enforcement. Suppose, for example, that Venezuela enters into a treaty that requires compliance with certain environmental standards. Assume that these standards are higher than what Venezuela would want to have adopted as a global standard and, in fact, Venezuela would prefer the status quo to this agreement except for the fact that the country received some other benefit – for example, greater market access for its exports – in exchange for its consent. Once the agreement is in place, Venezuela has a limited incentive to comply. The threat that other states may also refuse to comply with the higher environmental standards will not generate compliance because, by assumption, Venezuela prefers a regime without the treaty.

If commitments made in exchange for concessions in unrelated areas are to be credible, then, we will often need some form of sanction. Though I certainly do not wish to advance the claim that the dispute resolution procedures of the WTO are perfect – they are far from that – they remain the most effective and the strongest form of

international dispute resolution that can be applied to such commitments. Dispute resolution would make these promises more credible which, in turn, would increase the ability of states to make welfare increasing deals.

The benefits of linkage listed here stand apart from another form of linkage that is sometimes discussed. This latter use of the term refers to the use of trade sanctions for a failure to comply with, for example, human rights norms. There is significant disagreement about whether trade should be used in this way, and if so, how the relationship should be managed.<sup>58</sup> Those who support this sort of linkage (among others) should also support the inclusion of relevant issue areas within the WTO. The inclusion of other issue areas is the only way that the proper tradeoffs can be established and effective, limited exceptions to WTO trade rules put in place.

Finally, though linkage is an important part of the argument in favor of a WTO expansion, there is no doubt that simultaneously discussing many issues increases the complexity of negotiations and this complexity may at times prevent agreement. To address this problem, the proposal advanced in this Article provides for periodic departmental negotiations. These negotiations will not be able to construct agreements that cross issue areas, but they will have the advantage of simplicity and common expertise.

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<sup>58</sup> See Alan O. Sykes, *International Trade and Human Rights: An Economic Perspective*, mimeo (2002); Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, *Journal of Small & Emerging Business Law*, Vol. 3:93, p. 158 (1999); Gary C. Hufbauer, Jeffrey Schott & Kimberley Elliot, *Economic Sanctions Reconsidered: History And Current Policy* (2d ed. 1990).

### C. Dispute Resolution

#### 1. Extending the Benefits of Dispute Resolution

Commitments in areas such as the environment, labor, and human rights are sure to face significant enforcement problems. It is in the nature of such commitments that each party will be tempted to cheat and hope that other states continue to comply. As discussed above,<sup>59</sup> the risk that other states will withdraw their own compliance will often be inadequate to generate universal compliance. The international community lacks coercive enforcement structures analogous to those found in domestic systems, so optimal levels of compliance may simply not be attainable. Nevertheless, compliance can be improved with the establishment of institutions capable of identifying and publicizing violations. This can be done in many different ways, and with different degrees of effectiveness. Though simply monitoring and drawing attention to violations, as is done by the many international organizations, including the ILO, encourages compliance, more powerful strategies are available.<sup>60</sup>

The international community has some experience with the use of tribunals to identify violations of international law. The most effective use of dispute resolution procedures is found within the WTO.<sup>61</sup> The merits and demerits of the WTO's dispute settlement procedures are well documented, and it serves no purpose to review them here.<sup>62</sup> Though the existing system is certainly not perfect, it is enough to observe that

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<sup>59</sup> See supra page **Error! Reference source not found.****Error! Bookmark not defined.**

<sup>60</sup> See Andrew T. Guzman, *International Law: A Compliance Based Theory*, forthcoming, 90 Cal. L. Rev. (2002).

<sup>61</sup> See Bronkers, supra note 12, at 45.

<sup>62</sup> See Alan Wm. Wolff, *Problems with WTO Dispute Settlement*, 2 Chi. J. Int'l L. 417 (2001).

the strong set of procedural rules (by the standards of international organizations) set within a mandatory dispute settlement mechanism has produced a system that is the envy of other international institutions. There is no comparable institution with an established, effective, mandatory dispute settlement system that can be compared to the WTO.<sup>63</sup> Making this dispute resolution mechanism available beyond the trade area would greatly improve the credibility of commitments made in those areas, and would, therefore, open the door to a wider set of commitments.

Given the substantial advantage of the WTO over other dispute resolution bodies, and given the importance of mandatory dispute resolution to the credibility of commitments,<sup>64</sup> the case for making a dispute resolution body with similar characteristics available to negotiators in a range of regulatory areas is strong. In principle, of course, one could imagine constructing similar dispute settlement procedures to deal with non-trade issues such as environmental law. In practice, however, there is no guaranty that the international community could reproduce the success of the WTO's Dispute Settlement Understanding (DSU). If anything, the uniqueness of the DSU suggests that effective dispute resolution bodies are not so easily built.

Bringing non-trade topics within the WTO, then, would give states access to the organization's dispute resolution procedures -- increasing the credibility of commitments and the level of compliance. This would generate two critical benefits. First, as discussed above, it would provide effective dispute resolution in the non-trade areas -- something

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<sup>63</sup> See Bronkers, *supra* note 12, at 45.

<sup>64</sup> See Guzman, *The Cost of Credibility: Explaining Resistance to Inter-State Dispute Resolution Mechanisms*, forthcoming, 31 *J. Legal Stud.* 303 (2002).

that may not be possible through any other strategy. Second, because trade and non-trade issues are related, the obligations taken on in one area may sometimes generate disputes that implicate issues in other areas.<sup>65</sup> Bringing non-trade issues within the WTO and, therefore, within the jurisdiction of the DSU, would provide a single, uniform dispute resolution system. Without such a uniform adjudicatory system, there will either be a single dominant dispute resolution mechanism whose allegiance is to a single issue area, as is the case with the DSU today; or there will be multiple fora, opening the door to forum shopping and competition among the various dispute resolution entities for prominence. It is easy to imagine, for example, one of the parties to a dispute turning to the trade forum while the other party turns to the environmental forum. With no higher court available to resolve such conflicts among fora, the result of this sort of uncoordinated dispute resolution will be unpredictable and chaotic.

An explicit extension of WTO authority would also help to clarify existing uncertainty about how conflicts between the WTO and other agreements should be resolved. This issue is most salient in the environmental area, where it is well-known that obligations under multilateral environmental agreements have the potential to generate such conflicts.<sup>66</sup> This risk has been increased by the large number of environmental agreements signed in the last generation and the use of trade sanctions as an enforcement tool in many of those agreements.<sup>67</sup>

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<sup>65</sup> See *Shrimp/Turtle;Tuna/Dolphin*.

<sup>66</sup> See Bronkers, *supra* note 12, at 56-57.

<sup>67</sup> See Barfield, *supra* note 4, at 405.

Conflicts between dispute resolution at the WTO and elsewhere are already a concern for both the WTO and some commentators.<sup>68</sup> The WTO Secretariat suggests that the WTO would defer to other dispute resolution procedures, including those in an environmental agreement.<sup>69</sup> The WTO web site, for example, states that:

“The Trade and Environment Committee says that if a dispute arises over a trade action taken under an environmental agreement, and if both sides to the dispute have signed that agreement, then they should try to use the environmental agreement to settle the dispute. But if one side in the dispute has not signed the environment agreement, then the WTO would provide the only possible forum for settling the dispute. That does not mean environmental issues would be ignored. The WTO agreements allow panels examining a dispute to seek expert advice on environmental issues.”<sup>70</sup>

Other observers believe that the dispute resolution panels within the WTO should look to non-WTO international law only sparingly.<sup>71</sup> Furthermore, it is pointed out that the above quote is inconsistent with the text of Article 23 of the DSU, which makes the WTO procedures the exclusive forum for dealing with violations of WTO obligations.<sup>72</sup> Bringing environmental issues within the WTO would ensure that there is a single forum within which to resolve such conflicts. As future agreements are reached, an expanded WTO would also have the merit of providing the drafters of such

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<sup>68</sup> See Atik, *supra* note 55, at 457-458; Paul B. Stephan, *The New International Law – Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 *U. Colo. L. Rev.* 1555, 1559-60 (1999).

<sup>69</sup> See Thomas Schoenbaum, *WTO Dispute Settlement: Praise and Suggestions for Reform*, 47 *Int'l & Comp. L. Quart.* 647, 652-53 (1998).

<sup>70</sup> [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey4\\_e.htm#MEAs](http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey4_e.htm#MEAs). Last visited, January 2, 2002.

<sup>71</sup> See Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 *Harv. J. Int'l L.* 333, 343 (1999).

<sup>72</sup> See DSU art. 23(1); Trachtman, *supra* note 71, at 366.

agreements with the opportunity to anticipate and provide for the interaction of trade and environmental issues in a way that is currently impossible.<sup>73</sup>

## 2. Which Obligations Get Dispute Resolution?

Expanding the WTO would also raise difficult questions about the proper treatment of the many existing non-WTO international obligations, the most obvious of which are the significant environmental and labor obligations currently in place. For example, if environmental issues are brought within the WTO, should existing environmental obligations also come within the WTO's jurisdiction and, if so, should they be subject to the dispute resolution mechanism?

Because many such obligations exist, and because states accepted these obligations on the understanding that they would be outside the WTO, it seems both simpler and more consistent with the intent of the parties to leave these agreements as non-WTO obligations (and outside the scope of dispute settlement proceedings).<sup>74</sup> Of course, existing obligations could be imported into the WTO system if the states party to an agreement agreed to do so.

There is no reason to give the expanded WTO a monopoly on international cooperation, so it does not seem troubling to leave these agreements outside the organization – especially for those agreements that are thought to be working well on their own. Nor does there seem to be any significant reason to resist the incorporation of the obligations into the WTO system. Bringing an agreement within the WTO would

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<sup>73</sup> There remain questions about the extension of the jurisdiction of the DSU. The Article returns to the issue and addresses such questions in Part IV.B.2.

not represent a change in the obligations of states or undermine the effectiveness of the agreement, so if there are practical administrative reasons to have an obligation within the WTO, there is little reason to object to its inclusion.

There is also the question of whether dispute resolution should apply to all WTO obligations negotiated in the future. If dispute resolution is required, it may reduce the willingness of states to enter into commitments. If it is not required, the credibility of the relevant commitment is reduced. In my view, WTO dispute resolution should not be considered mandatory for all WTO agreements, and states should be free to choose whether new agreements will be subject to the organization's mandatory dispute resolution procedures. Thus, states should be permitted to make some agreements that have different dispute resolution provisions, or none at all.<sup>75</sup> Thus, the dispute settlement system - one of the great strengths of the WTO - should be a default rule rather than a mandatory rule.<sup>76</sup> The case for a default rule is even stronger if existing obligations are imported into the WTO. For these obligations, states have not consented to a dispute resolution procedure. Adding one after the fact changes the force of the agreement without the consent of the parties.<sup>77</sup>

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<sup>74</sup> States may have reasons to sign treaties without committing to mandatory dispute resolution procedures. See Guzman, *Cost of Credibility*, supra note 64.

<sup>75</sup> See Joel Trachtman, "Trade and", at 16 ("states desire to confer varying degrees of binding force on particular legal rules, or orders.").

<sup>76</sup> Of course, if an agreement were subject to the dispute resolution provisions, those provisions would be mandatory. Thus, for any particular agreement, states can opt into or out of the mandatory dispute resolution system.

<sup>77</sup> See *infra* Part IV.B.2 (explaining why panels should not consider non-WTO law).

#### D. Universal Membership

When compared to the alternative of establishing new international organizations for environmental, labor, and other issues, the WTO also has the advantage that is already in existence and has essentially universal membership.<sup>78</sup> In contrast, a new organization would not be assured of widespread, let alone universal membership. For example, if a Global Environmental Organization were established, many states would have an incentive to remain outside the organization and free ride on the environmental protections required of member states. Within the WTO, however, such free-riding would not be possible because environmental commitments would bind all members. It is true that efforts to secure an environmental agreement would have to overcome the resistance of states that would prefer weaker commitments, but the free rider problem would largely be addressed.<sup>79</sup>

Membership in some specialized organizations may also be reduced because not all states will have a reason to join. For example, a World Environmental Organization would have little to offer developing states that prefer the status quo to stricter

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<sup>78</sup> Strictly speaking, of course, membership is not universal as there are some states that have not joined. A list of WTO members can be found at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).

<sup>79</sup> Another, less severe free-rider problem would remain, however, as each state would try to get the organization to adopt environmental obligations whose costs are felt by other states. This problem is similar to the free-rider problem faced in WTO trade talks that used bilateral commitments coupled with the MFN principle as their foundation. This negotiating structure gives a state an incentive to make no commitments of its own while benefiting from those made by others. In practice, this problem has not proved fatal because members have adopted a principle of reciprocity under which states are expected to give concessions that are comparable to those it gains. Though difficult to measure, this norm has reduced the free-rider problem. In recent rounds, the WTO has also used a tariff cutting formula, requiring that tariffs across the board be cut. This, too, reduces the free-rider problem (though some items are inevitably excepted from the across the board cuts). There is no reason that similar solutions cannot be adopted in non-trade areas such as the environment.

international environmental regulation. Joining such an organization would only serve to restrict their freedom to adopt the policies that they prefer.

#### **E. Disincentives to Exit**

Efficient and unbiased dispute resolution can improve compliance with an international agreement in at least two different ways. First, it establishes a peaceful and objective way for states to overcome legal disagreements. Even when cooperation is mutually beneficial, a dispute may escalate if each state has a different view of the relevant facts. Each may believe they it has acted appropriately and it is the other state that has caused the dispute. The problem can be aggravated by the fact that decision makers are likely to frame a dispute in the way that maximizes their own political payoff. A dispute that grows out of this sort of informational conflict can be resolved through the use of a dispute resolution mechanism, especially when that mechanism is mandatory. Either state can force the other into the dispute settlement process. Once a panel declares a certain set of facts to be accurate (e.g., that one country has violated its obligations), the informational problem is largely cured, and the dispute can be resolved.<sup>80</sup>

Dispute resolution can also contribute to compliance by increasing the cost of violating international law. It is true that there is no coercive enforcement mechanism in place at the WTO or elsewhere in international law, but a respected dispute settlement

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<sup>80</sup> The presence of a dispute settlement procedure can also prevent one state from opportunistically making inaccurate claims about the actions of other states in an attempt to gain a political advantage. Such fabrications or exaggerations can be proven false through the dispute settlement procedures.

mechanism is able to establish culpability.<sup>81</sup> This, in turn, can increase the reputational costs of a violation as wrongdoing is brought to the attention of all member states. It also establishes a structure for the orderly and limited application of economic sanctions. Although the sanctions at the WTO are intended to be neither retrospective nor punitive,<sup>82</sup> they do reduce the payoff to a state from an ongoing violation. As such, they reduce the incentive to commit the violation in the first place.

The above benefits could, in principle, be achieved in any agreement that includes a mandatory dispute resolution provision.<sup>83</sup> The WTO has an additional advantage, however. The obligations imposed on a state by an agreement can be ignored by that state in two different ways. First, the state could violate the agreement, in which case it would face the sanctions described above. Alternatively, the state could abrogate the agreement. By exiting an agreement, of course, a state can avoid the relevant commitments without violating international law. Though political or reputational consequences may result from such an act, at a minimum the state avoids the dispute resolution process and permanently escapes the relevant commitments. Within a stand-alone agreement, then, a state will find it worthwhile to exit whenever the burden of its obligation with respect to that particular agreement outweighs the benefits. So, for example, an environmental agreement that requires a reduction in emissions will only remain in force with respect to a state as long as the reduction in emissions yields a net

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<sup>81</sup> It is a small overstatement to say that there is no coercive enforcement mechanism at the WTO. The potential for the withdrawal of concessions granted to states that fail to comply with DSU rulings is a form of coercion, though it is limited in its ability.

<sup>82</sup> See DSU art. 22.

<sup>83</sup> This is a slight exaggeration as a stand-alone treaty could not approve the use of trade sanctions without running afoul of the WTO.

benefit to that state. This makes such agreements relatively fragile, as demonstrated by the decision of the United States to withdraw its support for the Kyoto Accord.<sup>84</sup>

By comparison, states have a much more circumscribed exit option at the WTO. Imagine, for example, that developing states had agreed to the TRIPs agreement in the form of a stand-alone agreement rather than within the auspices of the WTO. As discussed earlier, the consent of the developing states to such an agreement required some form of transfer outside the intellectual property area, and in the case of TRIPs, took the form of trade concessions. Once the TRIPs deal was in place, developing states had every reason to resist compliance since they consented only in order to get the trade concessions.<sup>85</sup> One would, therefore, expect developing states to exit the agreement constrained only by the political consequences of doing so.

Within the WTO, as compared to a stand-alone agreement, exit is much more difficult. To be sure, it remains within the sovereign power of a state to exit.<sup>86</sup> States

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<sup>84</sup> See Douglas Jehl, Hemisphere Conference Ends In Discord on Global Warming, New York Times, March 31, 2001, Section A; Page 11.

<sup>85</sup> This resistance has generated a number of WTO disputes. See Measures Affecting Patent Protection, WT/DS199/1 (Jun. 8, 2000); Measures on the Protection of Patents and Test Data, WT/DS196/1 (Jun. 6, 2000); Patent Protection for Pharmaceutical Products, WT/DS171/1 (May 10, 1999).

<sup>86</sup> See WTO Agreement, art. XV:1 (“[W]ithdrawal . . . shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received.”). The political discourse in the United States, for example, occasionally includes threats or proposals to exit the WTO. See, e.g., Peter Behr, Congress to Cast Vote On Historic Trade Pact; GATT's Issues Transcend Political Parties, *The Washington Post*, November 28, 1994 (“The final recourse for the United States would be to quit the WTO, which any nation can do on six months' notice. This option was underscored last week by the Clinton-Dole agreement. Under Dole's escape-clause plan, Congress could vote to leave the WTO if the United States wound up on the losing side of three WTO decisions in a five-year period and a review panel of federal judges found that U.S. rights under the WTO agreement had been violated.”); Mark Magnier, US Defeat In Auto Cases Would Be Bigger Loss For WTO, Analyst Says, *Journal of Commerce* June 9, 1995, Friday (“If the United States loses both cases currently before the World Trading Organization over access to Japan's auto market, subsequent U.S. political fallout could undermine the fledgling WTO and, by extension, the world trading system, said a key U.S. trade analyst in an interview Thursday. “If there's a double loss, no one will support the WTO in the United States,” said Charles Lake,

cannot, however, exit from a subset of the WTO Agreements while remaining party to the others. The decision to exit, then, would amount to a decision to leave behind a large and complex set of agreements and practices. Dissatisfaction with a single aspect of the WTO is unlikely to drive a state out because too many advantages would be lost. Because the WTO combines a large set of value-increasing agreements, exit from the organization is less attractive than it would be from any stand-alone agreement. Witness how the conflict over TRIPS and pharmaceuticals was eventually resolved. Though developing countries were unhappy with their TRIPs commitments, and despite the fact that in some cases they violated those commitments, no state decided to exit the WTO to avoid its obligations under TRIPs. Ultimately, a political solution was achieved at the Doha Ministerial where the “Declaration on the TRIPs Agreement and Public Health” was issued.<sup>87</sup> If TRIPs had been a stand-alone agreement, it is more than likely that developing states would simply have exited, to the detriment of international cooperation in intellectual property.

The same reasoning applies, of course, to specialized international institutions. If, for example, a Global Environmental Forum were established, state membership would be considerably less stable than would be the case if environmental issues were incorporated into the WTO. Any state that felt the aggregate burden of its environmental commitments exceeded the benefits it was receiving would have reason to exit.

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former U.S. Trade Representative official who oversaw U.S. trade policy toward Japan between 1990 and late 1994. Mr. Lake is now a trade attorney. "That means serious problems for the WTO. No multilateral organization can survive without the full participation of the U.S.," he added. "The implications are huge." The Geneva-based WTO regulates world trade.").

<sup>87</sup> Available at [http://www-svca.wto-ministerial.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www-svca.wto-ministerial.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm).

## IV. THE CASE AGAINST A SINGLE GLOBAL ORGANIZATION

This Part addresses the primary objections to the expansion of WTO authority. Many of the criticisms leveled against the WTO are well-placed. The organization is certainly imperfect and, as currently structured, is not a suitable forum for discussion of environmental, labor, and other issues. To the extent critics claim that the WTO in its current form should not incorporate non-trade issues, they are probably correct, but have focused on the wrong question. Asking whether the current WTO is a suitable forum for non-trade issues does not help us to understand how the international community should manage cooperation in trade, the environment, labor, competition, and so on. When this latter question is addressed, the WTO becomes an attractive institution with which to work. With appropriate reforms – some of which have already been presented, and some of which are discussed in this Part – the WTO can address the concerns of skeptics, extend its role in a productive fashion, and generate benefits for the international community.

### A. Institutional Competence

#### 1. Changing the Organization

Perhaps the first question that must be asked is whether the WTO has the ability, as an institution, to incorporate non-trade issues.<sup>88</sup> If one looks at the WTO as it exists

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<sup>88</sup> See Daniel C. Esty, *Greening the GATT: Trade, Environment and the Future* (1994); Steve Charnovitz, *Environmental Harmonization and Trade Policy in Trade and Environment: Law, Economics and Policy* (Durwood Zaelke et al. 1993); Jeffrey L. Dunoff, *Institutional Misfits: The GATT, The ICJ and Trade-Environment Disputes*, 15 *Mich. J. Int'l L.* 1042 (1994); Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 *Amer. J. Int'l L.* 478 (2000).

today, the answer is clearly “no.” The WTO is a relatively small organization devoted to trade. There are not enough staff to manage a significant expansion, and they lack expertise in areas such as environmental law and human rights.<sup>89</sup> Simply put, the WTO and its precursor the GATT were built to handle trade, and are poorly equipped to deal with other issues.<sup>90</sup>

Skepticism of the WTO’s ability to manage, for example, environmental issues, is often advanced as a justification for a separate, specialized institution.<sup>91</sup> However, it seems, to be a failure of the imagination to think that the WTO cannot be changed. The proposed reform of the WTO is intended to address the institutional capacity problem head on. By structuring the organization as a series of departments, each with a certain degree of autonomy, different issue areas could be staffed by specialized personnel and managed using different strategies. If, for example, environmental issues require more monitoring than trade issues, the relevant department could be managed and staffed to achieve that end. Each department would be built to handle the responsibilities of the organization with respect to its particular issue area.

The departmental approach dominates the commonly cited alternative of stand-alone specialized organizations. All the advantages of stand-alone institutions - expertise, customized structure, and specialization - could be achieved within a department. Housing the departments within a single organization would preserve the enormous

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<sup>89</sup> See J. Patrick Kelly, *The WTO and Global Governance: The Case for Contractual Treaty Regimes*, 7 *Widener L. Symposium J.* 109, 111 (2001), at 129.

<sup>90</sup> Even a GATT report reached this conclusion. “The GATT is not equipped to become involved in the tasks of reviewing national environmental priorities, setting environmental standards or developing global policies on the environment.” Report by Ambassador H. Ukawa, Chairman, Group on Environmental Measures and International Trade, 49<sup>th</sup> Session of the Contracting Parties 3 (Jan. 25, 1994).

benefit of a unified and effective dispute resolution system and the ability to enter into cross-issue area negotiations.<sup>92</sup>

Expanding the WTO would, of course, require an increase in the resources provided to the institution. The requisite increase, however, would almost surely be less than that required to establish or reform stand-alone organizations dealing with the environment, labor, and so on. By bringing various issues within the WTO, some economies of scale could be achieved, including a single dispute resolution system, sharing physical facilities, more efficient research where topics overlap, and so on.

Two important caveats must be made at this point. First – although it would be desirable to bring additional issues into the WTO – the WTO need not, and probably should not, have a monopoly on international cooperation. Suppose, for example, that environmental issues were brought into the organization as proposed in this Article. There would still be room for other, non-WTO environmental organizations to exist including, for example, regional environmental efforts. Furthermore, if one believes that there are certain tasks that simply cannot be handled within the WTO, those tasks could be left with a non-WTO organization. This is what has already happened in the intellectual property area. Intellectual property has been brought into the WTO through the TRIPs Agreement, but the World Intellectual Property Organization (WIPO) continues to exist as a separate organization.<sup>93</sup> Indeed, non-WTO organizations may find

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<sup>91</sup> See Kelly, *supra* note 89, at 129.

<sup>92</sup> See Andrew L. Strauss, *From GATTzilla to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization*, 19 U. Pa. J. Int'l Econ. L. 769, 803-05 (1998).

<sup>93</sup> See <http://www.wipo.org>.

their influence enhanced by the presence of a reformed WTO if that organization looked to them for expertise and advice.<sup>94</sup>

Second, though this Article supports the inclusion of environmental issues, competition policy, intellectual property, human rights, and labor issues, it is not a call to include all of those topics in one fell swoop. As with any organization, change that is conducted too quickly may strain the system. In the near term, the WTO should adopt a departmental structure along with separate issue area negotiations in trade and intellectual property.<sup>95</sup> It should also undertake serious negotiations about incorporating environmental issues during the Doha Round, at least inasmuch as they impact trade obligations.<sup>96</sup> The WTO should also begin to pave the way for including competition policy and labor issues. It is inevitable that timetables for this sort of international cooperation are unreliable, so I do not advance one here. It will take time for the WTO to address legitimate environmental, labor, human rights, and competition policy concerns, and the sooner the organization begins moving in that direction, the better.<sup>97</sup>

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<sup>94</sup> For example, the standards, guidelines, and recommendations of the Codex Alimentarius Commission, the International Office of Epizootics, and the Secretariat of the International Plant Protection convention are incorporated into the SPS Agreement and, therefore, have a much larger impact on national policymaking than would have been the case before the Uruguay Round. See Agreement on the Application of Sanitary and Phytosanitary Measures, art. 3.1, Annex A, para. 3.

<sup>95</sup> It may be preferable to sub-divide trade further into, for example, trade in services, trade in goods, and agriculture. This Article does not advance a view on the question of how many departments should be created to handle to different aspects of trade.

<sup>96</sup> The Ministerial Declaration adopted at the Doha Ministerial in November, 2001, opened the door for discussion of environmental issues, but appears to have limited the agenda to the interaction of trade and environmental agreements. See WTO Ministerial Declaration, Nov. 14, 2001, available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm). There may, therefore, be only limited scope for the incorporation of environmental issues at this stage.

<sup>97</sup> Much more could and should be said about the pace and order of incorporation. In the interests of space, such discussions will be left for another time.

## 2. Acquiring Expertise

One of the challenges facing a reformed WTO would be ensuring that agreements and standards are prepared by qualified specialists. It has been proposed that the WTO work with other international organizations as a way to tap into existing sources of expertise. Thus, existing standards might be taken from ILO and, as was done in the TRIPs Agreement, intellectual property standards might be borrowed from the WIPO.<sup>98</sup> With the WTO structured as it currently exists, working with more specialized organizations makes sense. Under the proposal advanced in this Article, however, the WTO itself would have departments within which there would be expertise in environmental issues, labor issues, intellectual property issues, and so on. Even with such in-house specialists it may be wise to consult with other organizations, of course, but the presence of in-house expertise will improve the communication between the WTO and other institutions and allow more sophisticated judgments by the WTO when considering the adoption or modification of standards prepared by other organizations. The presence of specialists within the organization would also make it relatively easy for one department to seek the counsel of experts from another department. This sort of inter-departmental cooperation could be carried out less formally, more frequently, and at lower cost than cooperation between the WTO and stand-alone organizations.

Having in-house experts is important because the WTO's mission is different from that of other organizations. It must make independent judgments about the desirability of any particular standard or practice. The ILO, for example, has a great deal of expertise

about labor, but less interest or expertise in trade. Because the WTO under this Article's proposal will be in the business of balancing trade and labor interests, it cannot rely exclusively on the ILO to evaluate labor issues. The WTO itself must have the ability to weigh the concerns felt in each area – something that more specialized organizations are not designed to do.

One might wonder whether there would be any room for separate international organizations such as the ILO or WIPO if the WTO were to establish departments that deal with those same issues. One could imagine that the WTO departments, with the benefit of a strong and effective organization behind them, would outperform existing stand-alone organizations, within which agreements are more difficult to reach (because of a lack of transfers across issue areas) and more difficult to enforce (because there is no mandatory dispute settlement mechanism and no cross-issue sanctions). If this were to happen there would be no particular reason to mourn the departure of the ILO or WIPO since the functions of those organizations would simply be occurring in a different place. On the other hand, separate issue organizations may continue to thrive alongside a reformed WTO. If other organizations continue to play an important role – perhaps as stronger advocates for their respective issue areas than the WTO departments would be – there is no reason why they should not remain in place.<sup>99</sup> On the question of what to do with existing institutions, then, the international community can simply wait and see

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<sup>98</sup> See Bronkers, *supra* note 12, at 49.

<sup>99</sup> One factor that might affect the role of specialized institutions is the budget for the WTO. The reformed WTO described here would require a significant increase in funding as compared with the existing WTO which, in 2001, had a budget of about \$82 million dollars. One solution would be to draw funds from the issue organizations that are, in a sense, being duplicated within the WTO. If inadequate funds are provided for a reformed WTO, however, it will inevitably have to rely on other organizations for expertise.

whether a departmental structure within the WTO will complement other organizations or replace them.

Some may be concerned that WTO departments would lack the autonomy of existing issue-oriented organizations. Such a concern would be misplaced for several reasons. First, the WTO should establish departments with considerable independence, allowing them to pursue the policy issues that they believe to be most important, and operating without undue oversight or control by the larger organization. Second, though the autonomy of issue-oriented organizations is often important, it sometimes hampers their effectiveness. For example, the ILO can issue labor standards for the international community, but they are not binding on any state unless some form of international agreement is concluded. Even if a treaty is concluded, the obligations within that treaty may not be respected, and there are few mechanisms in place to ensure greater compliance. Finally, standards issued by the ILO may run afoul of commitments in other areas, such as trade. Without a mechanism to combine trade interests and labor interests, the ILO's autonomy to issue labor standards may not affect state behavior. Complaints about the trade bias of the WTO express, in part, the fact that the success of the organization has made it difficult for other issues to be heard when trade issues are implicated. The autonomy of the ILO does not seem especially valuable if the interests of the ILO are consistently pushed aside by the more powerful interests of the WTO. By joining a reformed WTO, labor, along with environment and other issues, will be put on an even footing with trade, and the interests of each of these groups will be balanced in a single policy setting.

### 3. Trade Bias

There is a widespread view among opponents – and many supporters – of the WTO that the institution has a trade bias which makes it difficult for other issues to receive a fair hearing.<sup>100</sup> This is hardly surprising in an organization that has been dedicated from the beginning to the liberalization of trade, but it generates understandable resistance to the idea of an expansion of WTO influence.<sup>101</sup> The concern among those with interests in other areas, such as the environment and labor, is that these non-trade issues will be overshadowed by the institution's commitment to trade.

The term “trade bias” can encompass many different concerns, two of which are addressed here. First is the claim that there is something inherently different about trade as compared to other issues that would prevent their coexistence in a single organization. For example, at least one commentator in the competition policy area argues that trade is a fundamentally adversarial process, whereas competition policy is not.<sup>102</sup> If this is so, the argument goes, the sort of cooperation necessary to advance international competition policy goals may be inconsistent with the adversarial nature of the WTO.<sup>103</sup> It is easy to imagine similar statements being made about environmental or other issues.

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<sup>100</sup> See James Thuo Gathii, *Institutional Concerns of an Expanded Trade Regime: Where Should Global Social and Regulatory Policy Be Made? Re-Characterizing The Social In The Constitutionalization Of The WTO: A Preliminary Analysis*, 7 *Widener L. Symp. J.* 137, 155 (2001); Sara Dillon, *Fuji-Kodak, the WTO, and the Death of Domestic Political Constituencies*, 8 *Minn. J. Global Trade* 197, 208-09 (1999); Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 *Cornell Int'l L.J.* 631, 645 (1994).

<sup>101</sup> See Robert Howse, *From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime*, mimeo, 2002 (providing an insightful intellectual history of the international trading system since the Second World War).

<sup>102</sup> See Tarullo, *supra* note 88, at 489-94.

<sup>103</sup> *Id.*

Though there are differences between trade and other issues, these differences should not be exaggerated. International cooperation, whether in trade, competition policy, or other areas, always involves states pursuing their national self-interest (or at least the interest of their decision makers) and trying to get as much as possible in exchange for the fewest possible concessions on their own part. Because negotiated agreement requires unanimous consent, it also involves an effort to achieve a Pareto-improving arrangement.<sup>104</sup> When viewed as a forum for international cooperation, there is nothing about the WTO that inherently favors trade over other concerns. That is, it is not the structure of the institution itself that leads to a trade bias, but rather the individuals that populate the institution.

This brings us to the second, more serious trade bias concern – that non-trade issues will receive less than a fair hearing within the WTO structure.<sup>105</sup> If the WTO were to simply declare that environmental issues were within its mandate and assign existing personnel within the WTO to address the topic, environmentalists would have cause for concern.<sup>106</sup> Because the WTO is a trade institution, it has developed expertise in the trade area. The people who work within the WTO are interested in and knowledgeable about trade rather than environmental issues, human rights, or other topics. The only

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<sup>104</sup> One of the important benefits of expanding the role of the WTO – the ability to make transfers across issues areas – is a mechanism to make more Pareto-improving agreements available. See *supra* Part III.B.

<sup>105</sup> See, e.g., Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can we Prosper and Protect?* 49 *Wash. & Lee L. Rev.* 1407, 1441 n. 214 (“The environmental community is understandably reluctant to see a trade institution such as the GATT adjudicate disputes between trade interests and environmental interests.”).

<sup>106</sup> To a certain extent, of course, the WTO is already involved in environmental issues. By limiting the use of trade sanctions as a mechanism to encourage environmental compliance the WTO undermines certain environmental efforts. See *GATT XX(b,g)*; *Shrimp/Turtle case*; *Tuna/Dolphin case*.

way to overcome the perceived trade bias is to involve individuals with an interest in and commitment to relevant non-trade issues. On the other hand, adding, say, environmental specialists to the existing WTO might undermine the benefits of specialization that currently exist. The same trade-off exists with respect to negotiating rounds. At present, discussions are held among Member representatives whose interest is primarily, though not exclusively, in trade. Though this may generate a trade bias, it has the advantage of providing focus for the negotiations. Adding non-trade participants might eliminate the trade bias but would also undermine the cohesiveness of the process.

The departmental structure advocated by this Article offers an effective way to address the trade bias while maintaining a focused and specialized approach to trade. Trade issues that do not implicate environmental concerns, for example, could be handled by the trade department, which would not be terribly different from the current WTO structure. Similarly, during negotiating rounds on trade, trade specialists could reach agreement on trade issues. The same structure would exist in other departments, where specialists could pursue cooperation within their departments.

The departmental structure takes advantage of the fact that a great deal can be accomplished without involving experts from more than one field. For example, any number of environmental agreements are possible without resorting to transfers that run across issue areas. Indeed, most existing environmental agreements would fit this description. By structuring the organization along departmental lines, it is possible to capture the advantages of specialization that would be present in a stand-alone organization, including a more narrowly focused expertise, a deeper understanding of the

relevant issues, and streamlined negotiations. Within a department, it would be possible to capture the benefits of a single-issue organization.

The departmental structure would also provide a mechanism to address issues that cross departmental lines – something that stand-alone organizations cannot do. When a problem implicates more than one department, of course, no single department would be authorized to address the issue. This is as it should be; otherwise one set of interests, like trade in the current WTO, could dominate other concerns. Issues like the use of trade sanctions in environmental agreements would require the cooperation of more than one department.

Problems that require cooperation across departments will obviously be more challenging than ones that can be resolved within a single department, but that is both inevitable and desirable. Balancing, for example, a desire for improved labor rights against the risk of protectionism is both conceptually and politically difficult.<sup>107</sup> More generally, the trade-offs involved when one has to consider more than one issue area are much more complex and controversial than those involved in a single issue area. This difficulty is unavoidable, but the incorporation of non-trade issues into the WTO at least makes it possible to address these questions. Stand-alone organizations simply lack the capacity to do so. As a practical matter, because the WTO is more influential than other international organizations, its preferences with respect to the appropriate balance between trade and other concerns tend to dominate. Expanding the jurisdiction of the

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<sup>107</sup> See Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (Int'l Centre for Human Rts. & Democratic Dev., Policy Paper, 2000), at \*13.

WTO would force the trade interests of the current WTO to share the decision making process with other interests.<sup>108</sup>

#### 4. Dispute Resolution

Concerns about a trade bias are not, of course, limited to the negotiation of WTO obligations and the day-to-day operation of the organization. They also include the dispute resolution process. There is concern that WTO panels and appellate panels, when faced with a case that implicates the non-trade issues, do not give adequate weight to non-trade concerns.<sup>109</sup> Trade values hold a privileged position because the WTO is a trade organization and its dispute resolution mechanism is stronger than any comparable institution. The incorporation of non-trade issues and the resulting access to the dispute settlement procedures of the WTO would help to put these other values and trade on an equal footing. The question, then, is how to reform the dispute resolution process, without sacrificing its efficacy or authority, and ensure that it does not systematically favor one issue area over another.

One solution would be to place dispute resolution procedures within the departments, leading to a separate tribunal for each substantive area. This would imply separate tribunals for trade, environmental issues, labor, and so on, and would resemble a

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<sup>108</sup> It is worth noting that the bias of individuals working within particular interest areas is limited by the fact that these individuals are government officials. Though trade officials may have a pro-trade bias, they must answer to their political superiors who have a broader agenda. The point is that although each issue area has a biased perspective, it is important to remember that domestic institutions are able to balance, for example, trade and environmental concerns, and the resulting policies can be communicated to the trade and environmental officials, greatly reducing the impact the latter's own biases.

<sup>109</sup> See, e.g., Dunoff, Prosper and Protect, *supra* note 88, at 1441 ("The environmental community is understandably reluctant to see a trade institution such as the GATT adjudicate disputes between trade interests and environmental interests.").

system of stand-alone organizations each with its own dispute resolution system.<sup>110</sup> The problems with this approach are obvious. First, there would be no single forum in which disputes that implicate more than one area could be resolved. Multiple fora would give the parties an incentive to forum shop, forcing the dispute resolution systems to generate choice of forum rules. In addition, there is no guarantee that the multiple dispute resolution units would agree on the relevant rules, so there may be power struggles among departments. As with any choice of forum problem, one would expect more than one of the competing fora to claim jurisdiction over some cases, leading to conflicting rulings and uncertainty as to the legal status of certain disputes.

Even if the jurisdictional problems were resolved satisfactorily, there would remain a problem of forum bias. A dispute resolution procedure designed for the environmental department, for example, would presumably select panel members from a list of individuals with an appropriate understanding of environmental issues. These individuals may not, however, have expertise in trade or other areas, leading to concerns about bias and qualification that look very much like the concerns that are currently expressed when non-trade issues represent an important part of a WTO dispute.<sup>111</sup>

A better solution is to have a single dispute resolution body that handles all cases, regardless of their content. A single forum eliminates the need for complicated choice of forum rules, prevents parties from pleading their cases strategically in an attempt to gain

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<sup>110</sup> See e.g., Amedeo Postiglione, *A More Efficient International Law on the Environment and Setting up an International court for the Environment Within the United Nations*, 20 *Envtl. L.* 321 (1990) (calling for the establishment of a “World Environmental Court”).

<sup>111</sup> See *Tuna/Dolphin; Shrimp/Turtle*.

access to one forum rather than another, and makes an unbiased dispute resolution system easier to construct.

If we are to maintain a common dispute resolution system for a wide range of international claims, however, it must be structured in such a way so as to have adequate expertise to address the issues at hand, and yet not have a bias in favor of, for example, trade. To achieve this goal, panelists should not all be experts in the same field and the individual panelists in a case should be chosen with a certain amount of care.<sup>112</sup> The pool of potential panelists would have to be expanded to include specialists in all relevant fields. In fact, the best panelists would probably have knowledge of more than one of the substantive issues areas. Thus, for example, a person with knowledge of both trade and environmental issues might be an appropriate panelist.<sup>113</sup> If the pool of potential panelists is selected with care, the actual establishment of panels would be fairly straightforward and could essentially follow existing WTO rules. Those rules state that the “Secretariat shall propose nominations for the panel” from an existing list of qualified individuals.<sup>114</sup> The parties are able to oppose a nomination, but are only supposed to do so “for

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<sup>112</sup> At a minimum, the qualifications for panelists provided in article 8(1) of the DSU would have to be expanded to include individuals with expertise in non-trade areas. See DSU art. 8(1) (“Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to the GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.”).

<sup>113</sup> The panels themselves could be encouraged to overcome any biases that remain. One way to do so would be to consider accepting amicus briefs from relevant NGOs. See Dunoff, *Reconciling International Trade with Preservation*, *supra* note 88, at 1441 n. 214; Georg C. Umbricht, *An Amicus Curiae Brief on Amicus Curiae Briefs at the WTO*, 4 *J. Int’l Econ. L.* 773 (2001). The amicus briefs issue implicates questions that go beyond what is discussed here, and this Article does not intend to advocate their acceptance by panels. The point is simply that if the WTO is reformed as proposed in this Article, there may be an additional reason to consider those briefs.

<sup>114</sup> See DSU art. 8(6).

compelling reasons.”<sup>115</sup> If the parties cannot agree on the panelists within 20 days from the date of the establishment of the panel, the Director-General selects the panelists.<sup>116</sup> These same rules would be appropriate for panel formation with an expanded WTO. Panelists that are perceived to favor one position over another could be vetoed by the parties, ensuring that a reasonably unbiased panel would be selected.<sup>117</sup>

A similar procedure could be used to appoint members of the Appellate Body. Because this is a standing body with only seven members, it is particularly important that the individuals serving on the Appellate Body be qualified and unbiased. It appears that the existing system of appointment – under which the Dispute Settlement Body appoints members of the Appellate Body – can remain in place as the WTO extends its jurisdiction to include additional issue areas.<sup>118</sup>

Though it may seem self-evident, it is also worth noting that after the inclusion of non-trade issues, panels cannot interpret all obligations against a background pro-trade liberalization principle.<sup>119</sup> Rather, agreements in non-trade areas must be interpreted on their own terms and not through a trade lens.<sup>120</sup> Where two or more agreements are being litigated simultaneously, panels will have to resolve the issue through tools of statutory interpretation other than a principle of trade liberalization.

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<sup>115</sup> See *id.*

<sup>116</sup> See DSU art. 8(7).

<sup>117</sup> Concerns about bias could be further addressed by drafting a stronger and more defined set of rules with which a party could prevent a particular panelist from joining the panel. For example, each party could be permitted to block a certain number of nominations.

<sup>118</sup> Recall that the DSB includes all member states, so every state will have input into the selection of Appellate Body members. The risk of an appointment that systematically disfavors a particular group of states is greatly reduced because every member is involved.

None of this is intended to suggest that resolving disputes that implicate both trade issues and, for example, environmental issues, is an easy task. The point is that the only way for a tribunal to weigh both trade and environmental interests without an institutional bias in favor of one or the other is to have a dispute resolution process that is common to both issues areas. Without a single authoritative dispute resolution mechanism, there is no unbiased forum for the resolution of disputes that cross issue areas and no orderly way of handling such disagreements.

### **B. Democracy and Transparency**

In addition to whatever other challenges the WTO faces, there is no denying that it has a legitimacy problem.<sup>121</sup> Like many of its problems, this one is the product of the organization's success. With greater power and influence have come concerns that the institution is insufficiently democratic.<sup>122</sup> The most obvious democratic problem at the WTO stems from the fact that the organization receives no direct democratic input.<sup>123</sup> Individuals are only heard through the actions of their governments. Of course, government officials act as agents for their citizens in a wide range of circumstances, and though we recognize that they may not always represent their constituents faithfully, we

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<sup>119</sup> See Marco C.E.J. Bronkers, *The WTO Reference Paper on Telecommunications: A Model for WTO Competition Law?*, in Marco Bronkers & Reinhardt Quick, *New Directions in International Law: Essays in Honor of John H. Jackson* (2000).

<sup>120</sup> See Bronkers, *supra* note 12, at 48.

<sup>121</sup> See Robert Keohane & Joseph Nye, *Between Centralization and Fragmentation: The Club Model of Multinational Cooperation and the World Trade Organization: Problems of Democratic Legitimacy*, mimeo, February 2001; Paul Stephan, *Accountability and International Rulemaking: Rules, Rents, and Legitimacy*, 17 *Nw. J. Int'l L. & Bus.* 681 (1996); Kal Raustiala, *Sovereignty and Multilateralism*, 1 *Chi. J. Int'l L.* 401 (2000); Anne-Marie Slaughter, *Building Global Democracy*, 1 *Chi. J. Int'l L.* 223 (2000).

are satisfied that democratic structures do what can be done to keep the agents faithful to the interests of their principals. At the WTO or any other international organization the agency problem is compounded by the fact that it is normally not the elected officials themselves that enter into negotiations or sit on panels. Rather, the participants at the WTO are themselves the agents of the government they represent. They are, therefore, two steps removed from individual citizens. There is an agency problem between the WTO participants and their government, and another agency problem between the government and its citizens.

The other important democratic problem at the WTO is the product of rule making by WTO panels. Despite the fact that the text of the DSU suggests otherwise, unelected and essentially unaccountable WTO panels and appellate panels make law.<sup>124</sup> Unlike judicial actions within democracies, however, there is no democratically chosen legislature capable of checking the authority of the panels.<sup>125</sup>

### 1. Direct Democratic Input

Before discussing this issue further, it is worthwhile to note that a move toward more global governance inevitably moves some decisions further from individual voters

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<sup>122</sup> See J. Patrick Kelly, *The WTO and Global Governance: The Case for Contractual Treaty Regimes*, 7 *Widener L. Symposium J.* 109, 111 (2001).

<sup>123</sup> See Atik, *supra* note 55, at \*5-6.

<sup>124</sup> See DSU art. 3(2) ("Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.").

<sup>125</sup> There is, at least in principle, some ability to check panel rulings through a refusal to adopt the ruling, which requires unanimous consent, see DSU art. 16(4), a waiver under GATT XXV(5) and WTO Agreement IX(3), an amendment to the relevant agreement, GATT XXX; or the adoption of an interpretation of the WTO Agreements, WTO Agreement IX(3). Each of these procedures, however, is cumbersome and unwieldy.

and democratic control.<sup>126</sup> Even the EU, which represents a far more advanced, sophisticated, and complete move toward international governance, faces serious concerns about the “democracy deficit.”<sup>127</sup> Simply put, whether the relevant decisions are taken by an international tribunal, by international bureaucrats, or even by national representatives, the process is simply less democratic than what goes on at the national level in democratic states.

To a certain extent, this is an inevitable consequence of growing interdependence. Just as decisions by the federal government are further removed from voters than those of local governments, decisions made by supra-national organizations are further removed than national decisions. In principle, the problem could be overcome - or at least mitigated - through some form of direct election of representatives to an international legislative body. In practice, of course, it is difficult to imagine such a direct form of democracy at the international level.<sup>128</sup>

A second point to keep in mind when considering the democracy problem is that it should not be exaggerated. The problem is certainly a real one that needs to be discussed, but there remain democratic checks on the system. First, decisions taken and agreements reached by negotiators and other national representatives are ultimately judged by voters (in democratic states) in much the same way as other decisions made by

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<sup>126</sup> The WTO has not escaped such criticism. See Jeffery Atik, *Democratizing the WTO*, 33 *Geo. Wash, Int'l L. Rev.* 451 (2001); Jeffery Atik, *Identifying Antidemocratic Outcomes: Authenticity, Self-Sacrifice, and International Trade*, 19 *u. Pa. J. Int'l L.* 229 (1998); Robert Howse & Kalypso Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far*, mimeo; Paul Stephan, *International Governance and American Democracy*, 1 *Chi. J. Int'l L.* 237 (2000).

<sup>127</sup> See J.H.H. Weiler, *The Transformation of Europe*, 100 *Yale L.J.* 2403, 2466-74 (1991); Renaud Dehousse, *European Institutional Architecture After Amsterdam: Parliamentary System or Regulatory Structure?*, 35 *Common Mkt. L. Rev.* 595, 598 (1998).

national authorities such as tax laws, domestic safety regulations, unilateral actions on the international stage, and so on. Thus, for example, political leaders in the United States have to answer to the public for American reaction to WTO decisions and rulings, as well as the substantive commitments into which the United States enters. Fast-Track trade authority is a contentious issue not only because it limits the ability of Congress to extract rents in exchange for accepting a trade agreement, but also because members of Congress must defend the content of such agreement in front of voters. Second, because the creation of “legislation” at the WTO continues to require unanimity,<sup>129</sup> there is a deeply conservative bias embedded in the decision making apparatus.<sup>130</sup> States need not worry that policies will be forced upon them as they retain the power to veto agreements.<sup>131</sup> To the extent that national decision makers are democratically accountable, therefore, they serve as guardians of the interests of their citizens. To be sure, political leaders may have

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<sup>128</sup> See Atik, *supra* note 126, at \*23.

<sup>129</sup> Beyond the periodic “rounds” that form the foundation of WTO rulemaking, there are some provisions for limited majoritarian decision making. These provisions, however, are limited in nature and, despite the existence of voting rules, typically operate, as a practical matter, through consensus. See, e.g., GATT XXV:5 (Joint action by the contracting parties).

<sup>130</sup> Although it is at times convenient to describe the WTO as a “government” or a “constitution,” the presence of the unanimity rule probably makes it more accurate to refer to it as a “contract.” Only states that choose to participate must do so, and they may leave at any time. Furthermore, there are no coercive mechanisms within the organization. Compliance with obligations and panel decisions is enforced only through political or reputational mechanisms. Even the sanctions provided for in the event of a refusal to bring one’s actions into compliance with a ruling of the DSU are intended only to offset the injury felt by the complainant in a prospective fashion. They are intended neither to be punitive nor to make compliance unavoidable. See DSU art. 22(4) (“The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.”); Mary Footer, *The Role of Consensus in GATT/WTO Decision-Making*, 17 *Nw. J. Int’l L. & Bus.* 653 (1996).

<sup>131</sup> It is true that the WTO provides for sanctions if a member refuses to bring its actions into compliance with the ruling of the DSU, but these sanctions are intended to offset the injury felt by the complainant in a prospective fashion only. They are intended neither to be punitive nor to make compliance unavoidable. See DSU art. 22(4) (“The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.”);

their own agendas and may not represent their constituents faithfully, but that is true of any decisions they make, including domestic policy decisions.

As in the domestic setting, at the end of the day we have to accept that an agency problem will remain in any form of international cooperation. The best we can do is try to reduce its impact. A variety of possible strategies are available, but the most prominent is to increase the transparency and openness of the institution. This solution has been discussed elsewhere and it is enough for present purposes to mention it briefly.<sup>132</sup> Opening up the institution and providing some role for NGO's is one strategy. At present, a great deal of WTO activity is done in secrecy, closed off even from other international organizations such as UN human rights bodies.<sup>133</sup> To increase the level of openness, it has been proposed that the WTO make more documents available (e.g., pleadings in cases before the dispute resolution body) and that NGOs be given greater access to the activities of the organization.<sup>134</sup> NGOs bring a different set of priorities and perspectives to the table, which may encourage national representatives to consider issues

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Mary Footer, *The Role of Consensus in GATT/WTO Decision-Making*, 17 *Nw. J. Int'l L. & Bus.* 653 (1996).

<sup>132</sup> See Claude E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 2 *Chicago J. Int'l L.* 403, 413 (2001); Robert Howse, *From Politics To Technocracy—And Back Again: The Fate Of The Multilateral Trading Regime*, 96 *Am. J. Int'l L.* 94, 107 (2002).

<sup>133</sup> See Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (Int'l Centre for Human Rts. & Democratic Dev., Policy Paper, 2000), at \*12.

<sup>134</sup> The inclusion of non-trade issues within the organization may generate an increase in transparency both because it is much more difficult to justify a purely technocratic approach to human rights, environment, and competition policy than is the case for trade policy, See Robert Howse, *From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime*, mimeo (2002), and because the presence of, for example, human rights experts will bring a culture of transparency into the organization. See Howse & Mutua, at \*15 (“The WTO institutional isolation from human rights institutions, among others, has compounded its inability to address transparency and due-process related provisions in specific agreements of the WTO.”).

they otherwise would have ignored.<sup>135</sup> Similarly, allowing NGOs to present amicus briefs to the dispute resolution panels represents at least a limited opening of the organization to the direct input of entities other than states.<sup>136</sup> More importantly, NGOs can serve as informational conduits between the WTO and the outside world. By disseminating information from the WTO to national governments and individual citizens, NGOs can serve a monitoring function and discourage WTO participants from straying too far from the interests of their states.<sup>137</sup> More generally, an increase in the transparency of the institution would allow closer monitoring of the actions of negotiators and WTO bureaucrats.

The reforms proposed in this Article would also help to reduce the agency problem between WTO participants and individuals. One of the concerns about the actions of WTO participants stems from a perception that they are insiders with a common set of values and priorities that differ from those of their governments.<sup>138</sup> Bringing other important issues into the WTO means bringing in individuals with different sets of values. Within the organization, then, there will be a wider range of views on, for example, the relationship of trade and environmental issues, or the

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<sup>135</sup> See Daniel C. Esty, *Linkages and Governance: NGOs at the World Trade Organization*, 19 U. Pa. J. Int'l Econ. L. 709 (1998); Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated Marketplace"* 18 *Cardozo L. Rev.* 957 (1996).

<sup>136</sup> See *Shrimp/Turtle case*. For a more complete discussion of NGO participation, see Jeffrey Dunoff, *The Misguided Debate over NGO Participation in the WTO*, 1 J. Int'l Econ. L. 433 (1998); Philip Nichols, *Extension of Standing in World Trade Organization Disputes to Non Governmental Parties*, 17 U. Pa. J. Int'l Econ. L. 295 (1996); Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. Pa. J. Int'l Econ. L. 331 (1996); Jagdish Bhagwati & T.N. Srinivasan, *Trade and the Environment: Does Environmental Diversity Detract from the Case for Free-Trade*, in 1 *Fair Trade and Harmonization* 159 (Jagdish Bhagwati & Robert E. Hudec eds., 1996).

<sup>137</sup> The same dissemination of information can also help individuals to monitor the policies of their government, reducing the agency problem between citizens and government.

appropriate balance between SPS measures and trade liberalization. It is true that the departmental structure will generate some separation between the various issue areas, but the heterogeneity of perspectives within the organization will nevertheless be increased, and the interaction among insiders will no longer feature a single dominant bias.

## 2. Panels as Adjudicators of International Law

The previous sections have discussed the democracy problem with reference to negotiators and technocrats at the WTO. There is a different but equally important problem at the dispute resolution phase. WTO panels (both the panels and the appellate panels) interpret WTO Agreements and, through those interpretations, affect the obligations of states. This raises issues about the proper role of panels. Should they restrict their interpretation of WTO obligations to the text of the relevant agreements or should they also consider other aspects of international law or international norms?

Some commentators have suggested that WTO panels should take into account at least some non-trade values that are external to the WTO agreements.<sup>139</sup> For example, Howse & Mutua argue that trade law is accountable to human rights law.<sup>140</sup> They point

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<sup>138</sup> See Robert Howse, *From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime*, forthcoming *Am. J. Int'l L.* (referring to the 'insider network' at the WTO).

<sup>139</sup> Robert Howe & Kalypso Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far*, in *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium* (2001); Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (Int'l Centre for Human Rts. & Democratic Dev., Policy Paper, 2000); Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 *J. Small & Emerging Bus. L.* 131, 134-35 (1999); Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 *Am. U. J. Int'l L.* 7 Pol'y 1, 40-45 (1996).

<sup>140</sup> See Howse & Mutua, *supra* note 139, at \*6 ("Human rights, to the extent they are obligations *erga omnes*, or have the status of custom, or of general principles, will normally prevail over specific conflicting provisions of treaties such as trade agreements."); David Palmetier & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 *Am. J. Int'l L.* 398 (1998).

out that preemptory norms of international law take precedence over treaties, including the WTO Agreements. To the extent human rights obligations are preemptory norms, therefore, they trump trade law.<sup>141</sup> These authors then suggest that panels should permit the use of trade sanctions against violations of such preemptory norms.

Howse and Mutua also make the more controversial claim that interpretation of WTO Agreements should be carried out with reference to the evolving norms of international law. This would mean that the interpretation of the term “necessary” in Article XX of the GATT<sup>142</sup> would “have to be considered in light of relevant rules of international law, including international agreements on human rights.”<sup>143</sup> Such an interpretation, they contend, would call into question the traditionally narrow interpretation of that term under WTO/GATT jurisprudence.

Finally, they make a third, still more controversial, assertion. They point out that under Article 103 of the UN Charter, the Charter is to take precedence over conflicting obligations, including treaty obligations.<sup>144</sup> They then argue that the UN Charter places obligations on member states to promote and protect human rights. From these two

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<sup>141</sup> The question of whether particular human rights norms qualify as preemptory norms is complex and controversial. This Article does not attempt to make any such classification.

<sup>142</sup> GATT art. XX (“[N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; . . . (d) necessary to secure compliance with laws or regulations . . .”).

<sup>143</sup> See Howse & Mutua, *supra* note 139, at \*10.

<sup>144</sup> See Howse & Mutua, *supra* note 137, at \*11 (“It is clear here that a treaty – even one of universal application – would be overridden by the UN Charter in the event of a conflict.”).

premises, they conclude that in the event of a conflict between a human rights obligation and a treaty obligation such as those under the WTO, the former prevails.<sup>145</sup>

To the extent Howse & Mutua argue that non-WTO law should be used for more than interpretative guidance, their view is not widely held. The claim that panels should apply non-WTO rules or use international law to guide interpretation as much as these authors propose can be disputed on a number of grounds.<sup>146</sup> It is certainly the case that WTO obligations in general, and the language of Article XX in particular, are to be interpreted consistently with the customary rules of interpretation of international law.<sup>147</sup> The most convincing reading of this obligation is offered by Professor Trachtman, who emphasizes that the test refers to rules of interpretation rather than the substantive rules of customary international law.<sup>148</sup> The Vienna Convention on the Law of Treaties, widely accepted as reflecting customary international law, references substantive provisions of customary law, but as Trachtman argues, this does not indicate that such rules apply, but rather that they can be taken into account.<sup>149</sup> WTO Obligations, then, should be interpreted, where possible, to avoid conflict with the substantive norms of international law.<sup>150</sup>

With respect directly applicable rules, however, it seems clear that only WTO law is to be considered. First, the text of the DSU indicates that panels should only look to

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<sup>145</sup> Howse & Mutua, *supra* note 139, at \*11-12 (“Thus it would appear that in the event of a conflict between a human rights obligation, particularly one that is universally recognized, and a commitment ensuing from international treaty law, the former prevails or the latter must be interpreted to be consistent with the former.”).

<sup>146</sup> See Dunoff, *supra* note 19, at 754.

<sup>147</sup> See DSU art. 3(2).

<sup>148</sup> See Trachtman, *Domain of WTO Dispute Resolution*, *supra* note 71, at 343.

<sup>149</sup> See Vienna Convention of the Law of Treaties, art. 31(3)(c).

WTO law. Article 3 states that dispute resolution “serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the provisions of those agreements,”<sup>151</sup> and that “the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”<sup>152</sup> The standard terms of reference for panels, provided in article 7, instruct panels “[t]o examine, in light of the relevant provisions in (name of the covered agreements cited by the parties to the dispute), the matter referred to the DSB.”<sup>153</sup> No mention is made of any source of law other than the covered agreements. Finally, according to article 11, the function of a panel is to “assist the DSB in discharging its responsibilities under this Understanding and the covered agreements.”<sup>154</sup> The same article also states that a panel should assess the “applicability of and conformity with the relevant covered agreements.”<sup>155</sup> These provisions, both individually and as a group, suggest that the Members intended WTO law to be the exclusive source of legal authority used by panels.<sup>156</sup>

Second, if panels were to take a more aggressive foray into non-trade topics, the challenge to their legitimacy would be even greater than it is today. It is clear that the dispute resolution mechanism is not intended as a forum for policy making. Though panels will inevitably “make law” in a meaningful sense, to the extent that the decisions of panels tend toward policy making rather than interpretation, they risk overstepping their institutional role. There is virtually no guidance within the WTO Agreements

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<sup>150</sup> See Trachtman, *Domain of WTO Dispute Resolution*, *supra* note 71, at 343.

<sup>151</sup> DSU art. 3(2).

<sup>152</sup> DSU art. 3(2).

<sup>153</sup> DSU art. 7(1).

<sup>154</sup> DSU art. 11.

<sup>155</sup> *Id.*

regarding the appropriate trade-off between trade and, for example, the environment or human rights. For panels to strike their own balance based on their reading of non-WTO obligations, whether based on treaty or customary international law, could only be described as the making of policy.<sup>157</sup> Actions of this sort threaten to undermine the legitimacy of the dispute resolution system.<sup>158</sup> Panels, after all, represent the least democratic component of the WTO – an institution criticized because of its anti-democratic features. Encouraging panels to create exceptions to WTO obligations based on their readings of customary international law grants them a great deal of discretion. For example, there remains no consensus on the question of just what constitutes a violation of customary human rights norms. Asking WTO panels to sit in judgment of this question seems wholly inappropriate for several reasons. First, these are not jurists with a particular expertise in human rights.<sup>159</sup> Rather, they are likely to know something about trade and trade law. Second, panels and the Appellate Body lack legitimacy. Not only are they appointed through a bureaucratic process,<sup>160</sup> there is virtually no oversight of their decisions,<sup>161</sup> and they operate to a considerable degree in secret.<sup>162</sup> Finally, if WTO panels make these judgments, even if they do a good job, they will be deciding not only what counts as a violation of international human rights law, but also what sanction

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<sup>156</sup> See Trachtman, *Domain of WTO Dispute Resolution*, *supra* note 71, at 342.

<sup>157</sup> The problem would be compounded by the inevitable fact that panels would bring their own policy preferences and opinions to bear on their decisions.

<sup>158</sup> See Dunoff, *supra* note 19, at 756.

<sup>159</sup> See DSU art. 8 (composition of panels), art. 17(1-8) (the standing appellate panel).

<sup>160</sup> See DSU art. 8(6).

<sup>161</sup> An erroneous interpretation of the WTO Agreements by an appellate panel [is automatically adopted] unless the DSB decided by consensus not to adopt it. See DSU art. 17(14).

<sup>162</sup> See Alan Wm. Wolff, *Problems with WTO Dispute Settlement*, 2 *Chi. J. Int'l L.* 417, 422 (2001).

is appropriate. Suppose, for example, that the United States alleges that China, now a member of the WTO, is engaged in ongoing violations of human rights obligations under international law. Imagine that the United States, invoking article XX of the GATT,<sup>163</sup> imposes sanctions on China. These sanctions might be relatively mild – for example, a tariff imposed on a particular category of goods from China. On the other hand, the sanction could be quite severe – anything up to a complete ban on the importation of Chinese goods. A panel must not only determine whether the requirements of article XX are met by the Chinese actions, they must also determine if the reaction by the United States is “necessary” under article XX. In this sense, they are passing judgment not only on the question of whether the human rights violation qualifies as a violation of international law sufficient to give the United States an exception to its WTO obligations, they are also evaluating the sanction imposed by the United States, and determining if it is an appropriate one. There is no guidance in the WTO or elsewhere for this sort of decision. To be sure, panels have to interpret article XX under existing rules and, therefore, engage in a similar inquiry. But having them interpret a broader range of international law questions, including the relative priority of WTO and non-WTO obligations, would give panels much greater authority to create international obligations for states.

Up to this point, the discussion has focused on the importation of customary international law into the WTO decision making process. When applied to treaties, the problem is even more difficult. When states enter into agreements, they have the ability

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<sup>163</sup> Article XX permits, among other things, the adoption of measures “necessary to protect human,

to structure a dispute resolution clause that suits their needs. If they choose not to include such a clause, or if they include one that has particular features, they cannot be said to have consented to the adjudication of the treaty before a forum that has the features of the WTO. To import treaty law into the WTO dispute resolution process, then, is to change the enforcement structure of that treaty and, therefore, change the agreement to which states consented. This is inappropriate both because it leads to a treaty that is no longer based on the consent of the parties, and because it may deter future agreements in which the parties prefer not to include a dispute resolution clause.<sup>164</sup>

Even if panels consider non-WTO norms in the interpretation of WTO Agreements, they cannot be asked to resolve conflicts and tensions between WTO provisions and these non-WTO obligations. Doing so would be beyond any authority they have been granted, distort the substantive obligations that states believed themselves to be establishing, and invent an enforcement scheme to which states did not consent in the non-trade agreement.<sup>165</sup> Though commentators at times bemoan the absence of an enforcement mechanism in other international organizations, this outcome is not a “problem” from the perspective of the parties to the agreement.<sup>166</sup> The agreements and the organization are the product of a negotiation, and the states involved could have

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animal, or plant life or health.” GATT art. XX(b).

<sup>164</sup> See Andrew T. Guzman, *The Costs of Credibility: Explaining Resistance to Inter-State Dispute Resolution Mechanisms*, forthcoming, *Journal of Legal Studies* (2002).

<sup>165</sup> By way of example, consider the International Covenant on Economic, Social and Cultural Rights (ICESCR). The agreement does not provide for mandatory dispute resolution before arbitral panels, and to date it has not been subject to enforcement mechanisms beyond the use of reporting standards. See Alvarez, *supra* note 41, at 10.

<sup>166</sup> See Kelly, *supra* note 89, at 111 (“many international institutions suffer from ‘an enforcement gap.’” Citing Sol Picciotto, *Linkages in International Investment Regulation: The Antinomies of the Draft multilateral Agreement on Investment*, 19 U. Pa. J. Int’l Econ. L. 731, 734 (1998)).

chosen to establish an enforcement system. The absence of such a system, then, is what the parties intended.

Third, the claim that human rights obligations should trump WTO obligations is difficult to square with either conventional notions of international law or sound policy.<sup>167</sup> Even if one believes that a particular norm of customary international law exists, there is at best a weak argument that WTO panels should apply those norms. As a general matter, a treaty can derogate from customary law. Treaties are invalid only when they conflict with peremptory norms of customary international law.<sup>168</sup> This means that the WTO Agreements trump custom in a wide range of circumstances, and interpretation of WTO obligations should be based on the language in the relevant agreement.

In any event, the main problem is not one of a direct conflict between customary international law and the WTO. Rather, the problem is how to deal with the indirect conflict between efforts to sanction violations of international law and trade obligations. Panels, after all, are asked to resolve disputes within the WTO system. That a state is in violation of an established principle of customary international law does not imply that there is an accepted form of permissible retaliation. To justify an exception to WTO

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<sup>167</sup> A conservative reading of Howse & Mutua could conclude that, with the exception of peremptory norms, the authors are calling for the use of non-WTO law to affect the interpretation of existing exceptions to WTO obligations rather than the creation of new ones. On the other hand, a fair reading could also conclude that the authors argue for much more than simply the use of non-WTO law in the interpretation of existing obligations. See, e.g., *supra* note 145.

<sup>168</sup> Vienna Convention on the Law of Treaties, arts. 43, 64. Howse and Mutua are aware of this, and would no doubt concede that a treaty can trump custom. In their presentation, however, they seem to stretch the set to preemptory norms beyond conventional definitions to include, among other things, “violations of human rights.” This category is listed in addition to the slave trade, slavery, and genocide meaning it presumably includes other human rights violations. See Howse & Mutua, *supra* note 21, at \*8. This is not the place to debate the status of human rights violations under international law, but it is clear that the list of preemptory norms is small, and excludes a large number of activities that would be considered human rights violations.”

obligations based on, say, human rights violations, requires interpretation of article XX of the GATT such that the trade sanctions put in place are considered “necessary to protect human, animal or plant life or health”<sup>169</sup> or “necessary to protect public morals.”<sup>170</sup> Though such an interpretation is possible, it is not the only available interpretation even if one accepts that panels should take customary law into account. Put more simply, the suspension of trade obligations represents a sanction, yet the violation of a principle of customary international law does not, by itself, justify the imposition of sanctions in violation of other agreements.<sup>171</sup> Whether retaliation is permitted through trade sanctions which would otherwise be a violation of WTO commitments is a question that must be answered through the WTO Agreements.<sup>172</sup>

The reforms proposed in this Article will not resolve the debate regarding the appropriate tools of interpretation to be used by WTO panels (or other international adjudicatory bodies). Bringing more non-trade issues into the WTO, however, would allow member states to balance the priorities of trade against those of other interests. This would put the decision-making authority where it belongs - with negotiators from member states - rather than with WTO panels.<sup>173</sup> Bringing, for example, environmental

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<sup>169</sup> GATT XX(b).

<sup>170</sup> GATT XX(a).

<sup>171</sup> Cf., Alvarez, *supra* note 41, at 6 (pointing out that human rights obligation do not generally prevail over trade obligations).

<sup>172</sup> The same conclusion can be reached through an *SS Lotus* style of argument. See *The Case of the S.S. Lotus*, P.C.I.J. Ser. A No. 10 (1927). As discussed in the *Lotus* case, a state is free to impose any rules it chooses within its jurisdiction, limited only by the prohibitions of international law. In particular, there is no affirmative obligation under international law to address human rights violations through the use of trade sanctions. Under customary law, therefore, a state, therefore, is free to trade with human rights violators on whatever conditions it chooses.

<sup>173</sup> Gary Sampson, former director of the GATT/WTO has commented, “[I]n the long term, policy choices as important as the legitimacy of unilateral applications of trade measures to enforce domestic societal preferences extraterritorially should not be left to litigation . . . . These should be the subject of

issues within the WTO, would allow states to agree on which existing environmental commitments are subject to WTO dispute resolution, and which are not. They could also provide guidance to future panelists regarding the interplay of the environmental and trade obligations.<sup>174</sup> Presently, the WTO provides reasonably specific guidelines regarding the circumstances in which exceptions to WTO obligations are permitted, and tries to limit the impact of those exceptions.<sup>175</sup> If there are to be exceptions to trade obligations for environmental and human rights issues, states must agree on the conditions under which those exceptions are triggered, and the scope of the exception. If those decisions are placed in the hands of national representatives, the compromises reached will be based on the consent of member states rather than the decision of unelected and unaccountable panels and appellate panels.

Perhaps the greatest benefit of a negotiated incorporation of non-trade issues is that it provides legitimacy for the process. WTO dispute settlement procedures, though strong when compared to other international institutions, do not enjoy the stability and resilience of domestic courts in the United States or other advanced democracies. An attempt to expand the reach of panels to incorporate human rights, environmental law, or other issues without the explicit consent of member states would bring enormous criticism from many sources. Whether the panels and the WTO could withstand such attacks is

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policy debates with the participation of representatives from all WTO members.” Gary P. Sampson, *Trade, Environment, and the WTO: The Post-Seattle Agenda* 111 (2000).

Gary Sampson, *Trade Environment and the WTO*

<sup>174</sup> See Alvarez, *supra* note 41, at 4 (“[T]he status of WTO agreements vis-à-vis particular human rights (or environmental) conventions may best be clarified through explicit provision.”).

<sup>175</sup> See, e.g., AD Agreement, art. 9.3 (“The amount of the anti-dumping duty shall not exceed the margin of dumping.”).

uncertain. In other words a failed attempt to increase the role of human rights values through the DSU might weaken the entire institution – perhaps even causing its collapse.<sup>176</sup> Given that there is no consensus within the WTO or elsewhere about the appropriate interplay of trade and non-trade values, failure seems likely.

In contrast to the risks of failure of an attempt by panels to become more activist, attempts to incorporate issues through negotiated agreements are relatively safe. In the Doha Round, for example, if no agreement can be reached on environmental issues, that issue can be put aside while negotiators focus on other areas. If the Round is completed without significant progress on the environment, the WTO would more than likely remain a strong and vital institution and could return to the environmental question at another time.

### 3. The Limits of the Democracy Critique

As already stated, there is no denying that the WTO has a democracy problem. That said, the problem should not be exaggerated. This section lays out a few of the limits and problems with the democracy critique. The point here is not to dismiss concerns about democracy but rather to demonstrate that there are forces at work that constrain the magnitude of the problem.

The democracy problem of the WTO is exaggerated when the organization is impliedly held accountable for the imperfections in domestic democracies. Though we may wish for more democracy in our domestic politics, we must accept that domestic institutions are imperfect. Identifying flaws in the domestic system does not lead to any

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<sup>176</sup> See Alvarez, *supra* note 41, at 14-16.

particular policy conclusion with respect to international organizations. Critics at times seem to suggest that the WTO must not only reach a level of democracy rivaling what we see in domestic politics, but that imperfectly democratic national policymaking is itself a problem for the WTO. For example, at least one commentator includes in his discussion of the WTO's "democracy deficit" the criticism that American participation of the WTO was approved with Fast Track authority.<sup>177</sup> It is claimed that because Fast Track is not "a more democratic process than ordinary Congressional deliberations"<sup>178</sup> the decision to join the WTO is "doubtful from a democratic standpoint."<sup>179</sup> Surely this argument cannot be taken as a serious criticism of democracy at the WTO. For the foreseeable future, international institutions cannot hope to achieve a level of democracy that rivals that of democratic national regimes. The most that can be hoped, it seems, is that national policies of relevance to the organization are made within a democratic polity. Examination of these decisions to see if they are made within the most democratic corners of that polity is to demand too much. It is neither fair nor constructive to undermine support for international cooperation based on such unrealistic expectations.

Nor should it be forgotten that democracy within an international organization must be compared to the available alternatives. Here I have in mind two significant issues. First, even democratic states suffer from serious problems related to their decision making. Most salient of these is the influence of special interest groups. Some claim that

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<sup>177</sup> See Atik, *supra* note 126, at \*12.

<sup>178</sup> *Id.*, at \*12.

<sup>179</sup> *Id.*

this problem is especially acute in the foreign relations sphere,<sup>180</sup> and others suggest that it calls into question international cooperation in general.<sup>181</sup> In any event, it is clear that no matter how international cooperation is structured, it will face the problem of interest groups. The public choice problem remains whether the WTO is enlarged to incorporate environmental, human rights, and labor issues; those issues are left to other international organizations; or cooperation in those areas is done only through ad-hoc negotiations. It is made no more serious by the inclusion of non-trade issues within the WTO.

Second, it is an illusion to think that weakening or eliminating the WTO or other international institutions leaves the world more democratic. Where international organizations and laws are weak or nonexistent, the international sphere is marked, not by democracy, but by anarchy. The high barriers to trade that existed prior to the establishment of the GATT were only “democratic” in the sense that they were put in place by national governments. There is no serious doubt that those policies were harmful and contrary to what a democratic polity (meaning one free of public choice problems) would choose. The adoption of the GATT led to an opening of trade and an increase in welfare that can be considered much more democratic than what existed before, both because it delivered a higher quality of life and because it allowed the interests of exporters to be taken into account alongside those of import-competing industries.

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<sup>180</sup> See Robert Hudec, *Circumventing Democracy: The Political Morality of Trade Negotiations*, 25 *Int'l L. & Pol.* 311 (1993); Atik, *Democratizing the WTO*, *supra* note 126, at \*11.

<sup>181</sup> See Paul Stephan, *Regulatory Cooperation and Competition: The Search for Virtue*, in *Transatlantic Regulatory Cooperation – Legal Problems and Political Prospects* 167 (George A. Bermann, Mathias Herdegen & Peter Lindseth, eds. 2000).

Democracy is also undermined when policy makers are responsible to only some of the individuals that are affected by policies – a situation that is common when policies have international consequences. For example, if a national government adopts weak environmental policies because it knows that much of the harm from those policies will be felt by foreigners, it may be responding to the wishes of its constituents, but there is no voice at all for many affected individuals. International cooperation, when successful, allows states to exchange promises through which each state can influence the conduct of the other – giving their constituents at least some voice in the policies of the other state. If no effective mechanism for cooperation is established, the policies adopted by states will often be ineffective,<sup>182</sup> undesirable,<sup>183</sup> or both. Though international cooperation does not give all affected individuals equal voice, and international institutions are at best controlled indirectly by voters, it is often an improvement over the alternative in which unilateral policies allow for domestic decisions that ignore the interests of foreign parties

In the absence of international cooperation, then, there is no reason to think that national democracies will take action that is consistent with an international vision of democracy. Rather, they will try to impose costs on others while retaining benefits for themselves.<sup>184</sup> In many cases, this will generate outcomes that nobody would have chosen, and that make everybody worse off. Analysis of international institutions, then,

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<sup>182</sup> Michael Allen, *As Dot-Coms Go Bust In U.S., Bermuda Hosts An Odd Little Boomlet*, *The Wall Street Journal*, Monday, January 8, 2001, at A1 (discussing the use of tax havens to avoid full tax jurisdictions).

<sup>183</sup> See Andrew T. Guzman, *Choice of Law: New Foundations*, forthcoming *Georgetown Law Review* (2002) (explaining how unilateral policies will diverge from globally optimal policies).

<sup>184</sup> See Guzman, *Choice of Law*, *supra* note 183 (demonstrating how national governments can generate policies that are domestically optimal but that lead to a sub-optimal global regime).

should include comparisons of those institutions, flawed as they are, with the alternative of non-cooperation or reduced cooperation.

Having said all of the above, there is no denying that there remains a democracy problem at the WTO. This will not go away with the adoption of my proposal. In fact, it may become more salient because the organization will have greater reach.<sup>185</sup> On the other hand, the same democracy critique affects virtually all forms of international cooperation. The problem should be addressed and considered, but it is also important to note that the problem is not at root the product of the WTO's structure. The problem is inherent in the system of interdependent nation states.

### C. Sovereignty Concerns

Any expansion of global governance must confront concerns about its impact on national sovereignty.<sup>186</sup> The sovereignty issue is related to both the level of political support for the institution and concerns about democracy.<sup>187</sup> Once again, these concerns stem in part from the remarkable success of the WTO. Sovereignty issues arise because the WTO has succeeded in limiting the policy options of national government.<sup>188</sup> As Jeff

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<sup>185</sup> On the other hand, the democracy problem would probably be at least as significant if international cooperation were carried out through specialized issue-oriented institutions such as the ILO, an international environmental organization, and so on.

<sup>186</sup> See Jeffery Atik, *Identifying Antidemocratic Outcomes: Authenticity, Self-Sacrifice, and International Trade*, 19 U. Pa. J. Int'l Econ. L. 229 (1998).

<sup>187</sup> See John McGinnis & Mark Movsesian, *The World Trade Constitution*, 114 Harv. L. Rev. 511 (2000).

<sup>188</sup> For example, the WTO Agreements demand that foreign goods receive national treatment, GATT III; forbid the imposition of anti-dumping measures except as permitted within those agreements, GATT VI, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 1; and ban the use of quantitative restrictions (subject to exceptions), GATT XI:1.

Dunoff has pointed out, the goals of advancing globalization, enhancing democracy, and preserving national sovereignty are incompatible.<sup>189</sup>

Though there is no coercive enforcement mechanism within the organization beyond the retaliation provisions of the DSU, state behavior is affected by WTO obligations and panel rulings. There is no denying that the WTO seeks to affect state behavior, and that its dispute resolution system is designed to limit the ability of states to violate their obligations. In this sense, the WTO system can be described as an authority above that of national law.<sup>190</sup> Whether the existence of such an authority should lead to serious sovereignty concerns, however, is another question.

Sovereignty is a difficult topic to discuss because there is no clear definition of national sovereignty that can be applied to today's world. It is certainly not the case (and perhaps never was) that states have complete and exclusive control over everything that takes place within their borders.<sup>191</sup> For example, both the United States and the EU enforce their antitrust laws extraterritorially – applying their own laws to conduct that takes place abroad.<sup>192</sup> Nor is it the case that states refuse to cede control over domestic policy issues. The WTO, after all, exists because states sought to bind themselves collectively to certain domestic policies and practices. The remarkable cooperation among states within the EU is another example, demonstrating that states are willing to

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<sup>189</sup> See Jeffrey L. Dunoff, *Mission Impossible: Resolving the WTO's Trilemma*, working paper (2003).

<sup>190</sup> See Atik, *Democratizing the WTO*, *supra* note 126, at \*2-3.

<sup>191</sup> This point has been made in Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (2000) 19-25.

<sup>192</sup> See Andrew T. Guzman, *Is International Antitrust Possible?*, 73 *N.Y.U. L. Rev.* (1998).

cede sovereignty under the right circumstances. Sovereignty, then, involves a balance between a state's desire for autonomy and its need to forge relationships and make commitments with other states.

The sovereignty question at the WTO can be viewed through the lens of contract. Domestic legal systems allow individuals to make binding agreements. These contracts limit the future actions of each party, but we do not criticize them as infringements on individual autonomy. In fact, we view them as tools to further individual autonomy because they allow individuals to advance their interests more effectively than would be possible in a world without binding contracts. International agreements can be viewed as contracts among sovereign states. Like domestic contracts, they restrict (or seek to restrict) future behavior, but like contracts they should be viewed as serving the interests of states, rather than undermining those interests.

Because the proposal advanced in this Article does not challenge the unanimity requirement of the WTO, the organization remains more of an international contract than an international legislature. As such, it is much less of a threat to sovereignty than some critics would claim. As long as every country has a veto over agreements, the WTO represents at root a multilateral contract. As such, it is an intrusion on national sovereignty that is qualitatively no different from any other multilateral treaty, including the present WTO.

Indeed, bringing negotiations under a single umbrella organization that includes a coherent and uniform dispute resolution procedure might protect national sovereignty. By providing a forum in which states can reach, for example, environmental agreements,

the pressure to impose standards unilaterally will be undermined.<sup>193</sup> Unilateral approaches are likely to be more violative of national sovereignty because they seek to compel other states to adopt certain behaviors, and those states have no influence over the policy.

There remains at least one significant threat to our current notions of sovereignty that should concern proponents and critics of the WTO alike. That is the rule-making power of WTO panels and the appellate body. Because the WTO Agreements inevitably have gaps and because unforeseen issues arise, panels find themselves making new law. This happens in domestic democratic systems, of course, but in those systems the legislature can step in and override a judicial decision – providing a democratic check on the courts. At the WTO, however, the “legislature” acts through unanimity, making it very difficult (though not impossible) to change the rules laid down by appellate panels. It is possible, therefore, that states will face obligations that are shaped by panels without the consent of all, or even a significant number of members.

There is no complete solution to this sovereignty problem, but steps can be taken to reduce its impact. First, panels, and especially appellate panels, should be encouraged to remain as faithful as possible to the text of the WTO Agreements. The text can then provide a constraint on the activism of panel members. Second, the fact that panel decisions do not, strictly speaking, create binding precedent, should not be forgotten. If a panel creates a rule that is inconsistent with the intent of WTO members, future panels

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<sup>193</sup> See *Tuna/Dolphin, Shrimp/Turtle*, where the United States sought to impose unilateral environmental requirements.

have the authority to disagree.<sup>194</sup> Third, panels should resist the temptation to import customary international law or other international norms into their jurisprudence in the form of binding obligations. Though WTO panels are sometimes encouraged to consider these international norms in their decisions, it must be remembered that these non-WTO rules have not been incorporated into the treaty by the members of the organization.<sup>195</sup> It should be left to the members to determine whether such international legal rules should be incorporated into the set of obligations that are adjudicated at the WTO.<sup>196</sup> Finally, more creative solutions should also be considered. For example, Claude Barfield has suggested that a specified minority of WTO members (he proposes one-third of members amounting to at least one quarter of trade among members) should be able to block a panel decision.<sup>197</sup> A blocked ruling would impose no obligation on the losing party and would not have any legal authority.<sup>198</sup> At the very least, this approach would prevent widely unpopular rules from becoming part of the WTO's jurisprudence. It may also help identify areas where future negotiations must take place.

In the end, it is important for those concerned with sovereignty to recognize that traditional notions of national sovereignty are being eroded by globalization itself, and not by international institutions. Faced with this loss of control, the question is: what will states do? They can continue to rely on domestic institutions and simply accept the

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<sup>194</sup> Similarly, the Appellate Body can revisit issues it has decided.

<sup>195</sup> See Barfield, *supra* note 4, at 410.

<sup>196</sup> See Trachtman, *supra* note 71.

<sup>197</sup> See Claude E. Barfield, *Free Trade, Sovereignty, Democracy* (2001). In principle, the current provisions of the WTO Agreement would allow  $\frac{3}{4}$  of Members to adopt an interpretation of the relevant agreement, which could serve to block a panel ruling. WTO art. IX(2).

consequences of being unable to regulate certain activities effectively – a strategy that becomes less effective with each passing year – or they can work toward well-functioning international institutions that are as effective as possible, and as democratic as we are willing to make them.

## V. CONCLUSION

The WTO is at a crossroads. Its current status as the most effective and reliable of international institutions is not sustainable if the organization retains its trade focus. It is not enough for the WTO to simply address the non-trade topics as potential trade barriers that must be regulated. Without reform, the WTO will face continued challenges to its legitimacy and criticism for its trade bias. These critiques are powerful because they are correct.

To date, the organization has struck a balance between trade and non-trade values such as the environment or human rights, but this balance is the product of the particular institutional structure of the organization rather than a collective decision of its members. The relationship between, for example, environmental issues and trade finds minimal support in Article XX of the GATT. The real driving force behind the WTO's approach to the problem has been the dispute resolution system. At no point have member states explicitly sought to frame the tradeoff between environmental values and trade values. Furthermore, a serious attempt to consider such a tradeoff cannot take

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<sup>198</sup> See Barfield, *supra* note 4, at 412. This Article takes no position on whether the Barfield suggestion is desirable. The point is simply that such approaches should be considered as potential solutions to the problem of panel-made rules.

place in the existing system of international cooperation. No organization other than the WTO has the ability to manage the trading system, and the WTO lacks the expertise and the will to study and properly evaluate non-trade issues. The WTO is also hampered by the fact that environmental groups and organizations are suspicious of the institution and believe that its decisions reflect a bias in favor of trade values to the detriment of non-trade values. The same problems are present with respect to labor, human rights, and competition.

From where it is now, the WTO can do one of two things. It can try to restrict itself to a more narrow set of trade issues in the hope that its impact on important non-trade issues will be reduced to a manageable level. It is not clear exactly how such a contraction would proceed, but one approach might include a policy of giving certain non-WTO laws and norms such as human rights issues precedence over WTO law.<sup>199</sup> A contraction of this sort is problematic because it does not generate a political agreement about how to trade-off the competing trade and non-trade values. Instead, it simply reduces the importance of trade values. Even if it represents a move in the right direction – something we cannot know without a prior understanding of how these interests should be balanced against one another – it will not generate a political discussion about these competing values, let alone an agreement on them. Furthermore, a contraction of the WTO's influence may not successfully relieve the political strains on the organization and the world trading system. A restricted WTO would remain a trade organization with a

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<sup>199</sup> In this sense, the Howse and Mutua proposal, see *supra* note 139, represents a form of contraction for the WTO.

bias toward trade values and would continue to impact non-trade issues. The legitimacy problem would remain.

The alternative strategy is to address the basic tensions that are straining the WTO system. Conflict between trade and non-trade values is inevitable in today's world, making it impossible to keep trade isolated from other policy concerns. Any sensible attempt to resolve these conflicts must include both trade and non-trade interests at the bargaining table. The WTO offers a promising place to undertake such negotiations because it has an established set of procedures and a history of organizing such international discussions. To be effective, however, the WTO must be reformed. First, the negotiations cannot be carried out in a forum and among negotiators that are perceived to favor trade values over other concerns. The talks themselves must include specialists from the relevant non-trade issue areas in addition to trade specialists. Second, simply establishing rules for the interaction of trade and non-trade issues will not resolve the problem. What is needed is an international organization that can handle the day-to-day management of these issues. Again, the WTO has many of the features one would like in such an organization, but cannot fulfill that role as long as it is just trade institution.

Despite the trade focus of the WTO, it is the best place to start building the necessary institution. The reforms proposed in this Article would keep much of the structure of the WTO intact, but would create separate departments for each of the issue areas that come with the organization. These departments would be autonomous from one another, and would be authorized to hold their own departmental rounds of negotiation. In this way the departments could address matters of cooperation within

their issue areas at relatively low cost, and would retain the advantage of specialization. The departments, however, would not be able to balance competing trade and non-trade values. This would require negotiation among member states and across all departments. These Mega-Rounds would provide states with the opportunity to manage the relationship between trade and environment, trade and human rights, and so on. The resulting agreements would enjoy greater legitimacy because they would reflect the consent of states and because several different interests (e.g., trade, environment, labor, competition, and human rights) would be represented. Finally, the existing dispute resolution system of the WTO – reformed to include more than just trade specialists – would remain in place to provide effective enforcement and interpretation of the resulting agreements.

There is no doubt that negotiation across issue areas is difficult, and neither this proposal nor any other could claim to eliminate that difficulty. The approach outlined in this Article, however, provides a forum for such negotiations. At present, such a forum does not exist. Though negotiations among states are imperfect, they are the only mechanism we have to address the important tradeoffs between trade and non-trade values. This proposal provides a forum for such negotiations and an institution to make the resulting agreements effective.